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ANNUAL SURVEY OF ANTITRUST DEVELOPMENTS—CLASS ACTIONS, MERGERS, AND MARKET DEFINITION: A NEW TREND TOWARD NEUTRALITY

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The 1973-74 Term of the Supreme Court signaled the emergence of a new trend in antitrust jurisprudence. In recent years, each new antitrust decision seemed to produce victory for the government or the private plaintiff. Expansion of the scope of antitrust coverage has been the order of the day. Many of the Court's decisions appeared to push the frontiers of the law outward into uncharted areas without careful consideration or, frequently, satisfying rationale.

For instance, the boundaries of per se illegality under the Sherman Act were substantially altered by such decisions as *United States v. Topco Associates, Inc.*,[1] *United States v. Container Corporation of America*,[2] and *United States v. Arnold, Schwinn & Co.*[3] The

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[1] 405 U.S. 596 (1972). *See, e.g.*, Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 241-47 (1972); Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457 (1971).

[2] 393 U.S. 333 (1969). *See, e.g.*, Note, *Antitrust Implications of the Exchange of Price Information Among Competitors—The* Container Corporation *Case*, 68 MICH. L. REV. 720 (1970); Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 1, 227-35 (1969).

[3] 388 U.S. 365 (1967). *See, e.g.*, Averill, *Sealy, Schwinn and Sherman One: An Analysis and Prognosis*, 15 N.Y.L.F. 39 (1969); Keck, *The Schwinn Case*, 23 BUS. LAW. 669 (1968); Kittelle, *Territorial and Customer Restrictions Through Consignment or Agency—Schwinn or Sin?*, 12 ANTITRUST BULL. 1007 (1967); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal*, 37 A.B.A. ANTITRUST L.J. 137 (1968); Pollock, *Alternative Distribution Methods After* Schwinn, 63 NW.U.L. REV. 595 (1968); Williams, *Distribution and the Sherman Act—The Effects of General Motors, Schwinn, and Sealy*, 1967 DUKE L.J. 732 (1967); Zimmerman, *Distribution Restrictions After Schwinn and Sealy*, 12 ANTITRUST BULL. 1181 (1967). *See also*, Preston, *Restrictive Distribution Arrangements: Economic Anal-*

law of mergers and market definition was remade in *United States v. Pabst Brewing Co.*,[4] *United States v. Von's Grocery Co.*,[5] and *United States v. Grinnell Corp.*[6] *Perma Life Mufflers, Inc. v. International Parts Corp.*[7] and *Albrecht v. Herald Co.*[8] threatened to take all meaning from the Sherman Act's requirement for a contract, combination or conspiracy.

But in the last several Terms with the crescendo of nationwide economic difficulty and the alteration of the Court's prevalent philosophy which has accompanied the shift in personnel, the innovative and expansive thrust of the Court's antitrust decisions has been replaced by an increasing desire to consolidate the gains and to rationalize the results. The Court seems to have adopted a more neutral stance. No longer is the defendant assumed necessarily to be wrong, nor the government's position, despite assorted legal defects, assumed automatically to be meritorious.

This new trend took hold during the most recent Term in a number of critical areas. The Court took a firm grip on the development of class actions and in a notable decision required that, where possible, the class members must be individually notified at the expense of the plaintiff class representative.[9] In *Zahn v. International Paper Co.*[10] the Supreme Court required that the separate claim of each member of a class of multiple plaintiffs must satisfy the jurisdictional amount for suits in federal courts. In the merger area, the

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ysis and Public Policy Standards, 30 LAW & CONTEMP. PROB. 506 (1965). For an article questioning the effectiveness of the *Schwinn* per se rule, *see* Note, *Exceptions to* Schwinn's *Per Se Rule: Their Validity and Implications for the Future*, 31 WASH. & LEE L. REV. 643 (1974).

[4] 384 U.S. 546 (1966). *See, e.g.*, Note, *Section of the Country as a Subsidiary Issue in Litigation Brought Under Section 7 of the Clayton Act*, 52 CORNELL L. REV. 600 (1967); Note, *Competition and the Geographic Market Under § 7 of the Clayton Act*, 62 NW. U.L. REV. 58 (1968).

[5] 384 U.S. 280 (1966). *See, e.g.*, Bison, *The Von's Grocery Merger Case—Antitrust in Reverse*, 55 GEO. L.J. 201 (1966); Note, *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 1, 245-47 (1966); Note, *Competition and the Geographic Market Under § 7 of the Clayton Act*, 62 NW. U.L. REV. 58 (1968).

[6] 384 U.S. 563 (1966). *See, e.g.*, Note, *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 1, 240-45 (1966).

[7] 392 U.S. 134 (1968). *See, e.g.*, Comment, *The* In Pari Delicto *Doctrine Is Not a Defense to a Private Antitrust Action if the Parties are not Equally Responsible for the Violation*, Perma Life Mufflers, Inc. v. International Parts Corp., 47 TEXAS L. REV. 322 (1969); Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 1, 260-66 (1968).

[8] 390 U.S. 145 (1968). *See, e.g.*, Comment, *Albrecht v. Herald Co.—Resale Price Fixing*, 63 NW. U.L. REV. 862 (1969); Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 1, 254-60 (1968).

[9] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[10] 414 U.S. 291 (1973).

Supreme Court looked beyond the statistical case, which had so frequently in recent years led to success for the government, to other pertinent factors in considering an acquisition.[11] Similarly, in *United States v. Marine Bancorporation, Inc.*[12] the Court found that the regulated nature of the banking industry precluded automatic application of antitrust rules developed in the conventional industry context. Also in the bank merger area, the Court suggested a redefinition of geographic market analysis in *United States v. Connecticut National Bank.*[13]

In each of these cases, the emerging antitrust majority of Chief Justice Burger and Justices Stewart, Blackmun, Powell and Rehnquist was found on the prevailing side. Justices Douglas, Brennan and Marshall were dissenters in every case except one.[14] Justice White was on the majority side in two out of the five cases. A change in his position in any of the cases, however, would not have altered the outcome.[15]

The major antitrust decisions this past Term in all likelihood provide the most accurate indication of the direction of antitrust law in the near future. What the decisions demonstrate is that the era of judicial expansion of the scope of antitrust law has come to a close.

I.

CONTROL OVER CLASS ACTIONS

Rule 23[16] was amended in 1966 in an effort to develop a reliable mechanism for handling complex litigation involving a multiplicity of parties. Under the current version,[17] all class actions must satisfy

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[11] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[12] 418 U.S. 602 (1974).

[13] 418 U.S. 656 (1974).

[14] Mr. Justice Douglas did not participate in the decision in the *Marine Bancorporation* case.

[15] Mr. Justice White was in the minority in *General Dynamics* (5-4), *Marine Bancorporation* (5-3) and *Connecticut Nat'l Bank* (5-4), and in the majority in *Eisen* (6-3) and *Zahn* (6-3).

[16] FED. R. CIV. P. 23.

[17] Original Rule 23 defined categories of class action based upon the character of the right sought to be enforced for or against the class. These classes came to be known as "true," "hybrid," and "spurious" class actions. Of most interest in the antitrust context, the category of "spurious" class actions was comprised of cases in which a form of permissive joinder was allowed. A major defect of this aspect of the Rule was that it offered the opportunity of one-way intervention. *See, e.g.*, Simon, *Class Actions Under Amended Rule 23*, 12 ANTITRUST BULL. 187 (1967); Symposium, *Amended Federal Rule 23: Antitrust Class Actions*, 32 ANTITRUST L.J. 251 (1966); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629 (1965).

four requirements: (1) that the class is so numerous that joinder of all members is impracticable, (2) that there are questions of law or fact common to the class, (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) that the representative parties will fairly and adequately protect the interests of the class.[18] Most antitrust class actions must meet the further standard, found in subdivision (b)(3), that permits the class action to proceed if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[19]

Whether the purpose of the Rule, and particularly of subdivision (b)(3), to achieve "economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated . . . ,"[20] has been realized is a subject of substantial controversy. On the one hand the class action device has been characterized as "one of the most socially useful remedies in history"[21] and relied upon as "insuring that powerful product sellers confront an equally powerful adversary in the marketplace."[22] The contrary view is expressed by those who attack class actions as a "Frankenstein monster"[23] and a device not just "to *solicit* clients, but, more accurately, a device to *conscript* them without their consent."[24] Major alterations of the Rule have

[18] FED. R. CIV. P. 23(a).

[19] FED. R. CIV. P. 23(b)(3). The Rule then lists considerations pertinent to a (b)(3) determination:

> (A) the interest of members of the class in individually contolling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23 (b)(3).

[20] Advisory Committee Note to the 1966 Amendment to Rule 23, 39 F.R.D. 69, 102 (1966).

[21] Pomerantz, *New Developments in Class Actions— Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

[22] Comment, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected*, 73 COLUM. L. REV. 1641, 1660 (1973).

[23] Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting).

[24] Pollock, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 BUS. LAW. 741, 742 (1973) (emphasis in original).

been proposed[25] and opposed.[26]

In the most recent Term the Supreme Court decided three cases bearing on the class action remedy.[27] Of these, *American Pipe & Construction Co. v. Utah* refused to restrict the usefulness of the class action procedure as a means of tolling the statute of limitations with regard to purported members of a class, even when the class action is ultimately held to be inappropriate. The other cases, *Eisen v. Carlisle & Jacquelin* and *Zahn v. International Paper Co.*, reflect the new majority's concern that class action procedures have been too expansively interpreted and that the risk of the federal judiciary's being engulfed by wave after wave of enormous class suits pressed by enterprising attorneys is not too remote for consideration. Thus, the Term's output in the class action area offers something both to the proponents of an expansive use of Rule 23 and to the critics. But it is the latter group whose views seem to have carried more weight. Whether any significant limitations on class action procedures has actually resulted is still open to question.

An early indication of caution in the Supreme Court's treatment of class actions was the decision in *Zahn v. International Paper Co.*[28] Mr. Justice White, speaking for the six-man majority, ruled that in a class action under Rule 23(b)(3) each plaintiff member of the class must satisfy the jurisdictional amount, and any plaintiff who fails must be dismissed from the case.[29] Although not an antitrust case—and indeed not directly relevant to cases brought under § 1337, which is one of the areas of federal jurisdiction exempted from the jurisidictional amount requirements[30]—the decision nevertheless clearly indicates that the Court is not searching for ways to broaden the sweep of the class procedure.

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[25] *See, e.g.*, Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1 (1971).

[26] Kohn, *The Antitrust Class Action as a Social Instrument*, 41 Antitrust L.J. 288 (1972).

[27] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973).

[28] 414 U.S. 291 (1973).

[29] Burger, C.J., and Stewart, Blackmun, Powell and Rehnquist, JJ., joined in the opinion of the Court. Brennan, J., filed a dissenting opinion in which Douglas and Marshall, JJ., joined.

[30] *See* 28 U.S.C. §§ 1333-34, 1336-40, 1343-45, 1347-58, 1361-62 (1970). The question naturally occurs whether, with so many areas of exemption, decisions limiting class actions for failure to meet the jurisdictional amount will have much impact on the federal court system. *See* Snyder v. Harris, 394 U.S. 332, 341 (1969).

Plaintiffs, owners of property fronting on Lake Champlain, brought an action on behalf of a class consisting of themselves and 200 lake-front property owners and lessees seeking damages from the International Paper Company for discharges from a pulp and paper plant causing water pollution in the lake and damaging the value of surrounding property.[31] The district court found that the claim of each of the named plaintiffs satisfied the $10,000 jurisdictional amount, but was dubious that every individual owner in the class had suffered pollution damages in excess of the jurisdictional amount. Consequently, on the authority of *Snyder v. Harris*,[32] the district court reasoned that it would not feasible to define a class of property owners with claims of more than $10,000. Accordingly, it refused to permit the suit to proceed as a class action.[33] A divided Court of Appeals affirmed[34] and the Supreme Court granted the petition for a writ of certiorari.[35]

In a broad-ranging opinion the Supreme Court affirmed. Justice White first recited the familiar history of the "matter in controversy" requirement.[36] The Court showed that since at least 1832 it has been a rule of interpretation that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement.[37] The opinion then reiterated the *Snyder* principle that Rule 23, as amended in 1966, had not effected any change in the meaning or application of the jurisdictional-amount requirement in class action cases. Because none of the plaintiffs in *Snyder* alleged a claim exceeding $10,000, that class action did not survive a motion to dismiss. In *Zahn*, those plaintiffs without the jurisdictional amount ac-

[31] The suit was brought as a diversity action under 28 U.S.C. § 1332 (1970). The language of the Court, however, expressly included the jurisdictional-amount requirement in the general federal-question jurisdiction under 28 U.S.C. § 1331 (1970).

[32] 394 U.S. 332 (1969).

[33] 53 F.R.D. 430 (D. Vt. 1971).

[34] 469 F.2d 1033 (2d Cir. 1972).

[35] 410 U.S. 925 (1973).

[36] The jurisdictional amount in diversity suits under § 11 of the First Judiciary Act of 1789 was $500. 1 Stat. 78. In 1801, the requirement was lowered to $400, 2 Stat. 89, 92, but it was restored to $500 the following year. 2 Stat. 132. The jurisdictional amount requirement remained fixed at the $500 level until 1887 when it was raised to $2,000. 24 Stat. 552. The current jurisdictional amount was enacted into law in 1958. 72 Stat. 415. The legislative history demonstrates the intention to set the amount of a level not "so high as to convert the federal courts into courts of big business nor so low as to fritter away their time in a trial of petty controversies." S. REP. No. 1830, 85th Cong., 2d Sess. 3-4 (1958).

[37] Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832). Where several plaintiffs unite to enforce a single right, in which they have a common and undivided interest, their claims may be aggregated to qualify. *See* Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911).

cordingly were dismissed from the case, even though others had alleged jurisdictionally sufficient claims.

The Court was not inclined to overrule *Snyder*, nor to change its rule of interpretation concerning the "matter in controversy" requirement of § 1332. The majority held that a rule of such long standing which had remained undisturbed by Congress should not be altered simply on the basis of speculative allegations of the intended effects of the 1966 amendments:

> It also seems to us that the application of the jurisdictional-amount requirement to class actions was so plainly etched in the federal courts prior to 1966 that had there been any thought of departing from these decisions and, in so doing, of calling into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims, some express statement of that intention would surely have appeared, either in the amendments themselves or in the official commentaries. But we find not a trace to this effect. As the Court thought in *Snyder v. Harris*, the matter must rest there absent further congressional action.[38]

Mr. Justice Brennan's dissent noted that the jurisdictional amount provision of § 1332(a) applied to "civil actions" and not necessarily to individual claims in such actions. He argued that once jurisdiction has attached to the action, in this case by means of at least one plaintiff's seeking more than the statutory amount, the remaining claims may be entertained on the theory of ancillary jurisdiction. The dissent pointed out that ancillary jurisdiction to achieve litigation efficiency is in line with the principles governing the Federal Rules of Civil Procedure and has been used in many contexts to consider claims that do not fit within the aggregation rules.[39] Particu-

[38] 414 U.S. at 302 (footnote omitted).

[39] *See* Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); Phelps v. Oaks, 117 U.S. 236 (1886); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861). The opinion points out that the exercise of ancillary jurisdiction has been sanctioned by the Supreme Court in cases involving compulsory counterclaims. Horton v. Liberty Mutual Ins. Co., 367 U.S. 348 (1961), *aff'g* 275 F.2d 148 (5th Cir. 1960); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926) (intervention as of right under Rule 24(a)); Phelps v. Oaks, *supra* (cross claims under Rule 13(g)); R.M. Smythe & Co. v. Chase Nat'l Bank, 291 F.2d 721 (2d Cir. 1961); Childress v. Cook, 245 F.2d 798 (5th Cir. 1957) (impleaded defendants under Rule 14), Pennsylvania R.R. Co. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); (defendants interpleaded under Rule 22); Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955). *See Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874 *passim* (1958). *See also* 7 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1756 (1972).

larly because the district court had been unable to define a class of plaintiffs who satisfied the jurisdictional amount, which resulted in dismissal of the entire suit, Mr. Justice Brennan felt that the limitation imposed by the majority opinion on the class action procedure was unnecessary and unduly restrictive.

The importance of this opinion for the antitrust student is its implications for the antitrust class action. Although not required to meet the jurisdictional-amount standards found in the diversity of citizenship and general federal question jurisdiction areas, class action plaintiffs in antitrust cases are subject to various requirements of the Rule, stated in general terms and therefore subject to interpretation. Questions of numerosity under subdivision (a)(1), representativeness of the claims under subdivision (a)(3), adequacy of representation under subdivision (a)(4) and other similar standards may be interpreted restrictively or broadly, depending upon the orientation of the court involved. *Zahn* is interesting, therefore, because it demonstrates the Supreme Court's willingness to accede to a denial of federal court access for certain kinds of class actions. In short, the Supreme Court, as currently composed, is not willing to adopt a rule of law simply because claims may not otherwise be adjudicated. Of course, in *Zahn* itself, if the class members who can satisfy the jurisdictional-amount standard are few enough, the action can proceed under the rules of joinder.[40] Those unable to reach the jurisdictional-amount standard will be relegated to whatever remedies the state makes available, if any. Thus, the major significance of the decision lies in what it reflects of the Court's intention to maintain a tighter check on the reach of Rule 23.[41]

The promise of *Zahn* was borne out in the most important case the Court decided last Term dealing with class actions, *Eisen v. Carlisle & Jacquelin*.[42] That decision, by regulating the adequacy and type of notice and by charging the plaintiff with the responsibility for providing such notice, threw doubt on the viability of massive class actions.

Morton Eisen was an odd-lot trader on the New York Stock Exchange.[43] In May 1966, he filed a class action on behalf of himself

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[40] FED. R. CIV. P. 20.

[41] *Zahn* is also interesting because it may have revived the "true," "hybrid" and "spurious" categories of former Rule 23, thought to have been abandoned by the 1966 amendments, because of the necessity of determining the applicability of the "matter in controversy" language of § 1332 or § 1331.

[42] 417 U.S. 156 (1974).

[43] Odd-lot traders deal in lots of shares fewer than 100. Shares are also frequently sold in multiples of 100, or round lots.

and other odd-lot traders on the New York Stock Exchange charging two brokerage firms, which controlled 99% of the odd-lot business, with violations of the antitrust and securities laws. Specifically, the complaint alleged that by illegally fixing the odd-lot differential[44] charged to the investing public at an excessive level, the brokerage firms had violated §§ 1 and 2 of the Sherman Act.[45] The complaint also charged the New York Stock Exchange with failure to regulate the differential for the protection of investors in violation of §§ 6 and 19 of the Securities Exchange Act of 1934.[46] The complaint sought treble damages, attorneys' fees and injunctive relief.

A complex series of procedural skirmishes ensued over the next eight years. Initially, the district court dismissed the suit as a class action.[47] Eisen sought permission to appeal under 28 U.S.C. § 1292(b), but his motion was denied.[48] Thereafter, he moved to file an appeal as of right under § 1291, but the respondents opposed the motion on the grounds that the order appealed from was not final. The Second Circuit Court of Appeals held that the denial of class action status in this case was an appealable final order.[49] The court reasoned that an appeal should be permitted of right since dismissal of a class action in this case was the "death knell" for the entire action, and accordingly, under the reasoning of *Cohen v. Beneficial Industrial Loan Corp.*,[50] rendered the order appealable.

The Court of Appeals then reversed the dismissal of the class action.[51] It found the district court's action "too summary, holding that improper standards had been applied and inadequate consideration given to the specific requirements of amended Rule 23."[52] As a result, the Second Circuit directed that a full evidentiary hearing be held:

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[44] The odd-lot differential is a surcharge imposed on the odd-lot investor in addition to the standard brokerage commission applicable to round-lot transactions. For the period in question the differential was one-eighth of a point (12½ cents) per share on stocks trading below $40 per share and one-quarter of a point (25 cents) per share on stocks trading at or above $40 per share. 417 U.S. at 157.

[45] 15 U.S.C. §§ 1 and 2 (1970).

[46] 15 U.S.C. §§ 78f and 78aa (1970).

[47] 41 F.R.D. 147 (S.D.N.Y. 1966).

[48] Under 28 U.S.C. § 1292 (1970), appeals may be taken to courts of appeals of certain interlocutory orders on a discretionary basis, whereas § 1291 gives courts of appeals jurisdiction of appeals from all "final" decisions of district courts.

[49] Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) [hereinafter cited as *Eisen I*].

[50] 337 U.S. 541 (1949).

[51] 391 F.2d 555 (2d Cir.1968) [hereinafter cited as *Eisen II*].

[52] 479 F.2d 1005, 1007 (2d Cir. 1973) [hereinafter cited as *Eisen III*].

> Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper.[53]

Based on its findings on remand,[54] the district court held that the suit was maintainable as a class action.[55] First, the court found that the plaintiff could adequately represent the class, in that his claim typified those of the class, his lawyer was well qualified and there was no danger of a collusive suit.[56] Next, the court concluded that the action was manageable. Although the problem of proving and awarding damages in connection with so large a class was substantial, the adoption of a "fluid class" recovery significantly reduced the manageability problems.[57]

The court then turned its attention to the problem of notice to so large a class. Concluding that neither Rule 23(c)(2)[58] nor the due

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[53] 391 F.2d at 570.

[54] In brief, the court found that approximately 6 million shareholders had odd-lot transactions during the period from May 1962 through June 1966 in stocks listed on the Exchange; that during the same period the typical buyer or seller of odd-lots had approximately five transactions on the Exchange, and the average odd-lot differential per transaction was approximately $5.18; that of the approximately six million shareholders with such transactions in stocks listed on the Exchange, the names and addresses of at least one-third could be identified through the use of computer tapes and the names and addresses of the remainder could not be identified with "reasonable effort;" that an additional 250,000 persons who had invested through monthly investment plans and payroll deduction plans could be identified through the use of computer tapes; and that the cost of stuffing a single-page printed notice and mailing it with first class domestic postage would be 10 cents per letter, irrespective of the number of letters to be sent.

[55] 52 F.R.D. 253 (S.D.N.Y. 1971).

[56] *Id.* at 261.

[57] Under the "fluid class" recovery concept, the damages of the entire class would be determined in gross without having individual claims filed by each class member. With such a fund established, claims could be administratively processed to return damages to individuals, and the remainder could be devoted to any of several beneficial purposes. The court suggested that one possible use to which the residue could be put was the reduction of the future cost of odd-lot buying and selling. *Id* at 265. On "fluid class actions," *see, e.g.*, Note, *Managing the Large Class Action:* Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 446-54 (1973); Note, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected*, 73 COLUM. L. REV. 1641 (1973).

[58] Rule 23(c)(2) provides in pertinent part:

> . . . The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B)

process clause required the substantial expenditure approaching $300,000 to give individual notice to all identifiable class members, the court devised a notification scheme consisting of individual and published notices. Specifically, the court proposed individual notice to all member firms of the Exchange, the commercial banks with large trust departments, the approximately 2,000 identifiable class members who had at least ten transactions during the relevant period, and an additional 5,000 class members selected at random. It further proposed large advertisments published twice in five newspapers in three cities. The cost of this program was estimated by the court to be approximately $21,720.[59]

To determine who should pay the cost of notice, since the plaintiff had repeatedly stated his refusal to bear the large cost involved in notice in order to recover a small individual claim, the court decided to hold a preliminary hearing on the merits to serve as a basis for allocation of the expenses of the notice.[60] Following the preliminary hearing, or so-called "mini-hearing," the district court issued an opinion[61] finding that the odd-lot defendants had fixed the differential in 1951, that this was a per se violation of the antitrust laws and that the Exchange was an active participant through its failure to regulate it. Reasoning that the plaintiff was likely to prevail at trial on the merits, the court ordered the defendants to pay 90% of the notice costs, or $19,548.

On appeal,[62] the Second Circuit ruled that the suit could not proceed as a class action.[63] The court in essence held that individual notice was required for all identifiable class members under Rule 23(c)(2) and that the district court had no authority to conduct a mini-hearing on the merits to allocate costs of notice. Accordingly, the court decided that the entire expense of notice necessarily must fall on the representative plaintiff. Rejecting the expedient of a "fluid class" recovery, the court concluded that the proposed class action was unmanageable under Rule 23(b)(3)(D), and thus ordered the suit

the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

[59] 52 F.R.D. at 263.

[60] *Id.* at 270-72.

[61] 54 F.R.D. 565, 567 (S.D.N.Y. 1972).

[62] Appeal was taken pursuant to the jurisdiction retained by the Court of Appeals in its 1968 decision (*Eisen II*) and on independent grounds pursuant to 28 U.S.C. § 1291 (1970).

[63] 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*).

[64] *Id.* at 1020.

dismissed as a class action. Requests for rehearing and rehearing en banc were denied.[64]

A not-quite-united Supreme Court affirmed.[65] At the outset, the Court treated the question of the jurisdiction of the Court of Appeals to review the district court's order permitting the suit to proceed as a class action and allocating the cost of notice. The Court found that the order in question constituted a final decision within the meaning of 28 U.S.C. § 1291,[66] and was therefore appealable of right.[67] As to questions of finality which require the balancing of competing considerations—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other"[68]—the Supreme Court decided that in this instance its decision was controlled by *Cohen v. Beneficial Industrial Loan Corp.*[69] Like the order in *Cohen*, the lower court had conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the proposed class. Furthermore, the order involved a collateral matter not directly related to the merits of the petitioner's claim. In short, it was a final disposition of a claim of right which was not "an ingredient of the cause of action and [did] not require consideration with it."[70] Accordingly, in *Eisen IV* the

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[65] The opinion was written by Powell, J., joined by Burger, C.J., Stewart, White, Blackmun and Rehnquist, JJ. Douglas, J., with whom Brennan and Marshall, JJ., concurred, dissented in part.

[66] § 1291 provides:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

28 U.S.C. § 1291 (1970).

[67] The Court therefore did not discuss the express retention of jurisdiction by the court of appeals in *Eisen III*.

[68] Dickerson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) (footnote omitted).

[69] 337 U.S. 541 (1949). In *Cohen*, the Supreme Court held appealable a trial court order ruling inapplicable a state statute governing the allocation of expenses of a stockholder's derivative action in a federal diversity case. The Court found, first, that the lower court's conclusion was sufficiently complete to settle the corporation's claim that it was entitled by state law to require the shareholder to post security for costs and, second, that the decision concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment. In short, the decision was one that finally determined "claims of rights separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

[70] *Id.* at 546-47.

Supreme Court concluded that the Court of Appeals had jurisdiction to review the lower court's resolution of the class action notice problems.

Turning to the merits, the Supreme Court first ruled that the district court's resolution of the notice problem failed to comply with the requirements of Rule 23(c)(2). The Court relied upon the language of the Rule requiring "individual notice to all members who can be identified through a reasonable effort." Mr. Justice Powell found his conclusion confirmed both by the Advisory Committee's Note[71] and the due process standards elaborated in *Mullane v. Central Hanover Bank & Trust Co.*[72] Holding that publication notice could not satisfy the requirements of due process where the names and addresses of the persons to be notified were known, the Court stated in *Mullane* that the method used must be reasonably certain to give notice:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . .[73]

The Court was unimpressed with the contention of the petitioner that the requirement of individual notice in this case should be abandoned. As to the prohibitive cost of providing individual notice to more than two million class members, the Court replied that individual notice to identifiable class members is not a discretionary matter which can be waived in a particular case. The Court disagreed with

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[71] *See* 39 F.R.D. 98 *et seq.* (1966).

[72] 339 U.S. 306 (1950). *See also,* Schroeder v. City of New York, 371 U.S. 208 (1962).

[73] 339 U.S. at 315. The Court discussed the inadequacies of published notice:

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.

339 U.S. at 315.

petitioner's argument that adequate representation, rather than notice, is the substance of the due process requirement in a class action. Not only did the argument run counter to the words of Rule 23 but it led in the end to the conclusion that no notice at all, published or otherwise, was required. The Court therefore concluded that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

Mr. Justice Powell also agreed with the Second Circuit that the plaintiff must bear the cost of notice to the members of his class. Finding nothing in the language or history of Rule 23 that gives any court the authority to conduct a preliminary inquiry into the merits of a class action suit, the Court concluded that a mini-hearing was directly contrary to the command of subdivision (c)(1)[74] that a court determine "as soon as practicable after the commencement of [the] action . . ." whether a suit was maintainable as a class action. The Court was clearly fearful of prejudicing the defendant in such a preliminary determination of the merits, since rules of evidence and procedures applicable to civil trials would not then be applicable. Yet the tentative findings of the court might well color subsequent proceedings and lead perhaps to unfair pressure to settle.

Because the petitioner had consistently maintained that he would not bear the cost of notice, the Court remanded the case with instructions to dismiss the class action. Nevertheless, in a footnote, the Court left the way open for the definition of a class sufficiently small that the petitioner would be willing to pay the cost of notice to its members.[75]

Mr. Justice Douglas' dissent, focusing on the potential for designating smaller subclasses, argued that such a result could properly be accomplished by order of the district court without amendment of the complaint as filed. In his view, to permit the district court the widest flexibility in altering or modifying the class composition during the development of the case for trial, it would have been preferable to leave the full class complaint in existence.

Eisen IV is a major blow to actions on behalf of large, amorphous classes whose members can nevertheless be identified with reasonable effort. The requirement of individual notice and the direction that the plaintiff must bear the expense of that notice is a major obstacle for any plaintiff to confront at the outset of a class action. Nevertheless, the ingenuity of lawyers and the fact that the Supreme Court declined to reach all of the class action issues raised in *Eisen III* make

[74] FED. R. CIV. P. 23(c)(1).
[75] 417 U.S. at 179 n.16.

certain that all of these issues will continue to be reviewed in courts across the land.

For instance, the Court ruled that a preliminary evidentiary hearing on the merits was impermissible to determine the allocation of expenses for notification of class members. On the face of it, such a position seems eminently sensible. Since the plaintiff initiates the action, it seems rational to require that the plaintiff likewise bear the necessary expense of putting his case into shape for trial. In addition, Rule 23 nowhere authorizes a "mini-hearing," and moreover the entire procedure's potential for prejudicing a court seems undeniable.

Nevertheless it may be impossible to avoid probing the merits of a case in determination of the class action issues required under Rule 23(c). It has been assumed that an evidentiary hearing on pure Rule 23 questions, including discovery, live witnesses and the presentation of other evidence, is necessary to assess fully such problems as the manageability of a class action, whether the common issues of law are in fact predominant, and the like. Thus, despite *Eisen IV's* dictates, it seems unlikely that some inquiry into the merits of a class action can be avoided.[76] Although not specifically authorized in Rule 23, the oft-repeated necessity for flexibility in using the Rule[77] seemingly endows the courts with the capacity to hold a preliminary hearing if it is required for the efficient conduct of an action. Assuming the effort is to avoid the arbitrary allocation of the expense of notice, it can hardly be denied that a preliminary hearing is thus less likely to be wholly arbitrary than the automatic imposition of costs on one party or the other. In light of this consideration, the Court could have rationalized the need for a preliminary hearing in terms of the necessity to make the rule workable, even though the device is not expressly authorized in Rule 23. That the Court has declined to do so is one more piece of evidence that it seeks to confine the class action remedy within a somewhat limited scope.

Perhaps it was most influenced by the potential for prejudice. It is difficult to see how the district court in *Eisen* could have come to a full trial on the merits without being influenced by the residual effect of its findings on the probability of success. While a court might

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[76] Indeed, the holding of *Eisen IV* on the preliminary hearing issue may prove ultimately to be of greater advantage to plaintiffs who desire to postpone analysis of the merits of the case in order to achieve class certification in the interests of improving their settlement leverage. No doubt courts will be compelled, therefore, to resist defendants' suggestion that the merits of the case be analyzed. *See, e.g.*, Professional Adjusting Systems v. General Adjustment Bureau, Inc., 1974-2 Trade Cases ¶ 75,183 (S.D.N.Y. 1974).

[77] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 1.43 at 15 (1973).

take steps to erase the formal results of such a hearing, one other aspect of preliminary hearings, the increased settlement leverage, is reason enough to avoid them. While it can be argued that a correct evaluation of the merits should lead to a realisitic assessment of the chances of success in the litigation by both parties in the context of settlement discussions, the whole point of the Court's concern is that in a truncated preliminary hearing, without the traditional procedures in an adversary proceeding, the trial court's analysis of the case will too closely resemble a throw of the dice. Further, assuming the non-appealability of a preliminary hearing opinion, the result for the losing party could be devastating. If the defendant loses the hearing and pays notice costs, it will likely be unable to recover those costs even in the event it subsequently is vindicated after trial on the merits. Of course, if instead of payment of the notice costs, it settles even though it has a strong case, the result is prejudicial.

Finally, the Court, always concerned with the burdens on the judicial system, may have apprehended that the addition of another stage in the proceedings, serving only to resolve a collateral issue at great expense of resources, is in the final analysis simply not worthwhile. The mini-hearing is presumably designed to permit survival of those cases in which the plaintiff class is likely to prevail on the merits but the class representative can neither afford nor collect the expense of notice. The number of such cases may simply have appeared to the Supreme Court too small to justify the imposition of additional burdens upon an already overburdened judicial system in every class action case. Weighing the few cases that the mini-hearing would save against the fundamentally defective nature of the hearing itself, its potential for prejudice in every class action and the waste of judicial resources that will be the result in many cases, the Court undoubtedly felt justified in paring down the number of large class actions that would otherwise have had access to the courts.

It is important to realize that the Supreme Court did not directly address the issues of "fluid class" recovery and manageability of large class actions. One possible interpretation of *Eisen IV* is that by vacating the judgment of the Court of Appeals, it has excised the hostile language of *Eisen III* toward fluid class recoveries which indicated that a suit on behalf of a six million member class is unmanageable.[78]

[78] Mr. Justice Powell expressly refused to consider these issues, 417 U.S. at 172 n.10, and affirmed only those parts of *Eisen III* dealing with notice and the preliminary "mini-hearing" on the merits.

At least one case, however, has rejected fluid recovery on the basis that the Supreme Court in *Eisen IV* left standing the Court of Appeals opinion dealing with the impropriety of fluid class recoveries.[79]

The fluid class recovery is clearly not expressly authorized by statute or by any of the federal rules. It represents an innovative mechanism for distributing funds which have been gained illegally. Whether such a device is to be permitted by the Supreme Court must await final decision in another case.

While the decisions in *Zahn* and *Eisen* may prove discouraging to class action plaintiffs, *American Pipe & Construction Co. v. Utah*[80] demonstrates that the Court is not hostile to class action procedures. Speaking for an unanimous Court,[81] Mr. Justice Stewart held that the statute of limitations provided in the Clayton Act for antitrust suits was tolled as to purported members of a class, even though subsequently the action might be held an improper class action. The Court's decision reconciles the policy of the statute of limitations in affording security to potential defendants against the filing of stale claims with the contrasting policy underlying the class action rules of avoiding a multiplicity of individual claims in favor of consolidated litigation.

A complicated chronology of events preceded the decision. A federal grand jury in March 1964 indicted a number of individuals and companies for criminal violations of § 1 of the Sherman Act.[82] The indictments contained allegations of collusive and rigged bidding and division and allocation of markets in restraint of trade in the steel and concrete pipe industry. The defendants offered pleas of *nolo contendere* and judgments of guilty were entered on the pleas on June 19, 1964. Almost immediately afterward, the United States filed civil suits against the companies. After extended negotiations between the government and the defendants, these suits were terminated by a final judgment entered on May 24, 1968, in which the defendants consented to a decree barring the specified violations of the antitrust laws.

On May 13, 1969—eleven days short of a year later—the State of Utah filed a treble damage suit against the same defendants on behalf of itself and a class of "public bodies and agencies of the state

[79] Barnett & Son, Inc. v. Outboard Marine Corp., 1974-2 Trade Cases ¶ 79,293 at 97,630 n.15 (D. Del. 1974).

[80] 414 U.S. 548 (1974).

[81] Mr. Justice Blackmun filed a concurring opinion.

[82] 15 U.S.C. § 1 (1970).

and local government in the State of Utah who are end users of pipe acquired from the defendants." The suit alleged the same antitrust violations as had been the subject of earlier litigation.

The action was filed before the running of the statute of limitations contained in the Clayton Act[83] which also provides for tolling during the pendency of any suit instituted by the United States and for one additional year after the termination of such suit.[84] The action was thus filed with eleven days to spare before the end of the permitted one year following the termination of the government's civil action by the consent decree entered on May 24, 1968.[85]

In November of 1969, the defendants moved for an order pursuant to Rule 23(c)(1)[86] that the suit could not be maintained as a class action. In granting the motion, the court found that most of the prerequisites to a class action contained in Rule 23(a)[87] were met, but that the numerosity requirement was not satisfied. The complaint alleged that the members of the class totalled more than 800, but the court, having participated in earlier litigation involving the same defendants and related causes of action, decided that the number of entities likely to qualify for recovery was in fact far lower and that

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[83] Section 4B, 15 U.S.C. § 15b (1970), provides in pertinent part: "Any action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

[84] Section 5(b) of the Clayton Act, 15 U.S.C. § 16(b) (1970) provides:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 . . . is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

[85] An earlier argument by the defendants that the tolling period provided by § 5(b) should have begun to run from the termination of the criminal proceedings in June, 1964, was rejected in Maricopa County v. American Pipe & Constr. Co., 303 F. Supp. 77 (D. Ariz. 1969), and was not renewed in the Utah litigation.

[86] Subparagraph (c)(1) of Rule 23 provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

FED. R. CIV. P. 23 (c)(1).

[87] *See* text accompanying note 18 *supra*.

joinder was therefore practicable.[88] Eight days after the entry of the order denying class action status, over 60 towns, municipalities and water districts in the State of Utah, all of whom had been claimed as members of the original class, filed motions to intervene as plaintiffs in Utah's action under Rule 24(a)(2) as of right, or, in the alternative, under Rule 24(b)(2) by permission.[89]

The district court denied the motion in all respects on the grounds that the limitations period provided by § 4B of the Clayton Act, as tolled by § 5(b), had run as to the movants and had not been further tolled by the institution of the class action on their behalf.[90] On appeal, the Court of Appeals for the Ninth Circuit affirmed as to the denial of leave to intervene as of right, but reversed as to the denial of permission to intervene.[91] The court decided that suit was actually commenced by Utah's filing even as to purported class members who

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[88] 49 F.R.D. 17 (C.D. Cal. 1969). The suit had been transferred from Utah to the United States District Court for the Central District of California by the Judicial Panel on Multidistrict Litigation because Judge Martin Pence, Chief Judge of the District of Hawaii sitting in the California District by assignment, had participated in the more than 100 actions arising out of the same factual situation concentrated in that District. 303 F. Supp. 507 (J.P.M.L. 1969).

[89] Rule 24 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24.

[90] Utah v. American Pipe & Constr. Co., 50 F.R.D. 99 (C.D. Cal. 1970).

[91] 473 F.2d 580 (9th Cir. 1973).

subsequently were found not to qualify for class action treatment. Certiorari was granted.[92]

The Supreme Court began its analysis by recalling the "one-way intervention" problem with the earlier version of Rule 23 which permitted purported members of a class to await trial developments to determine whether continued participation would be favorable to their interests.[93] Whatever might have been the views of the courts as to intervention by members of a "spurious" class after the termination of a limitation, the majority found little to puzzle over in *American Pipe*. The Court found that a class action under the current version of Rule 23 is a "truly representative suit" with the purpose of avoiding, rather than encouraging, the unnecessary filing of suit papers. Such a purpose would hardly be satisfied by requiring protective suits by purported class members who are in danger of losing their class status.

> Thus, the commencement of the action satisfied the purpose of the limitations provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties —precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3).[94]

The Court therefore held that where a class action has been denied solely because of failure to demonstrate that the class is so numerous as to make joinder impracticable, the commencement of the original suit tolls the statute of limitations for all purported class members who make timely motions to intervene after the denial of class action status. In the Supreme Court's view, statutory limitation

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[92] 411 U.S. 963 (1973).

[93] Original Rule 23 contained no device for determining at any point in advance of final judgment which members of the claimed class would be bound thereby. The amendments to the Federal Rules of Civil Procedure in 1966 were in part designed to cure this defect and insure that members of the class would be identified at an early stage and thus subjected to the binding effect of final judgment. *See* Advisory Committee's Note, 39 F.R.D. 98, 105-06 (1966).

[94] 414 U.S. at 551.

periods were designed to prevent surprises through the "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[95] But in *American Pipe* no plaintiff had slept on his rights and the defendants were not prejudiced by lack of warning as to the number and identities of potential plaintiffs who might participate in the judgement. As a result, because imposition of the statute of limitations period deadline would not have served the purpose of the statute of limitations, the interpretation of Rule 23 adopted by the Court was necessary to insure the efficiency and economy that amended Rule 23 was intended to achieve.

With respect to the argument that, regardless of the policies underlying Rule 23 and the statute of limitations, federal courts are powerless to extend a limitation period because of its substantive element, the Court concluded that judicial power to toll a statute of limitations does not constitute an abridgment or modification of a substantive right. Indeed, the legislative history of §§ 4B and 5(b) of the Clayton Act demonstrates that during debate members of the House Judiciary Committee left no doubt that the amendment was "strictly a procedural limitation and [had] nothing to do with substance."[96] The Court therefore concluded that a provision in a federal statute for substantive liability which also sets a time limitation upon the institution of the suit does not necessarily restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

Finally, the Court decided that the decision to deny permission to intervene was not discretionary, involving as it did a finding that the prospective intervenors were absolutely barred by the statute of limitations. Such conclusions of law were subject to review by the appellate courts, and consequently the Ninth Circuit had not erred in reversing the decision to exclude the intervenors. Because they had filed their motions to intervene within the appropriate period, the motions were timely and the judgment of the Court of Appeals was in all respects affirmed.

In analyzing *American Pipe,* one question of primary importance is whether it is ever proper for a legislatively imposed statute of limitations to be tolled by a court. In *American Pipe* the trial court was persuaded by the defendants' contentions that the Federal Rules

[95] Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

[96] 414 U.S. at 558 n.29.

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of Civil Procedure could never "abridge, enlarge or modify any substantive rights . . . ."[97] The court accordingly denied leave to intervene on the basis of its conclusion that the tolling of § 5(b) by a class action proceeding, ultimately not maintainable, constituted an abridgment of substantive rights. On the other hand, the Supreme Court adopted the concept of consistency with the legislative scheme as the focus of analysis. If tolling of a federal statute of limitations is "consonant with the legislative scheme,"[98] the substantive-procedural dichotomy becomes irrelevant.

Comparing the policies underlying Rule 23 with those behind the statutes of limitations, the Court was fully justified in concluding that the major purposes served by the statute of limitations are not violated by permitting intervention in *American Pipe*. On the other hand, to prohibit intervention and thus penalize purported class members for initially pursuing their remedies through the class action device would do great violence to the viability of the class action procedure. In effect, asserted class members would be required to file individual suits in order to protect their rights before the expiration of the statute of limitations, unless they could be assured that the statute of limitations would be tolled even in the event the class action was ultimately held not maintainable.

As to the latter point, the Supreme Court apparently went beyond other federal courts. The Court declined the opportunity to toll the statute of limitations and permit intervention only for those purported class members who had relied upon the existence of the class action to preserve their rights.[99] One other court had suggested the more stringent rule that only in those cases where class action status had been denied for "considerations of judicial housekeeping" should purported class members be permitted to show their good faith reliance on the existence of the class to ensure the tolling of the statute of limitations.[100]

If the basis upon which the Supreme Court declined the invitation to restrict its holding was the efficiency of class action procedures and the policy of avoiding a multiplicity of individual claims, then it could have adopted the "good faith reliance" standard without damaging these principles. Unless a purported class member is aware of the class action, he will inevitably not be able to file an individual

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[97] 28 U.S.C. § 2072 (1970).

[98] 414 U.S. at 557-58.

[99] Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971).

[100] Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

claim. And conceivably, by converting unaware purported class members into potential intervenors, the Court may well have unnecessarily increased the settlement leverage against a defendant.

American Pipe, together with *Zahn* and *Eisen*, have thus introduced new questions into class action law, and the answers to these new questions are difficult to predict. *Zahn* and *Eisen* seem to be consistent with the new antitrust majority's movement toward caution and away from expansion, but the result in *American Pipe* points in the other direction. Apparently going beyond what would have been required to fulfill the policies underlying Rule 23, the Court framed a rule that avoids conversion of the class action procedure into a trap for the unwary. Yet it may produce unjustfied additional pressures upon defendants to avoid litigation even when they can assert meritorious defenses.

It appears that the Court is looking at each class action case very carefully, taking into account the facts of the case and the basic policies underlying Rule 23. The concepts of fairness for both parties and the wear and tear upon the judicial system are also matters of major importance to the Court in its consideration of class action cases. Because class action issues thus far have been resolved mostly in the lower federal courts, it is clear that the Supreme Court's authoritative interpretation of Rule 23 is just beginning to evolve.

II.

MERGERS AND MARKET DEFINITION—A NEW LOOK?

The second major antitrust area in which the Court seemed to be taking a new direction last Term is the application of § 7 of the Clayton Act.[101] Since the 1950 amendments to § 7 by the Celler-Kefauver Act, the government has encountered a nearly unbroken string of victories in the Supreme Court. That string came to a halt last Term with the decisions in *United States v. General Dynamics Corp.*,[102] *United States v. Marine Bancorporation, Inc.*,[103] and *United States v. Connecticut National Bank.*[104]

General Dynamics has a long history. In 1954, a large midwest producer and supplier of building materials, concrete, limestone and coal, Material Service Corporation, began to acquire the stock of United Electric Coal Companies, strip miners in Illinois and Ken-

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[101] 15 U.S.C. § 18 (1970). *See* note 106 *infra*.

[102] 415 U.S. 486 (1974).

[103] 418 U.S. 602 (1974).

[104] 418 U.S. 656 (1974).

tucky.[105] In 1959, General Dynamics entered upon a diversification program including the acquisition of Material Service. This purchase made General Dynamics the nation's fifth largest commercial coal producer. Eight years later, the government filed suit challenging the acquisition of the stock of United Electric by Material Service and its successor, General Dynamics. The § 7[106] complaint alleged that the acquisition substantially lessened competition in the production and sale of coal in two geographical markets, Illinois and the so-called Eastern Interior Coal Province Sales area.[107]

The district court decided against the government on the three major issues in the case: (1) the appropriate line of commerce; (2) the proper section of the country; and (3) the probability of a lessening of competition. As to the relevant product market, the trial court refused to find that coal, by itself, defined the product market parameters. Instead, it held that because coal faces strong competition from other energy sources, the "energy market" was the line of commerce in which the anticompetitive effects, if any, of the acquisition could best be assessed. Similarly, the trial court refused to agree with the government's proposed geographic market definitions, which it felt were unduly tied to past and present production statistics and not necessarily related to "actual coal consumption patterns."[108] Rather, the court concluded that the relevant geographic market was a number of smaller areas defined by the characteristics of the customers

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[105] For five years Material Service purchased United Electric stock until its holdings amounted to more than 34% of the outstanding shares, a point at which all parties to the litigation eventually agreed Material Service had effective control. Changes were made in the corporate structure of United Electric at the behest of Material Service. General Dynamics, after its purchase of Material Service, continued to acquire equity in United Electric by direct purchases of stock, controlling approximately 66% by 1966. In September of 1966 a tender offer to holders of the remaining United Electric stock was successful and United Electric shortly thereafter became a wholly owned subsidiary of General Dynamics. 415 U.S. 486, 488-90 (1974).

[106] Section 7 of the Clayton Act reads in pertinent part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

15 U.S.C. § 18 (1970).

[107] That sales area is one of four major coal distribution areas recognized by the coal industry and comprises Illinois and Indiana, and parts of Kentucky, Tennessee, Iowa, Minnesota, Wisconsin, and Missouri. 415 U.S. at 490.

[108] United States v. General Dynamics Corp., 341 F. Supp. 534, 556 (N.D. Ill. 1972).

and by the Interstate Commerce Commission freight rate districts. Finally, the district court did not agree that the government's contention of anticompetitive effect had been proved. In its view, the decline in the number of coal producers in the area resulted from the change in the nature of demand for coal and not from anticompetitive acquisitions. Second, the court found the parties to the acquisition to be complementary, in the sense that their mining methods were wholly different. Third, the court found that for the most part the companies were not competitive for the same customers and that United Electric's weak coal reserve position suggested the absence of market power.

On appeal,[109] the judgment of the district court was affirmed. Writing for the majority,[110] Mr. Justice Stewart embraced the district court's analysis of anticompetitive effect but found it unnecessary to consider market definition. The Court first analyzed the statistics presented by the government to prove an increase of concentration. The data demonstrated generally that the coal industry was concentrated among a small number of leading producers and that there was a trend toward increasing concentration. For instance, the number of coal-producing firms in Illinois decreased almost 73% during the period from 1957 to 1967, from 144 to 39. The statistics also showed that the challenged acquisition had increased the share of the merged company in the relevant markets.

The Court then reviewed the significance of aggregate statistics in cases involving horizontal mergers. Against the background of the legislative history of § 7, described in *Brown Shoe Co. v. United States*[111] as reflecting the "dominant theme pervading congressional consideration of the 1950 amendments . . . [namely] a fear of what was considered to be a rising tide of economic concentration in the American economy,"[112] the Court has relied heavily on a statistical demonstration of increased concentration:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger

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[109] The government appealed directly to the Supreme Court pursuant to the Expediting Act, 15 U.S.C. § 29 (1970). The Court noted probable jurisdiction. 409 U.S. 1058 (1973).

[110] The majority consisted of Burger, C.J., Stewart, Blackmun, Powell and Rehnquist, JJ. The dissent was written by Douglas, J., with Brennan, White and Marshall, JJ., concurring in the dissent.

[111] 370 U.S. 294 (1962).

[112] *Id.* at 315.

> which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[113]

The Court agreed that the statistical showing offered by the government as evidence in the trial court would have sufficed under the *Philadelphia Bank* approach to support a finding of "undue concentration." The crucial question for the majority, however, was whether the district court was justified in finding that other pertinent factors affecting the coal industry and the business of the parties to the acquisition led to a conclusion that § 7 had not been violated. In its earlier merger decisions, including *Brown Shoe*, the Court considered relevant any indicators of competitive effect beyond statistics:

> . . . Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry . . . .[114]
>
> Statistics reflecting the shares of the market controlled by the industry leader and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.[114.1]

Accordingly, Mr. Justice Stewart examined that portion of the district court's opinion devoted to a description of the changes that have affected the coal industry since World War II. The trial court concluded that coal was increasingly less able to compete with other energy sources. With the decline of the railroads and increasingly stiff competition from oil and natural gas, coal's share of the energy market in the United States fell from 78.4% in 1920 to 21.4% in 1968. In addition, the Court recognized that while the electric utility industry had become the mainstay of coal consumption, consuming in 1968 more than 59% of all the coal used in the country, the supply of coal

[113] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963); *see also* United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964).

[114] Brown Shoe Co. v. United States, 370 U. S. 294, 321-22 (1962); *see also* United States v. Continental Can Co., *supra* n.113.

[114.1] Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962).

to utilities took place under long-term requirements contracts which limit the amounts of coal available for "spot" purchases on the open market. In light of these fundamental changes in the structure of the coal market, the Supreme Court held that the district court was justified in viewing the statistics presented by the government as insufficient to prove its case.

The Court's thesis was based on the premise that evidence of past production is not necessarily proof of future ability to compete. Of course, in any industry in which distribution facilities and product differentiation reflect market power, past sales as demonstrated by market shares are assumed to be evidence of competitive position. Thus, companies controlling large market shares are frequently prohibited from expanding by merger. In the coal market, however, as analyzed by the trial court, statistical evidence of coal production was thought to be of considerably less significance. Since it is true that most of the coal produced is sold under long-term requirements contracts, the focus of competition is not on the disposition of coal already produced but on the procurement of new long-term supply contracts.

> In this situation, a company's past ability to produce is of limited significance, since it is in a position to offer for sale neither its past production nor the bulk of the coal it is presently capable of producing, which is typically already committed under a long-term supply contract. A more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal.[115]

Thus, a company with relatively large supplies of coal not under contract to a consumer has a stronger competitive position in the negotiation of supply contracts than a firm with small reserves, even though the latter may produce more coal.

Upon analyzing the coal reserves of United Electric, the Court found them "unpromising." Although United ranked fifth among Illinois coal producers in terms of annual production, it was tenth in reserve holdings and controlled less than 1% of the reserves held by producers in Illinois, Indiana and Western Kentucky. The depleted reserves had already forced the closing of some of its midwest mines. In addition, of the more than 52 million tons of currently minable reserves controlled by United, only 4 million tons were uncommitted under long-term contracts. Thus, the picture was one of depleted

[115] United States v. General Dynamics Corp., 415 U.S. at 501-2.

resources and an already obligated supply. Accordingly, United Electric was severely limited in its ability to compete for new long-term contracts. This severe limitation, not reflected in the government's statistics, substantiated the trial court's conclusion that the acquisition of United Electric would not substantially reduce competition.

The government argued that the lower court erred in giving undue consideration to post-acquisition evidence. Mr. Justice Stewart conceded that in certain cases post-acquisition evidence has only limited weight. Obviously events within the control of the merging companies could be manipulated to suggest the absence of anticompetitive effect when a § 7 suit was threatened or pending. In addition, because § 7 speaks in probabilities and not certainties[116] the fact that no concrete anticompetitive symptoms occur in the interval between acquisition and trial does not necessarily mean that no such symptoms will develop thereafter. Nevertheless, the Court decided that post-acquisition evidence "tending to diminish the probability or impact of anticompetitive effects might be considered in a § 7 case."[117] The trial court, however, had relied on evidence relating to changes in the patterns and structure of the coal industry and of United Electric's coal reserve situation, matters not within the control of the parties. Indeed these trends were exhibited throughout the coal industry in all parts of the country. Unlike evidence showing only that no lessening of competition had yet occurred, the proof concerning the weak coal reserve position necessarily implied an inability to compete. The Court concluded that post-acquisition evidence was not only pertinent, but that the trial court was fully justified in relying on it.

In response to the government's contention that the trial court's reliance on the limited resources of United Electric was a misconstruction of the "failing company" defense, the Court decided that the government had missed the point of the argument. While agree-

[116] Brown Shoe Co. v. United States, 370 U.S. at 323.

[117] 415 U.S. at 504. *See* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965); United States v. E.I. DuPont de Nemour & Co., 353 U.S. 586 (1957). A merger may be attacked long after its consummation when its anticompetitive effect occurs at a later date. Assuming post-merger evidence of no anticompetitive effect is limited in probativeness, Justice Stewart notes that the government has a "heads I win, tails you lose" advantage over a § 7 defendant:

> [P]ost-merger evidence showing a lessening of competition may constitute an "incipiency" on which to base a divestiture suit, but evidence showing that such lessening has not, in fact, occurred cannot be accorded "too much weight."

415 U.S. at 505 n.13.

ing that the "failing company" defense had been strictly limited in recent court decisions,[118] the Court recognized that the trial court had not concluded that United Electric was a failing company, but rather that the finding of inadequate reserves demonstrated the unpersuasiveness of the government's statistical case. The Court expressly refused to consider the questions of product and geographic markets. Having concluded that the statistical presentation by the government did not establish that a substantial lessening of competition was likely to occur in any market, it was superfluous to consider what relevant markets might exist had such an anticompetitive effect been demonstrated.

In contrast, the dissent did not agree that the merger could be analyzed without a determination of the relevant market. In the view of Mr. Justice Douglas, while the energy market might be one appropriate line of commerce for testing the merger's anticompetitive effect, another appropriate line of commerce would be the coal market. He concluded that coal had both price advantages and operational disadvantages combining to make it an economically significant submarket within the energy market. Consumer preference, price differences and the lack of functional interchangeability for certain end uses all combined to demonstrate the uniqueness of coal.[119]

The dissent also disagreed with the court's treatment of the geographic market question. Once again, it emphasized that a finding of no anticompetitive effect in one relevant geographic market did not necessarily imply the absence of such effects in other relevant markets. It further criticized the trial court's undue emphasis on standard rail rates, because much of the coal shipped in the United States is not subject to ordinary rail rates. The majority's error in this regard is amply demonstrated by the overlapping distribution patterns of

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[118] United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

[119] The dissent was unable to distinguish the energy market-coal market relationship from the fact situtation in United States v. Alcoa, 377 U.S. 271 (1964), in which aluminum conductor had "little consumer acceptance" for many purposes but its substantial price advantage gave it a competitive edge in areas of the market where price was the most important single factor.

> Despite the existence of some competition from other forms of conductor, those factors were sufficient to set aluminum conductor apart as an economically significant § 7 submarket. That precedent seems to be indistinguishable; and thus whatever the existence of a § 7 energy market, coal constitutes an economically significant submarket for § 7 purposes.

415 U.S. at 517 (Douglas, J., dissenting).

the parties to the acquisition and the fact that they sold one-half of their output to the same customers at the same facilities. Finally, the dissent found fault with the district court's treatment of the anticompetitive effect issue, chiefly because the lower court had failed to make clear the standard used in reaching its ultimate conclusion. The dissent argued that the lower court had failed to mention the relevant market shares or to specify the effect of the combination on industry concentration. It further contended that reliance on such facts as the difference in methods of extraction of the coal between the two companies and the fact that only one sold metallurgical coal was simply irrelevant to an evaluation of the anticompetitive effect of the acquisition. The dissent concluded with a bitter attack on the majority:

> On the basis of a record so devoid of findings based on correct legal standards, the judgment may not be affirmed except on a deep-seated judicial bias against § 7 of the Clayton Act. We should remand the case to the District Court with directions to assess the impact of the . . . combination on the Illinois and Eastern Interior Coal Province Sales area coal markets as of 1959. We should direct the court to make findings of respective market shares, and further to evaluate United Electric's viability as an independent producer or as the possible "acquiree" of a company other than General Dynamics as of 1959, in light of the strict standards applicable to the failing company defense. Since we abdicate our duty for responsible review and accept the mere conclusion that no § 7 violation is established on the basis of a record with none of these necessary findings, I dissent from the affirmance of the District Court's judgement.[120]

General Dynamics represents something of a departure for the Court in merger cases. Until *General Dynamics*, the government carried its burden of proof in § 7 cases by introducing statistical evidence of concentration. As a practical matter this shifted the burden of proving no anticompetitive effect to the defendants. The defendants' burden was difficult, and in case after case the Court endorsed the government's statistical case. In *General Dynamics*, the Supreme Court actually used "other pertinent factors" first to question and then to dismiss the government's statistical case. The fact that those factors grew out of the unique shift in the nature of the coal industry does not preclude introduction of similar kinds of proof in future

[120] 415 U.S. at 527 (Douglas, J., dissenting) (footnote omitted).

merger cases. In order to show why the government's statistics are misleading, defendants will be able to offer trial courts evidence concerning industry structure, and the nature and decline of demand and other such consideration.

Accordingly, what we may look for in future merger cases is a return to the full-blown economic inquiry that the Court in the *Philadelphia Bank* case specifically sought to avoid.[121] In that case, Justice Brennan speaking for the majority reasoned that the complexity of analyzing anticompetitive effect plus the need to give businessmen a simple standard upon which they could rely with some confidence dictated the advisability of using market share data "to simplify the test of illegality."[122] Wary of "subverting congressional intent by permitting a too-broad economic investigation,"[123] the Court in that and subsequent cases was criticized as having placed too much emphasis on statistics at the expense of the realities of the economic situation. Congressional intent was to focus on acquisitions that would produce anticompetitive effect. Thus there can be no serious doubt that rather than being subverted, congressional intent is actually effectuated by the introduction of evidence tending to supply a more precise resolution of that problem. The importance, then, of *General Dynamics* is that the Supreme Court has now sanctioned abandonment of the per se rule based on statistical evidence alone. While courts must be careful to limit evidence on "other pertinent matters" to that material likely to enhance the fact finder's understanding of the economic issues, the result in the long run will be a more equitable approach to merger challenges under § 7. This return to neutrality is overdue.

The trend toward neutrality was also evidenced in one area of the regulated industries field. For the second time in two years, the issue of potential competition in the banking industry was presented to the Court. In 1973, the judgment of the District Court of Colorado dismissing a § 7 complaint against First National Bancorporation for its acquisition of the First National Bank of Greeley was affirmed by an equally divided Court without opinion.[124] This Term, the Court in *United States v. Marine Bancorporation, Inc.*[125] decided that, in applying the potential competition doctrine to commercial banking,

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[121] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
[122] *Id.* at 362.
[123] *Id.*
[124] United States v. First Nat'l Bancorp., Inc., 410 U.S. 577 (1973) (Powell, J., not participating).
[125] 418 U.S. 602 (1974).

courts must take into account federal and state regulation and particularly the legal barriers to entry.

The National Bank of Commerce (NBC) was a Seattle-based bank wholly owned by a registered bank holding company, Marine Bancorporation, Inc. In terms of assets, deposits and loans it was the second largest banking organization with headquarters in the State of Washington.[126] Although it operated 107 branch banking offices within the state, it had no branch offices in Spokane. The Washington Trust Bank (WTB) was headquartered in Spokane. WTB, with seven branch offices in the Spokane area, was the ninth largest banking organization in the state with assets of $112 million, total deposits of $95.6 million and loans at $57.6 million.[127]

The banking market in Washington was concentrated with the five largest in the state holding 74.3% of the total commercial bank deposits and operating 61.3% of the banking offices. As of June 30, 1972, the two largest banking organizations in the state held approximately one-half of the total deposits and operated over one-third of the banking offices. In the Spokane metropolitan area, there were six banking organizations operating. One organization held an aggregate of 42% of the total deposits and another, some 30%. WTB held 18.6% of the total deposits in the area, for an aggregate holding of approximately 92% of total deposits by the top three banks.

The State of Washington has a law restricting geographic expansion by banks. According to the provisions of that law, no state-chartered bank can establish any branch in a city or town in which it does not operate if there is present in that city or town any other bank.[128] Federal law subjects nationally chartered banks to the branching limitations imposed on their state counterparts.[129] Consequently, neither national nor state banks in Washington may expand, except by merger or acquisition, into cities or towns that already have banking organizations. In addition, Washington law requires that new banks not merge with any other bank for a period of at least 10 years from the date of approval of the articles of incorporation without the consent of the State Supervisor of Banking,[130] and a bank that acquires another bank generally cannot branch from the acquired

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[126] At the end of 1971, National Bank of Commerce had total assets of $1.8 billion, total deposits of $1.6 billion and total loans of $881.3 million. The largest banking organization in the state, Seattle-First National Bank, had assets of $2.8 billion, deposits of $2.5 billion and loans of $1.4 billion. 418 U.S. at 606 & n.1.

[127] *Id.* at 607.

[128] WASH. REV. CODE ANN. § 30.40.020 (1961).

[129] 12 U.S.C. § 36(c) (1970).

[130] WASH. REV. CODE ANN. § 30.08.020(7) (1961).

bank.[131] Finally, multibank holding companies are prohibited in Washington,[132] thus making it impossible to simulate branching by arranging a number of unit banks under a bank holding company.

In February 1971, Marine, NBC and WTB agreed to merge the latter into NBC. The Comptroller of the Currency approved the merger pursuant to the Bank Merger Act of 1966.[133] The United States then filed suit within the 30-day limitation period set out in the Bank Merger Act of 1966.[134] The complaint contained no allegations that the acquisition would damage actual competition, but instead focused on the issue of potential competition. Specifically, the United States alleged that § 7 of the Clayton Act was violated by the acquisition in that it removed the possibility that NBC would enter the Spokane market *de novo* or through a toehold acquisition. The government argued that § 7 was also violated by removing the procompetitive effect of NBC's presence on the fringe of the Spokane market and by putting an end to the possibility that WTB would develop into a statewide counterweight to the existing large statewide banks.

Following trial the district court ruled for the defendants.[135] The trial court found that the merger would increase competition in commercial banking in the Spokane metropolitan area and would have no anticompetitive effect. In addition, the court concluded that in light of the legal and economic barriers to entry other than by acquisition, there was no reasonable probability that NBC would enter the Spokane market except by the merger route.

It was crucial for the district court that Washington law forbade *de novo* branching by NBC in Spokane, and that the government had failed to establish that there were any other existing banks in Spokane available for acquisition. The court also found no procompetitive effect from NBC's presence on the fringe of the Spokane market and concluded that the government had not proved that WTB was likely to expand beyond the Spokane market into a statewide bank. Finally, the trial court saw little likelihood that NBC would become

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[131] WASH. REV. CODE ANN. § 30.40.020 (1961).

[132] WASH. REV. CODE ANN. § 30.04.230 (1961).

[133] 12 U.S.C. § 1828(c) (1970). Pursuant to 12 U.S.C. § 1828(c)(4) the Comptroller requested reports on the competitive factors involved from the Attorney General, the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve System. Each of these agencies submitted negative reports.

[134] For a discussion of the dual antitrust scheme for the banking industry, *see* Shenefield, *Annual Survey of Antitrust Developments—The Year of the Regulated Industry*, 31 WASH. & LEE L. REV. 1, 22-39 (1974).

[135] United States v. Marine Bancorp., Inc., 1973-1 Trade Cases ¶ 74,496 (W.D. Wash. 1973).

entrenched as a dominant bank in the Spokane metropolitan area as the result of the merger, or that it would trigger a series of defensive mergers by other banks in the state.[136] The district court accordingly dismissed the complaint. The government appealed directly to the Supreme Court under the Expediting Act.[137]

The opinion by Mr. Justice Powell[138] first addressed the relevant market question. As to definition of the product market, the opinion agreed with the district court's finding that the relevant market was commercial banking and the cluster of products and services involved.[139] The district court had found that the relevant geographic market was the Spokane metropolitan area. Mr. Justice Powell had no reason to doubt that the metropolitan area constituted a reasonable approximation of the area within which the Spokane banks offered most of their services and to which Spokane consumers could practicably turn for alternatives. In addition, it was the area in which the effect of the merger on competition was "direct and immediate."[140] The Court therefore affirmed the holding that the Spokane metropolitan area was the appropriate geographic market.

Although it had stipulated to that market area, the government nevertheless contended that the entire state was also an appropriate "section of the country," in spite of its concession that the state was not a banking market and that WTB only competed in the Spokane metropolitan area. Concerned that this acquisition would trigger others leading to domination of all banking in the state by a few large banks, the government attempted to argue that "section of the country" and relevant geographic markets might not necessarily be identical, and that the state as a whole was the appropriate context within which to assess the probability of a development of a network of oligopolistic banking organizations. The Court rejected this reading

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[136] The district court also made findings of fact with regard to the "convenience and needs" defense set out in the Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(5)(B) (1970). The trial court concluded that even if the acquisition violated the standards of § 7 of the Clayton Act, it was nevertheless lawful under the Bank Merger Act of 1966. The Supreme Court declined to evaluate this finding in light of its conclusion that the acquisition was lawful under the standards of § 7.

[137] 15 U.S.C. § 29 (1970). The Court noted probable jurisdiction. 414 U.S. 907 (1973).

[138] Burger, C.J., Stewart, Blackmun and Rehnquist, JJ., concurring in the majority opinion. White, J., with whom Brennan and Marshall, JJ., joined, dissented. Douglas, J., took no part in the consideration of the case.

[139] *Accord*, United States v. Phillipsburg Nat'l Bank, 399 U.S. 350 (1970); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[140] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963).

of § 7 as unsupported by precedent and largely speculative on the record in the trial court. Given that § 7 was designed to arrest mergers "at a time when the trend to a lessening of competition in a line of commerce [was] still in its incipience,"[141] the Court held that the legislation concerned probabilities, not "ephemeral possibilities."[142]

> The Government's underlying concern for a linkage or network of statewide oligopolistic banking markets is, on this record at least, considerably closer to "ephemeral possibilities" than to "probabilities." To assume, on the basis of essentially no evidence, that the challenged merger will tend to produce a statewide linkage of oligopolies is to espouse a *per se* rule against geographic market extension mergers like the one at issue here. No § 7 case from this Court has gone that far, and we do not do so today.[143]

Accordingly, the majority concluded that the appropriate "section of the country" and the "relevant geographic market" were the same—the Spokane metropolitan area.

The opinion then addressed application of the potential competition doctrine to the banking industry. After briefly tracing the history of the potential competition doctrine[144] in the nonregulated industry context, the opinion interpreted the *Falstaff* case[145] as focusing on the likely effects of the acquiring firm that has a position on the fringe of the target market. The opinion recited those factors that cause market extension mergers to be held unlawful: (1) if the target market is substantially concentrated; (2) if the acquiring firm has the characteristics, capabilities and economic incentive to render it a perceived potential *de novo* entrant; and (3) if the acquiring firm's presence on the fringe of the market has influenced existing participants in that market.

> In other words, the Court has interpreted § 7 as encompassing what is commonly known as the "wings effect"—the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter *de novo*.[146]

[141] Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962). *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[142] 370 U.S. at 323.

[143] 418 U.S. at 623 (footnote omitted).

[144] The potential competition doctrine is found chiefly in United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).

[145] United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

[146] 418 U.S. at 625 (citation omitted).

The Court had never accepted the government's theory of potential competition. In *Falstaff,* the opinion expressly reserved the issue whether the potential competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the possibility of deconcentration that might have taken place either through *de novo* entry or through the toe-hold acquisition of a smaller existing concern.

The Court first addressed the issue of whether the potential competition doctrine applied with full force to commercial banks. The opinion held that geographic market extension mergers by commercial banks must pass muster under the potential competition doctrine of § 7 cases. However, the Court further concluded that the application of the doctrine to commercial banking must take into account the unique federal and state regulatory restraints on entry into new markets in that line of commerce.

After reciting the record of failure of the government's position in the eight previous cases tried under the potential competition doctrine,[147] Mr. Justice Powell pointed out that an important reason why the government had been uniformly unsuccessful in those cases is that the doctrine fails to give full weight to the extensive federal and regulatory barriers to entry into commercial banking markets. The reason that the omission is of such great importance is that ease of entry on the part of the acquiring firm is the central premise for the potential competition doctrine. In the conventional manufacturing context, firms are free to base their decisions regarding market entry on any number of different factors, particularly the profitability of entry in the target market. In banking, however, regulatory barriers to entry have been developed since the Great Depression to avoid superfluous banking firms which may increase the probability of bank failures. This regulatory control reduces the likelihood of the acquiring bank's entry into new markets *de novo* if precluded from entry by acquisition. "In this case, . . . there are serious questions whether an 'alternative to the merger route' through branching or a functional equivalent is a legal or feasible method of entry by NBC into the Spokane market."[148]

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[147] In addition to the district court decision in *Marine Bancorporation, see* United States v. Connecticut Nat'l Bank, 362 F. Supp. 240 (D. Conn. 1973), *vacated and remanded,* 418 U.S. 656 (1974); United States v. United Virginia Bankshares, Inc., 347 F. Supp. 891 (E.D. Va. 1972); United States v. First Nat'l Bancorporation, Inc., 329 F. Supp. 1003 (D. Colo. 1971), *aff'd mem.,* 410 U.S. 577 (1973); United States v. Idaho First Nat'l Bank, 315 F. Supp. 261 (D. Idaho 1970); United States v. First Nat'l Bank of Maryland, 310 F. Supp. 157 (D. Md. 1970); United States v. First Nat'l Bank of Jackson, 301 F. Supp. 1161 (S.D. Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133 (N.D. Cal. 1967).

[148] 418 U.S. at 630.

Mr. Justice Powell then proceeded to examine the structure of the Spokane metropolitan area commercial banking market, because potential competition has meaning only in concentrated markets. Obviously, in markets with adequate actual competition, the existence of a potential entrant at the edge of the market will not influence firms already in the market. The government's data, which showed that the three largest banking organizations including WTB controlled approximately 92% of the total deposits in Spokane, persuaded the majority that the government had established a prima facie case that the Spokane market was a candidate for the potential competition doctrine. Consequently, the burden was transferred to the appellees to show that the concentration ratios, "which can be unreliable indicators of actual market behavior,"[149] did not accurately reflect the state of competition within the Spokane market. In this regard, the Court was forced to conclude that the appellees had not carried their burden and that the district court had erred in holding to the contrary. In particular, no evidence had been introduced concerning the absence of parallel behavior in pricing or the provision of banking services in the market: While some aspects of competition among banks were muted by regulation, the Court found that other aspects were totally unregulated and could be an accurate reflection of the presence or absence of significant parallel conduct. In particular, the Court looked for "the much advertised differences in various forms of services offered by banks which are in the same geographic market."[150]

On the other hand, the majority was not surprised that the commercial banking market in Spokane was structurally concentrated since, as the government's expert witness conceded, all banking markets in the country are likely to be concentrated:

> This is so because as a country we have made the policy judgment to restrict entry into commercial banking in order to promote bank safety. Thus, most banking markets in theory will be subject to the potential competition doctrine. But the same factor that usually renders such markets concentrated and theoretical prospects for potential competition § 7 cases—regulatory barriers to new entry—will also make it difficult to establish that the doctrine invalidates a particular geographic market extension merger.[151]

[149] *Id.* at 631, *citing* United States v. General Dynamics Corp., 415 U.S. 486 (1974).
[150] 418 U.S. at 632 n.34.
[151] *Id.* at 632.

The Court then came to the heart of the government's case, namely, the contention that the challenged merger violated § 7 of the Clayton Act because it eliminated the likelihood that, if the merger were precluded, NBC would enter the market either *de novo* or through a foot-hold acquisition. The government argued that utilization of one of these alternative methods was preferable to acquisition since it would be likely to produce deconcentration of the market or other procompetitive effects. The Court insisted that there were two essential preconditions upon which the government's theory was built. First, the government must prove that NBC had available feasible means of entry into the market other than by acquiring WTB. Second, the government must then show that those means offered a substantial likelihood of producing deconcentration of that market or other significant procompetitive effects.

As to the first point, it was undisputed that NBC could not under state law establish *de novo* branches in Spokane and that its parent holding company could not hold more than 25% of the stock of any other bank. Thus, entry depended upon the possibility that NBC might acquire another existing bank in the Spokane market. The government contended that such an acquisition was possible, either by the device of "sponsorship," in which NBC would form a new bank through friendly stockholders and then ultimately acquire the bank, or acquire a smaller bank already existing in the market as a toe-hold acquisition. As to the first alternative, the Court declined to reach a decision on the issue since even if it were permitted by state regulatory authorities it was unlikely to produce any significant procompetitive benefits in the Spokane commercial banking market. In particular, state law would not allow NBC to branch from the sponsored bank after it was acquired, so that the entry into Spokane would be frozen at the level of its initial acquisition. Such a pigmy entry offers virtually no hope of producing the deconcentration for which the government yearned. As to the second suggested method of entry, the Court similarly found that it was wholly unlikely to produce significant procompetitive benefits since branching would be limited.

Thus, in the Court's view, the government had not offered a persuasive case on feasible alternative methods of entry, nor had it established that the alternate means offered a reasonable prospect of long-term structural improvement or other benefits in the target market. The Court thus held against the government on its principal argument—*i.e.,* the potential competition theory. Indeed, since the preconditions for that version of the theory were absent, the issue whether such a formulation of the potential competition doctrine could ever be valid was expressly reserved. For emphasis, the Court added a warning: "We reiterate that this case concerns an industry in which new entry is extensively regulated by the state and federal governments."[152]

Mr. Justice Powell then proceeded to examine the government's case under the more orthodox theories of potential competition—perceived potential entry.[153] Because the government had failed to establish that NBC had alternative methods of entry, the majority was willing to assume that firms in the Spokane market are likewise aware of the barriers that rendered NBC an unlikely entrant except by merger with WTB. In light of those barriers, the Court concluded that it was unlikely that NBC exerted any meaningful influence on competition within the market by standing "in the wings." The Court thus affirmed the district court's finding that the threat of entry by means other than merger did not have a significant effect on the competitive practices of banks already in the market. Furthermore, the Court agreed with the trial court's view that there was no reasonable probability that WTB might expand outside its Spokane headquarters into a direct competitor statewide.

Mr. Justice Powell clearly summarized the lessons of *Marine Bancorporation* for the Antitrust Division of the Department of Justice. First, courts must take into account the extensive federal and state regulation of banks. The Court's affirmance of the trial court judgment rested primarily on state statutory barriers to *de novo* entry and to expansion following entry into new geographic markets. The Court concluded with a "textbook" for future trials of bank merger cases:

> In States where such stringent barriers exist and in the absence of a likelihood of entrenchment, the potential competition doctrine—grounded as it is on relative freedom of entry on the part of the acquiring firm—will seldom bar a geographic market extension merger by a commercial bank. In States that permit free branching or multibank holding companies, courts hearing cases involving such mergers should take into account all relevant factors, including the barriers to entry created by state and federal control over the issuance of new bank charters. Testimony by responsible regulatory officials that they will not grant new charters in the target market is entitled to great weight, although it is not determinative. To avoid the danger of subjecting the enforcement of the antitrust laws to the policy of a particular bank regulatory official or agency, courts

[152] *Id.* at 639.
[153] *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

> should look also to the size and growth prospects of the target market, the size and number of banking organizations participating in it, and past practices of regulatory agencies in granting charters. If regulatory restraints are not determinative, courts should consider the factors that are pertinent to any potential competition case, including the economic feasibility and likelihood of *de novo* entry, the capabilities and expansion history of the acquiring firm, and the performance as well as the structural characteristics of the target market.[154]

Mr. Justice White, writing for the dissent, was displeased with what he perceived to be a weakening of § 7. "For the second time this Term, the Court's new antitrust majority had chipped away at the policies of § 7 of the Clayton Act."[155] The dissent characterized the majority opinion as redefining the elements of potential competition and escalating the burden of proof required to show that a merger violates § 7. Given the admittedly concentrated commercial banking market in the Spokane metropolitan area, the dissenters found the two alternative methods of entry suggested by the government both attractive and feasible. For them, it was simply incredible that, in absence of the merger with WTB, NBC would not have proceeded to acquire a smaller bank or to assist in the sponsorship of a new bank. As to the contention that entry on such a limited scale would not contribute to the deconcentration of the Spokane market and would therefore have no current influence on competitive practices within the market, the dissenters simply disagreed with the majority.

Mr. Justice White criticized the majority position that the absence of branching potential rendered toe-hold entry or sponsorship an unmeaningful alternative:

> I cannot accept the *per se* view that without branching an able and willing newcomer to the banking market cannot be considered a sufficiently substantial competitive influence, immediately or in the foreseeable future, so that its loss to the market would warrant application of § 7. This is particularly true if the putative entrant is a large and successful banking organization with wide experience in developing new markets.[156]

The dissent also had difficulty with the majority's disposition of the "wings" theory of potential competition. It was unable to explain,

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[154] 418 U.S. at 641-42.

[155] *Id.* at 642.

[156] *Id.* at 647.

if the majority's branch disability theory was correct, why the evidence showed that bankers in the Spokane area had discussed NBC's interest in entry. In Mr. Justice White's view, the possibility of entry and the possibility of competition following entry were sufficiently strong to restrain anticompetitive practices.

But the minority was most concerned about the broader application of the majority's view of the potential competition doctrine. While it conceded that the Court's opinion was purportedly limited to industries in which new entry is regulated by state and federal government, the dissent pointed out that "barriers" to competition played a large part in the majority's analysis. Many non-regulated industries are afflicted with barriers to competition and, accordingly, the dissent was concerned that the precedent may have a wider application throughout the economy than the majority cared to foresee.

A second bank merger case last Term produced further illumination of the problem of selecting product and geographic markets for analysis of bank acquisitions. In *United States v. Connecticut National Bank*,[157] Mr. Justice Powell writing for the majority[158] reversed the district court's selection both of the product market and of the geographic market, and remanded the case for further consideration.

The Connecticut National Bank (CNB) desired to consolidate with First New Haven National Bank (FNH). The two banks had offices in contiguous areas in the southwestern portion of Connecticut.[159] CNB was the fourth largest commercial bank in the State of Connecticut with approximately 6% of commercial bank deposits. FNH was the eighth largest commercial bank with approximately 4% of the commercial bank deposits. As of the end of 1971, the five largest commercial banks in Connecticut held 61% of the deposits in the state and the ten largest banks held 83%.

The government brought a civil action challenging the consolidation under § 7 but following a lengthy trial, the trial court dismissed the government's complaint.[160] Thereafter the government appealed

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[157] *Id.* at 656.

[158] The majority in this case was comprised of Burger, C.J., and Stewart, Blackmun, Powell and Rehnquist, JJ. White, J., with whom Douglas, Brennan and Marshall, JJ., joined, concurred in part and dissented in part.

[159] Although there was overlap and therefore direct competition in a small area located between the banks' headquarters, the banks assured the district court that the overlapping offices would be divested so that the overlap of operation would be minimized. The district court held this divestiture plan eliminated antitrust difficulties presented by the horizontal merger of direct competitors.

[160] 362 F. Supp. 240 (1973).

directly to the Supreme Court under the Expediting Act.[161] On appeal, the Court disagreed with the trial court's decisions on the product and geographic market, and therefore declined to reach the issue of anticompetitive effect.

The district court had concluded that the appropriate "line of commerce" included both commercial banks and savings banks. Its conclusion was based on its view of the evidence that savings banks are direct competitors of commercial banks for real estate mortgages, personal loans, and for individual, partnership and corporate deposits and also for commercial loans. In addition, the trial court noted that state law would shortly permit savings banks to offer personal checking accounts.

While agreeing that savings banks and commercial banks are direct competitors for many services, the Court was unable to reach the same conclusion. For Mr. Justice Powell, the degree of direct competition was not sufficient to treat savings banks and commercial banks as being in the same product market. The unique cluster of services repeatedly mentioned by the Supreme Court in earlier cases[162] was what distinguished commercial banks as a product market. Nevertheless, as the majority saw the evidence, savings banks were not competitive in the market for loans to commercial enterprises. In addition, the Court discerned that commercial banks in the state offered credit card plans, trust services, investment services and loans for securities purchases, in addition to computer and account services and letters of credit, none of which were offered by savings banks. This alone made it inappropriate to consider them direct competitors.

> We do not say . . . that in a case involving a merger of commercial banks a court may never consider savings banks and commercial banks as operating in the same line of commerce, no matter how similar their services and economic behavior. At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. In Connecticut, that point may well be reached when and if savings banks become significant participants in the marketing of bank services to commercial enterprises. But, in adherence to the tests set forth in our earlier bank merger cases, which we are constrained to follow, we hold that such a point has not yet been reached.[163]

[161] 15 U.S.C. § 29 (1970). The Court noted probable jurisdiction. 414 U.S. 1127 (1974).

[162] United States v. Phillipsburg Nat'l Bank, 399 U.S. 350 (1970); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[163] 418 U.S. at 666 (citations omitted).

Accordingly, the Court remanded the case to the district court with instructions to treat commercial banking as the relevant product market.

With regard to the relevant geographic market, the district court had determined it to be the state as a whole. Mr. Justice Powell found this conclusion defective on several grounds. First, if the state were the relevant geographic market, the case should be analyzed not as a potential competition case, but rather as a direct competition case. In that event, because the aggregate market share of both banks amounted to approximately 10%, the consolidation would have been in jeopardy under conventional merger standards.[164]

Second, the two banks did not operate statewide. Quoting *Marine Bancorporation*, the opinion stated that the relevant geographic market is the area in which the acquired bank is in significant and direct competition with other banks. Definition of that area in accordance with the Court's other decision in the bank merger area indicates that the market must be drawn narrowly to reflect the immediate and direct effects of the merger on competition.[165] Consequently, the Court stated that on remand the lower court must determine the geographic market in which CNB operates and to which the bulk of its customers may turn for alternative commercial bank services, and then make the same determination with respect to FNH.

> The task is important, because the definition of the respective geographic markets determine the number of alternate avenues of entry theoretically open to CNB in piercing FNH's area of significant competitive influence and vice versa.[166]

Mr. Justice Powell noted that the government's evidence on this subject, while not necessarily required to produce a market definition with scientific precision, must nevertheless be sufficient to permit a rough approximation of localized banking markets. The Court agreed with the trial court that reliance on Standard Metropolitan Statistical Areas (SMSA) is insufficient, because these are developed by the Office of Management and Budget to determine areas of economic and social integration without regard to criteria particularly relevant to the banking industry.

As in *Marine Bancorporation*, the Supreme Court rejected the government contention that the state, although not a banking market, is nevertheless a "section of the country" within the meaning of § 7 of the Clayton Act. In addition, the Court held that the theory of

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[164] *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[165] *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[166] 418 U.S. at 669.

"linked oligopolies" was devoid of evidentiary support on the facts presented, as it was in *Marine Bancorporation*. In the Court's view, to adopt the theory would be to espouse a *per se* rule against geographic market extension mergers by commercial banks in the state as long as any town remained open to *de novo* branching.[167]

The dissenters agreed with the majority opinion as to the relevant line of commerce, but were unable to agree with the determination of a relevant geographic market. Mr. Justice White espoused the notion that there might be several possible relevant geographic markets, especially in a potential competition case where a merger might affect the economic behavior of existing firms in various markets. The dissenters favored leaving open the possibility that the merger, when analyzed in terms of the "wings" theory of potential competition, might have an anticompetitive effect in markets other than those in which the parties to the acquisition were found.

Marine Bancorporation and *Connecticut National Bank* are interesting for their impact on the requirements of geographic market definition. Until last Term, there had been a suspicion, based on the language in *United States v. Pabst Brewing Co.*,[168] that the phrase in § 7 "any section of the country" did not require any specific definition of geographic market. This line of reasoning gave rise to two erroneous contentions: (1) § 7 could be applied without regard to any particular geographic market; and (2) even if a merger had to be evaluated in a geographical context, no attempt at market definition in the traditional sense need be undertaken.

Both of these contentions have now been laid to rest. In *Marine Bancorporation*, Mr. Justice Powell interpreted *Pabst* to hold that the government had established three relevant markets in that case and that the requisite anticompetitive effect in any one of them was sufficient to invalidate the merger.[169] Elsewhere the Court rejected as inconsistent with precedent the government's proposal that "any section of the country" might not be identical to "relevant geographic market."[170] The Court noted that in no previous § 7 case had the

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[167] The Supreme Court also observed that the district court had made a finding that the consolidation met the standards of the "convenience and needs" test of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c)(5)(B) (1970). The Court, however, suggested that the findings on the "convenience and needs" defense were not controlling if the trial court erred in the standards applied in judging the status of the consolidation under the Clayton Act. United States v. Third Nat'l Bank, 390 U.S. 171, 183-84 (1968).

[168] 384 U.S. 546, 549-50 (1966).

[169] 418 U.S. 621 n.20.

[170] The government was forced to this position in its desire to couch its attack

Court determined the legality of a merger by measuring its effects on areas where the acquired firm is not a direct competitor.

In *Connecticut National Bank*, the Court spoke further of geographic markets, and particularly the burden of proof. Citing *Pabst* the government had increasingly come to rely on the position that it was not required to define geographic markets precisely. The Court agreed but nevertheless imposed on the government the responsibility to come forward with evidence "delineating the rough approximation of localized banking markets . . . ."[171]

In summary, the cases have clarified the problem of geographic market definition considerably. First, the government must propose and prove such markets, and second, at least in potential competition cases, the markets must be areas in which the acquired firm actually and directly competes. That area must not necessarily be defined with scientific precision but it must be proved by economic and business evidence.

The Court's assessment of the applicability of the potential competition doctrine in *Marine Bancorporation* reflects a new neutrality. The government must now present, not simply theories of anticompetitive effect, but evidence of such harm, and failure realistically to analyze particular situations will lead to failure for the government's case.

The government advanced three separate formulations of the potential competition doctrine. First it argued that in a concentrated banking market the Spokane acquisition precluded significant deconcentration that could be achieved, in the absence of the acquisition, by NBC's entry either through a toe-hold acquisition or bank sponsorship. Second, it argued that the acquisition should be prohibited because of its triggering effect on other banks and the likely development of a network of statewide oligopolies. Finally, it argued that the disappearance of the "wings" effect of NBC hovering on the edge of the market was sufficient reason alone for the acquisition to be prohibited.

As in *Falstaff*, the Court again declined to decide the validity of the "significant deconcentration" formulation. It did, however, define two essential conditions that must exist before the theory, if proven, could establish a violation of § 7. First, there must be a showing that the acquiring bank had available feasible means for entry into a market other than by acquisition. Second, there must be a showing that those means offered a substantial likelihood of pro-

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against statewide parallel practices and entrenchment in conventional § 7 terminology. The government conceded that the state as a whole was not a banking market.

[171] ___ U.S. at ___, 94 S. Ct. at 2796-97.

ducing deconcentration or other significant procompetitive effects. These preconditions will be difficult for the government to prove in any case. In many banking markets in the country there are sufficiently few banks operating that there may well be no candidates for acquisition. Given the restrictions contained in many state banking laws on branching from acquired banks, even if there are feasible alternative means of entry available, the likelihood of significant entry by acquiring a toe-hold in the market seems remote. Thus, while the Court purported not to reach the deconcentration issue, its discussion demonstrates fairly clearly that the avenue is not a promising one for the government to undertake in § 7 cases.

The Court's handling of the "wings" theory seems completely realistic. It is utterly speculative to argue that competitors in a market perceive of firms outside the market as potential entrants if there are legal barriers to such entry. To assess bank mergers without taking into account restrictive state banking laws constitutes idle speculation and the Court declined to engage in such an exercise. Obbiously, one probably effect of this decision may be to induce bankers to reverse their traditional hostility toward restrictive state regulation and to seek the enactment of new laws to enable them to achieve acquisition programs. Likewise, the decision can be read as an invitation to banks in states already possessing restrictive banking laws to step up their acquisition timetables.

Such a development would not necessarily be bad. On balance, in geographic market extension mergers it seems more likely that procompetitive benefits will be produced than that anticompetitive effects will result. A large bank's entry into a concentrated market may have the effect of introducing a broader spectrum of services and the capacity to offer larger loans. The speculative nature of the asserted anticompetitive effects seems particularly obvious in the Spokane context. First, the acquisition did not decrease the number of firms actually operating in the Spokane market. Second, there remained a number of potential entrants in the wings so that the disappearance of one potential entrant, if NBC can be characterized as such, did not decrease the impact of the "wings" effect to any significant degree. In short, the Court's decision stands for the proposition that the risk of permitting anticompetitive geographic market extension mergers is less than is the risk of losing procompetitive mergers.

Taken together, the Term's three merger cases show a desire to deal with the economic realities of a particular case rather than simply with market share statistics which may or may not reflect such realities. The Court's intelligent regard for the legal and economic barriers to competition led it in *Marine Bancorporation* and *General Dynamics* to depart from its past practice of permitting its decisions to depend excessively on market share statistics. The expansion of the area of relevance in a merger case will undoubtedly produce decisions that are more realistic, even at the expense of taking more time and resources. Yet the function of the antitrust court is not necessarily to reach a quick decision, but rather a correct one.

III.

THE NEW ANTITRUST MAJORITY

In his dissent in *Marine Bancorporation*, Mr. Justice White bitterly described the Court's new antitrust majority.[172] It is true, as many will say, that the new majority showed itself last Term to be both more cautious and more conservative in dealing with antitrust plaintiffs, government or private. But that formulation misses the point. In two quite separate areas of antitrust concern, class actions and mergers, the majority introduced into the law a respect on the one hand for the realities of competition, and on the other for the language of statutes and procedural rules. Both areas will be repeatedly revisited by the Court in the years to come. This past Term will be remembered as a year in which balance and neutrality were restored to the Court's antitrust considerations. The results were not foreordained by the fact that the government was on one side or that large corporations were on the other; opinions were more logical and more lawyer-like. An improvement in the quality of the Court's decisions and in the public regard for those decisions will be the inevitable result. Thus, the past Term can be regarded as a good omen for the future application of the antitrust laws and for the fair effectuation of those policies that serve to promote vigorous competition.

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[172] Of course, in *Eisen*, *Zahn* and Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), a trade secret case in which the "new antitrust majority" held that a state trade secret law was not preempted by federal patent law, Mr. Justice White joined the new majority. Thus his complaint seems directed against the majority only in the merger cases.