St. Mary's Law Journal

Volume 13 | Number 5 Article 5

12-1-1982

Section 7 of the Clayton Act Applies to Banks and Bank Holding Company Mergers.

Terry E. Mitchell

CASENOTE

ANTITRUST—BANK MERGERS—Section 7 of the Clayton Act Applies to Banks and Bank Holding Company Mergers.

Mercantile Texas Corporation v. Board of Governors
638 F.2d 1255 (5th Cir. 1981)

Mercantile Texas Corporation, the fifth largest bank holding company in Texas,[1] instituted suit seeking review of a Federal Reserve Board order denying approval of a merger between Mercantile and Pan National Group, Inc.,[2] another Texas bank holding company. The Board disallowed the proposed merger stating that potential competition between the two companies would be eliminated, thereby unduly concentrating the Waco and El Paso markets.[3] In response to Mercantile's appeal, the Board contended that section 1842(c) of the Bank Holding Company Act[4] bestows upon the Board broad discretion to reject mergers, regardless of whether the Board finds the merger would violate anticompetitive standards of Section 7 of the Clayton Act incorporated in 12 U.S.C. §18.[5] Held—*Vacated and remanded.* Section 7 of the Clayton Act applies to banks and bank holding company mergers.[6]

Antitrust theory is based on the premise that competition is necessary and desirable to promote the development of a free-market economy.[7]

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1. Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1259 (5th Cir. 1981). Mercantile owns nine banks having total deposits of $2.8 billion comprising 4.2% of Texas bank deposits. *Id.* at 1259.
2. *Id.* at 1259. Pan National owns five banks having total deposits of $622 million representing 0.9% of Texas bank deposits. *Id.* at 1259. The Federal Reserve Board has the authority to approve mergers between banks. *See* United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 876 (S.D.N.Y. 1965); 12 U.S.C. § 1828(c)(2)(B) (1976 & Supp. IV 1980).
3. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1259 (5th Cir. 1981) (merger would be anticompetitive).
4. *See* 12 U.S.C. §§ 1841-1849 (1976 & Supp. IV 1980).
5. Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1259, 1262-63 (5th Cir. 1981).
6. *Id.* at 1263.
7. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 559 (1944)

Therefore, abuses of competition must be controlled to prevent destruction of our free economy.[8] Finding that federal intervention was necessary to thwart abuses caused by trusts and cartels, Congress enacted the Sherman Act in 1890.[9] The Clayton Act, passed in 1914,[10] was designed to prohibit abuses outside the scope of the Sherman Act by preventing conspiracies and monopolies before they exist, thus averting their harmful effect on competition.[11] Section 7 of the Clayton Act gives the government the power to attack the three basic types of anticompetitive mergers:[12] horizontal mergers,[13] vertical mergers[14] and conglomerate

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(general objective is to insure a free economy); United States v. American Linseed Oil Co., 262 U.S. 371, 388 (1923) (competition necessary to U.S. economy). Antitrust theory dates back centuries as the ancient Sumerians, Babylonians, Athenians, and Puritans all found it necessary to control competition to prevent destruction of their free economies. *See* J. VAN CISE & W. LIFLAND, UNDERSTANDING THE ANTITRUST LAWS 4-17 (8th ed. 1980).

8. *See* Charles A. Ramsey Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923). The preservation of competition has been said to be as fundamental to our economy as the Bill of Rights is to our personal freedoms. *See* United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

9. *See* Sherman Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)); J. VAN CISE & W. LIFLAND, UNDERSTANDING THE ANTITRUST LAWS 15 (8th ed. 1980) (Senator Sherman, of Ohio, sponsored Legislation to combat trusts and other combinations which prevent free competition).

10. *See* Clayton Act, ch. 323, §§ 1-26, 38 Stat. 209 (1914) (current version at 15 U.S.C. §§ 12-27 (1976)).

11. *Id.* §§ 2-7; J. A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE U.S.A. 181 (3d ed. 1980).

12. *See, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973) (Section 7 forbids mergers substantially lessening competition); FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967) (Section 7 arrests anticompetitive effects); Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962) (Section 7 applies to mergers which lessen competition). Section 7 originally prohibited acquisition by one corporation of the stock of another. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 312-15 (1962). Subsequently, corporations began circumventing the Clayton Act by purchasing the assets of other corporations. *Id.* at 316. The Cellar-Kefauver Act eliminated this abuse by amending the Clayton Act to prohibit any mergers or acquisitions "where . . . the effect . . . may be substantially to lessen competition, or tend to create a monopoly . . . . " 15 U.S.C. § 18 (1976). *See generally* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297, 297-98 (1981) (Cellar-Kefauver amendments closed asset purchase loophole).

13. *See* United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 774 (D. Conn. 1969). A horizontal merger is a merger of one corporation with another corporation producing the same or very similar products and selling them in the same geographic market. *Id.* at 744; *see, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 271 (1966) (grocery store chain purchasing direct competitor); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 330-32 (1963) (merger of two banks in direct competition); Brown Shoe Co. v. United States, 370 U.S. 294, 334 (1962) ("economic arrangement between companies performing similar functions in the production or sale of comparable goods or services").

14. *See* United States v. First Nat'l Bank of Jackson, 301 F. Supp. 1161, 1190 (D. Miss. 1969). A vertical merger is a merger between two corporations in which one corporation

mergers.[15] While horizontal and vertical mergers involve corporations having some economic relationship with each other,[16] a conglomerate merger involves two corporations that do not compete in the same product or geographic market nor have a buyer-seller relationship in the same chain of production.[17] In analyzing these mergers, section 7 does not require a certainty that anticompetitiveness will result;[18] it prohibits a merger only when there is proof of a "probability" that the merger will lessen competition.[19] The Supreme Court originally stressed a qualitative analysis in proving probable anticompetitiveness of a merger.[20] Recently,

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produces a product that is sold to the other in the chain of producing or marketing a final product. *Id.* at 1190; *see, e.g.,* Ford Motor Co. v. United States, 405 U.S. 562, 573-75 (1972) (Ford prevented from purchasing company supplying Ford with parts); Brown Shoe Co. v. United States, 370 U.S. 294, 323-24 (1962) (merger of two companies that have a supplier-customer arrangement); United States v. Yellow Cab Co., 332 U.S. 218, 225-27 (1947) (affiliation of manufacturer and purchaser may violate antitrust laws).

15. *See, e.g.,* FTC v. Proctor & Gamble Co., 386 U.S. 568, 570 (1967) (merger of soap producer with bleach manufacturer); FTC v. Consolidated Foods Corp., 380 U.S. 592, 593 (1965) (food processor purchases producer of onion and garlic); Kennecott Copper Corp. v. FTC, 467 F.2d 67, 75 (10th Cir. 1972) (no economic relationship between merging firms).

16. *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294, 323-24 (1962) (merger of two companies having buyer-seller relationship); United States v. International Tel. & Tel. Corp., 306 F. Supp. 766, 774 (D. Conn. 1969) (merger of one company with another producing same product in same geographic area); United States v. General Dynamics Corp., 258 F. Supp. 36, 56 (S.D.N.Y. 1966) (merger with corporate customer or supplier).

17. *See, e.g.,* FTC v. Proctor & Gamble Co., 386 U.S. 568, 570 (1967) (soap producer merging with bleach manufacturer); FTC v. Consolidated Foods Corp., 380 U.S. 592, 593 (1965) (food processor merging with specialty food producer); United States v. International Tel. & Tel. Corp., 324 F. Supp. 19, 52-54 (D. Conn. 1970) (merger between firms having no economic relationship). In *Proctor & Gamble,* the Court was concerned with a subtype of conglomerate merger, the product-extension merger. *See* FTC v. Proctor & Gamble Co., 386 U.S. 568, 570 (1967) (soap manufacturer acquiring bleach producer). Another type of conglomerate merger is the geographic-extension merger. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 605, 625-27 (1974) (bank attempts to expand by merger into new geographic markets).

18. *See, e.g.,* FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967) (certainty not required); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171 (1964) (reasonable likelihood of anticompetitiveness required); Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (reasonable probability required).

19. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). The Supreme Court, however, has cautioned that section 7 does not prohibit mergers when there is only an "ephemeral possibility" of an anticompetitive result. *Id.* at 323.

20. *Id.* at 328 (anticompetitive behavior rarely determined to exist by analysis of numerical market shares held by each competitor). A qualitative approach would use criteria such as barriers to entry or trends in the market rather than relying solely on numerical percentages of market shares held by the competitors. *Compare* Brown Shoe Co. v. United States, 370 U.S. 294, 328 (1962) (market share seldom determinative of anticompetitiveness) *with* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) (increase in market share increases concentration, invariably lessening competition). *See generally* A. NEALE &

however, the Court has emphasized the importance of concentration ratios[21] derived from the leading firms in specific industries to indicate anticompetitive behavior.[22]

Originally, section 7 of the Clayton Act was used to prevent anticompetitive mergers when there was a decrease in actual competition within the relevant market.[23] Section 7 was later applied to the regulation of conglomerate mergers by proscribing mergers which tended to lessen potential competition between the acquiring and acquired firms.[24] Proscribing

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D. GOYDER, THE ANTITRUST LAWS OF THE U.S.A. 190 (3d ed. 1980).

21. Concentration ratios are numerical percentages that depict each competitor's proportionate share of the market in which they compete. *See, e.g.*, United States v. Marine Bancorporation, Inc. 418 U.S. 602, 608-10 (1974) (concentration ratios depict market share of deposits held by banks); United States v. Falstaff Brewing Corp., 410 U.S. 526, 527-28 (1973) (concentration ratios depict market share of beer production); FTC v. Proctor & Gamble Co., 386 U.S. 568, 570-73 (1967) (concentration ratios evidence market shares of household liquid bleach and packaged detergent markets).

22. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 272, 278-79 (1966) (grocery store merger proscribed to prevent undue concentration of 7.5% of market); United States v. Continental Can Co., 378 U.S. 441, 447-57, 461-66 (1964) (merger between two direct competitiors proscribed to prevent a 25% share of market); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364-65, 372 (1963) (bank merger proscribed because resulting firm would have 33% of the geographic market).

23. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 277-79 (1966) (actual competition proscribed); United States v. Continental Can Co., 378 U.S. 441, 464-66 (1964) (merger decreased actual competition); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 330-32 (1963) (merger between banks lessened actual competition). Actual competition refers to the situations in which the two merging firms are direct competitors or have a buyer-seller relationship. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270, 271 (1966) (Section 7 prohibited merger of grocery store chain with direct competitor); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 330-32 (1963) (Section 7 proscribed bank merger with direct competitior); Brown Shoe Co. v. United States, 370 U.S. 294, 335 (1962) (Section 7 prevented shoe manufacturer from merging with direct competitor and supplier). In analyzing the effects on competition, a finding must be made as to the relevant product market and the relevant geographic market involved in the merger. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974). The relevant product market is the particular line of commerce or type of product produced by each of the merging firms. *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618-19 (1974) (commercial banking); United States v. Falstaff Brewing Corp., 410 U.S. 526, 527 (1973) (beer production and sale); FTC v. Proctor & Gamble Co., 386 U.S. 568, 571 (1967) (household liquid bleach). The relevant geographic market is the particular section of the country where the "effect of the merger on competition will be direct and immediate . . . . " United States v. Marine Bancorporation, Inc., 418 U.S. 602, 619 (1974) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963)); *see, e.g.*, United States v. Falstaff Brewing Corp., 410 U.S. 526, 527 (1973) (New England states); FTC v. Proctor & Gamble Co., 386 U.S. 568, 571 (1967) (whole nation and series of regional markets); United States v. Pabst Brewing Co., 384 U.S. 546, 550-52 (1966) (whole nation and three state area of Wisconsin, Illinois and Michigan).

24. *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-42 (1974);

mergers by an analysis of the effects on potential competition has been applied under three distinct legal theories: the dominant entrant theory,[25] the perceived potential entrant theory[26] and the actual potential entrant theory.[27] Although the Supreme Court has utilized the first two theories as a basis for prohibiting mergers which may lessen competition,[28] the Court has reserved ruling on the validity of the actual potential entrant theory.[29] The actual potential entrant theory assumes that the acquiring firm exercises no present competitive influence on the market.[30] The con-

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United States v. Falstaff Brewing Corp., 410 U.S. 526, 529-38 (1973); FTC v. Proctor & Gamble Co., 386 U.S. 568, 570-81 (1967). The "potential competition" doctrine refers to situations in which the two merging firms are not presently in actual competition. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-32 (1973). The doctrine applies when if the proposed merger were to take place, future or potential competition is likely to be lessened. *See id.* at 547 (Marshall, J., concurring). The doctrine usually arises in the context of product extension-mergers and geographic-extension mergers. *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-42 (1974) (geographic-extension mergers); United States v. Falstaff Brewing Corp., 410 U.S. 526, 529-38 (1973) (geographic-extension mergers); FTC v. Proctor & Gamble Co., 386 U.S. 568, 570-81 (1967) (product-extension merger).

25. The dominant entrant theory arises in the context of a very powerful firm outside the market acquiring a firm within the market and, due to the acquiring firm's substantial resources, the resulting merger presents the likelihood of a severe anticompetitive result. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 558-59 (1973) (Marshall, J., concurring); FTC v. Proctor & Gamble Co., 386 U.S. 568, 575 (1967).

26. The perceived potential entrant theory arises when there is a potential competitor which appears to the existing firms to be a very likely entrant into their market. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 559 (1973) (Marshall, J., concurring). The existing firms' perception of this potential entrant causes them to act competitively. Consequently, the removal of the potential competition from the edge of the market (through the contested merger) releases this competitive pressure, resulting in a decrease in competition. *Id.* at 559; *see also* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624-25 (1974); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173-74 (1964).

27. *See* United States v. Siemens Corp., 621 F.2d 499, 504 (2d Cir. 1980). The theory would proscribe a merger with a large firm already in the market if the acquiring firm would have independently entered the market and increased competition. *Id.* at 504.

28. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973) (adopting perceived potential entrant theory); FTC v. Proctor & Gamble Co., 396 U.S. 568, 575-78 (1967) (relying on dominant entrant theory). Although each of these three theories are forms of potential competition analysis, they are not interchangeable; each theory applies to a particular market structure. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 558-62 (1973) (Marshall, J., concurring). There is some overlap in the applicability of the three theories in attacking a contested merger, as a particular market structure may fit the requirements of more than one theory. *Id.* at 558.

29. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 630 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973).

30. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 560 (1973) (Marshall, J., concurring).

glomerate merger, therefore, has no immediate anticompetitive effect.[31] If the acquired firm holds a significant market share, however, the acquisition may prevent future competition that would have arisen had the acquiring firm entered the market independently.[32]

The Supreme Court has stated that to reach the question of the validity and applicability of the actual potential entrant theory the government must prove the existence of three preconditions before the theory can be applied.[33] First, the target market must consist of several dominant participants engaging in parallel behavior with power to control the market.[34] Second, independent entry by the acquiring firm must be feasible.[35] Finally, the government must show a likelihood that independent entry will produce deconcentration in the market.[36] Past attempts by the government to apply this theory have failed, however, due to the inability to prove these three preconditions exist.[37]

The Bank Holding Company Act of 1956[38] was designed to give the Board discretion in approving or preventing mergers and acquisitions in-

31. *Id.* at 560.

32. *Id.* at 560. Independent entry may be accomplished by a de novo entry or a toe-hold acquisition. *See* United States v. Marine Bancorporation,Inc. 418 U.S. 602, 625 (1974) (toe-hold acquisition is acquisition of small, existing firm already in market); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 742 (D. Md. 1976) (de novo entry is accomplished by internal expansion of the acquiring company). *See generally* Carter, *Actual Potential Entry Under Section 7 of the Clayton Act*, 66 VA. L. REV. 1485, 1485-89 (1980); Kaplan, *Potential Competition and Section 7 of the Clayton Act*, 25 ANTITRUST BULL. 297, 298-99 (1980).

33. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 630-33 (1974).

34. *Id.* at 630 (market must be concentrated).

35. *Id.* at 632. This independent entry may be made by de novo entry by the acquiring company or by a toe-hold acquisition. *See id.* at 625 (toe-hold acquisition is acquisition of small, existing firm already in the market); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 742 (D. Md. 1976) (de novo entry refers to acquiring company entering market through internal expansion).

36. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633 (1974). Deconcentration refers to a lowering of the concentration ratios of the dominant firms in the market. *See id.* at 633-39 (large new banks added to market would result in deconcentration).

37. *See, e.g.*, BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 30-31 (2d Cir. 1977); FTC v. Atlantic Richfield Co., 549 F.2d 289, 296-98 (4th Cir. 1977); United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 814-15 (D.N.J. 1980). *But cf.* United States v. Phillips Petroleum Co., 367 F. Supp. 1226, 1262 (C.D. Cal. 1973) (district court decision prior to *Marine Bancorporation* and not a pure actual potential entrant case), *aff'd mem.*, 418 U.S. 906 (1974). Courts have established both a "reasonable probability" standard and a "certainty" standard to define the level of proof required to establish that the preconditions exist for application of the actual potential entrant theory to a proposed merger. *See* BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 28-29 (2d Cir. 1977) (reasonable probability); FTC v. Atlantic Richfield Co., 549 F.2d 289, 294-95 (4th Cir. 1977) (certainty).

38. *See* 12 U.S.C. §§ 1841-1849 (1976 & Supp. IV 1980).

volving bank holding companies,[39] based on the merger's effect on competition.[40] Applying antitrust laws to banks, courts have historically held the relevant product market[41] is commercial banking.[42] Recently, however, some controversy has arisen as to whether the relevant product market should be enlarged to include thrift institutions[43] and their competitive influence on the banking industry.[44] The result of the application of

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39. *Id.* § 1841(a)(1)(2). A bank holding company means any company which " . . . has control over a bank . . . . " *Id.* § 1841(a)(1)(2).

40. *Id.* § 1842(c). This restriction on acquisitions caused the banking industry to respond with the Bank Merger Act of 1960 in an attempt to insulate the banking industry from antitrust prohibitions. *See id.* 12 U.S.C. § 1828 (c)(5)(a)(b) (1976) (balance anticompetitiveness with needs of the community). The Act, however, never accomplished this purpose. *See* United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665, 669-70 (1964) (merger prohibited); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 342 (1963) (merger proscribed). This setback led to another special interest bill, the Bank Merger Act of 1966, which was a compromise between lawmakers who felt the banking community should be insulated completely from antitrust scrutiny and others who believed antitrust laws should be applied with full force to the banking industry. *See* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 Bus. Law. 297, 310-12 (1981); *see also* 12 U.S.C. § 1828(c)(5) (1976). *See generally* Hale, *Comment on Dr. Austin's Article, "The Evolution of Commercial Bank Merger Antitrust Law", 36* Bus. Law. 1557, 1560-61 (1981).

41. The relevant product market is the particular line of commerce or type of product marketed by each of the merging firms. *See, e.g.,* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963) (commercial banking); United States v. Siemens Corp., 621 F.2d 499, 502-03 (2d Cir. 1980) (nuclear medical equipment); United States v. Consolidated Foods Corp., 455 F. Supp. 108, 124 (E.D. Pa. 1978) (frozen dessert pies). The "commercial banking" product market in banking causes the relevant geographic markets to be quite small in states that prohibit branch banking, resulting in many geographic-extension conglomerate mergers. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 608-11, 618-20 (1974) (localized Spokane market resulted in geographic extension merger); Republic of Tex. Corp. v. Board of Governors, 649 F.2d 1026, 1028, 1043-46 (5th Cir. 1981) (geographic extension merger involved in Waco market).

42. *See, e.g.,* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618-19 (1974) (product market is commercial banking); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359-62 (1970) (relevant product market is banking); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963) (product market is banking).

43. *See* Republic of Tex. Corp. v. Board of Governors, 649 F.2d 1026, 1045 (5th Cir. 1981); United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 799-801 (D.N.J. 1980). *See generally* Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?*, 36 Bus. Law. 1537, 1540-53 (1981) (analysis of banks' relevant product market). A thrift institution is a financial institution which promotes savings among its members or depositors; examples are savings and loan associations, savings banks, and building and loan associations. *See* Comment, *Third Party Payments for Thrift Institutions—The Latest Round*, 12 Akron L. Rev. 689, 689 (1979).

44. *See* United States v. First Nat'l Bancorporation, 499 F. Supp. 793, 799-801 (D.N.J. 1980) (banks compete with thrifts in many offered services). Competition between banks and thrifts is typified by the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 U.S.C.). All

antitrust law to the banking industry displays a clear division of success: the government has never lost an actual competition case[45] and has never won a potential competition case.[46] The government's lack of success in potential competition cases has been attributed to the fact that banking is a highly regulated industry.[47] This has placed an almost impossible burden on the government to prove that the acquiring firm would increase competition through merger or independent entry.[48]

In *Mercantile Texas Corp. v. Board of Governors*,[49] the United States Court of Appeals for the Fifth Circuit held that in analyzing a proposed merger involving bank holding companies, the Federal Reserve Board is to apply the antitrust standards which have evolved under section 7 of the Clayton Act.[50] The *Mercantile* court reasoned that section 7 stan-

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depository institutions may borrow and discount funds with the Federal Reserve. *See* 12 U.S.C. § 461(a), (b)(7) (Supp. IV 1980). In addition, all depository institutions may offer interest bearing-checking accounts in the form of negotiable orders of withdrawal. *See id.* § 1832. Certain thrift institutions can offer credit cards and exercise trust and fiduciary powers. *See id.* § 1964 (b)(4), (n). As one court notes, thrift institutions and banks offer the same services to the household customer. *See* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 800 (D.N.J. 1980). Commercial banks do, however, offer a distinct line of services to the business customer that thrift institutions do not. *Id.* at 800-801 (business loans, letters of credit, bankers' acceptances, buying and selling foreign exchanges).

45. *See, e.g.*, United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 367 (1970) (merger between two banks in same market proscribed); United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366-67 (1967) (actual competition merger prevented); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 330, 371 (1963) (direct competitors prevented from merging). *See generally* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 Bus. Law. 297, 363 (1981) (government has never lost an actual competition case).

46. *See, e.g.*, United States v. Connecticut Nat'l Bank, 418 U.S. 656, 656-657 (1974) (merger not prevented); United States v. Marine Bancorporation, Inc., 418 U.S. 602, 605-06 (1974) (merger allowed); United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 814-15, 817 (D.N.J. 1980) (§ 7 not violated by contested merger). *See generally* Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?*, 36 Bus. Law. 1537, 1549 (1981) (potential competition cases).

47. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 629 (1974).

48. *See* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 Bus. Law. 297, 369-70 (1981) (Supreme Court has, in effect, rejected potential competition theory where banking laws regarding branching and entry are involved); *cf.* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 629-32 (1974) (regulatory barriers in banking industry reduce, if not eliminate likelihood of independent entry requirement of potential competition).

49. 638 F.2d 1255 (5th Cir. 1981).

50. *Id.* at 1261; *see* 15 U.S.C. § 18 (1976). The government argued that the Bank Holding Company Act's language directing the Board to consider the "convenience and needs" of the community in analyzing a proposed merger gave the Board power to approve or disapprove a merger, even if it did not violate section 7 standards. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1259-61 (5th Cir. 1981).

dards were intended to be incorporated into the Bank Holding Company Act.[51] The Bank Holding Company Act specifically incorporates the exact language of section 7.[52] Further, the legislative history of the Act evidenced a congressional intent to establish "uniform standards" applicable to both bank mergers and bank holding company mergers.[53] Moreover, the "convenience and needs"[54] language relied on by the Federal Reserve Board was designed to balance against a Clayton Act violation to determine whether any public benefit from the proposed merger outweighed the anticompetitiveness.[55] Additionally, the Bank Merger Act,[56] which uses the identical language of the Bank Holding Company Act, has been held by the Supreme Court to incorporate the standards set forth under section 7 of the Clayton Act.[57] Finally, two circuits have adopted the Clayton Act standard as being applicable to the Bank Holding Company Act.[58] Although the *Mercantile* court found no violation of the actual potential entrant theory,[59] it noted the theory was logical and consonant with section 7.[60]

The court in *Mercantile Texas Corp.* analyzed and set forth guidelines for application of the controversial,[61] and as yet unproven,[62] actual poten-

51. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1261 (5th Cir. 1981); 15 U.S.C. § 18 (1976).

52. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1261 (5th Cir. 1981).

53. *Id.* at 1261; *see* S. Rep. No. 1179, 89th Cong., 1st Sess. 10, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385, 2394.

54. *See* 12 U.S.C. § 1842(c) (1976).

55. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1261-63 (5th Cir. 1981).

56. *See* 12 U.S.C. § 1828(c)(5)(B), (c)(7)(B) (1976).

57. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1261 (5th Cir. 1981); 12 U.S.C. 1828(c)(5)(B), (c)(7)(B) (1976).

58. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1261 (5th Cir. 1981); *see also* County Nat'l Bancorporation v. Board of Governors, 644 F.2d 1253, 1260 (8th Cir. 1981); Washington Mut. Sav. Bank v. FDIC, 482 F.2d 459, 464 (9th Cir. 1973).

59. *See* Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255, 1259 (5th Cir. 1981). The *Mercantile* court referred to the actual potential entrant theory as the "actual potential competition doctrine". *Id.* at 1264.

60. *Id.* at 1265. The *Mercantile* Court set out four factors to be found by the Board to establish a violation of the actual potential entrant theory. First, the market in which the merger is to occur must be concentrated. *Id.* at 1266-67. Second, a determination of the number of other potential competitors should be made to see if the elimination of the acquiring firm as a potential competitior will have a significant effect on competition within the market. *Id.* at 1267-68. Third, the Board must show a "reasonable probability" that the acquiring firm would independently enter the market if the contested merger was proscribed. *Id.* at 1268-70. Finally, independent entry must be likely to cause a significant increase in competition. *Id.* at 1270-72.

61. *See* FTC v. Atlantic Richfield Co., 549 F.2d 289, 293 (4th Cir. 1977) (doctrine evolv-

tial entrant theory.[63] The theory is not consistent with the purposes of the Clayton Act,[64] since the contested merger may have no real effect on competition.[65] The theory states that a merger of a firm outside the market with a leading firm in the market may violate the Clayton Act because the acquiring firm might have otherwise entered the market de novo[66] or through a "toe-hold" acquisition,[67] thereby theoretically increasing competition.[68] Even in the event of such a merger, there would be no increase or decrease in competition because the acquiring firm merely assumes the position of the acquired firm in the market.[69] The Clayton Act, on the other hand, proscribes only those mergers which tend to *decrease* competition.[70] Furthermore, although the Supreme Court has, on two occasions, taken notice of the theory, it has refused to apply or endorse the doctrine.[71] Moreover, the Second Circuit has noted the theory

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ing and has no controlling authority); *cf.* United States v. Siemens Corp., 621 F.2d 499, 504 (2d Cir. 1980) (possible reason for Supreme Court's reluctance to endorse doctrine is its speculative nature). *See generally* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297, 369 (1981) (Supreme Court has effectively rejected application of doctrine to banking).

62. The government has never won an actual potential entry case. *See, e.g.,* BOC Int'l v. FTC, 557 F.2d 24, 30-31 (2d Cir. 1977); Raybestos-Manhattan, Inc. v. Hi-Shear Indus., Inc., 503 F. Supp. 1122, 1135-36 (E.D.N.Y. 1980); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 769 (D. Md. 1976).

63. *See* United States v. Siemens Corp., 621 F.2d 499, 504 (2d Cir. 1980) (doctrine would proscribe merger if acquirer is expected to enter market independently causing increase in competition).

64. *See, e.g.,* Carter, *Actual Potential Entry Under Section 7 of the Clayton Act*, 66 VA. L. REV. 1485, 1507 (1980) (courts will abandon the doctrine); Kaplan, *Potential Competition and Section 7 of the Clayton Act*, 25 ANTITRUST BULL. 297, 317 (1980) (doctrine not consonant with § 7); Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 A.B.A. ANTITRUST SECTION 128, 143 (1958) (§ 7 should not apply to potential competition).

65. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973) (actual potential entrant theory proscribes mergers that have no present effect on competition).

66. *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 742 (D. Md. 1976) (de novo entry accomplished by internal expansion of acquiring company).

67. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 625 (1974) (toehold acquisition is acquisition of small existing firm already in market).

68. *Id.* at 625 (independent entry would increase competition). The prevention of this projected increase in competition produces the violation; *see* United States v. Falstaff Brewing Corp., 410 U.S. 526, 560 (1973) (Marshall, J., concurring).

69. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973) (theory proscribes mergers that have no present effect on competition). Justice Marshall also noted that there is no present effect on competition. *Id.* at 560 (Marshall, J., concurring).

70. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487 (1977) (Congress proscribed only anticompetitive mergers); *cf.* United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973) (no ruling on merger that neither helps nor hurts competition).

71. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 639 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 537 (1973).

is based on mere speculation.[72] While the Clayton Act does prohibit mergers which involve a decrease in future competition,[73] violations under the Act always involve a decrease in future, as compared to existing, competition in the market.[74] Alternatively, the actual potential entrant theory compares one level of future competition (if the merger were to take place) with another level of future competition (if the acquiring firm were to enter independently).[75] To compare one projected level of competition with another projected level of competition borders on predicting an "ephemeral possibility"[76] which section 7 will not proscribe.[77] Moreover, courts which have applied the theory have been uniformly unable to find a section 7 violation because of the inability to prove independent entry would occur and would cause an increase in competition within the market.[78]

Even assuming the actual potential entrant theory can be applied to proposed mergers under the Clayton Act, the *Mercantile* court's required findings to prevent a merger are unworkable and will not adequately es-

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72. *See* United States v. Siemens Corp., 621 F.2d 499, 504 (2d Cir. 1980).

73. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-25 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973).

74. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-34 (1973) (perceived potential competitor on fringe of market exerts influence on present competition); FTC v. Proctor & Gamble Co., 386 U.S. 568, 578-81 (1967) (potential competitor proscribed from merging because it exerted present influence on market).

75. *See, e.g.,* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 625 (1974) (comparison of proposed merger level of competition with projected level of competition when independent entry occurs); United States v. Siemens Corp., 621 F.2d 499, 504 (2d Cir. 1980) (independent entry would enhance competition as compared to elimination of potential competitor by merger); United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 814-15 (D.N.J. 1980) (independent entry level of competition compared to competition level after merger). *See generally* Kaplan, *Potential Competition and Section 7 of the Clayton Act,* 25 ANTITRUST BULL. 297, 314-18 (1980) (discussion of whether doctrine compares two future levels of competition).

76. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622-23 (1974) (§ 7 applies to probabilities not possibilities); Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (§ 7 does not apply to possibilities).

77. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622 (1974); Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962). Some commentators who endorse the doctrine do so only under certain conditions. *See* Brodley, *Potential Competition Mergers: A Structural Synthesis,* 87 YALE L.J. 1, 65, 83 (1977) (theory would apply only by analyzing structure of market and *presuming* firms to be most likely entrants); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 HARV. L. REV. 1313, 1386 (1965) (doctrine should only apply when independent entry appears certain). *But see* Carter, *Actual Potential Entry Under Section 7 of the Clayton Act,* 66 VA. L. REV. 1485, 1507 (1980) (courts will abandon doctrine because judgments inherently uncertain).

78. *See, e.g.,* BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 30-31 (2d Cir. 1977); FTC v. Atlantic Richfield Co., 549 F.2d 289, 293-97 (4th Cir. 1977); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 765-69 (D. Md. 1976).

tablish anticompetiveness.[79] A finding that the market must be concentrated[80] ignores the additional requirement that the concentrated market's participants must be acting collusively.[81] If the target market is competitive, there is no need to deconcentrate the market.[82] Factors such as competition from thrift institutions,[83] bank market concentration due to government policy,[84] the market's loan activity,[85] the differences in fees and services,[86] any efficiency economies,[87] and similar criteria should have been noted by the Fifth Circuit as possible evidence to rebut the anticompetitiveness presumption created by the market's concentration ratios.[88]

The *Mercantile* court's requirement that the number of potential competitors "waiting in the wings"[89] be considered when evaluating a merger under the actual potential entrant theory is, in effect, a hollow requirement.[90] The past and current growth trends of banks and bank holding

79. *See* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297, 369 (1981) (Supreme Court has effectively rejected actual potential entrant doctrine in banking); *cf.* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633-39 (1974) (unlikely that preconditions for application of doctrine will be met in state having branching prohibitions).

80. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1266-67 (5th Cir. 1981).

81. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 630-31 (concentrated market must be engaging in parallel behavior).

82. *Id.* at 631. The Supreme Court did note that high concentration ratios establish a prima facie case for the application of potential competition doctrines. *Id.* at 631.

83. *See* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 799-801 (D.N.J. 1980) (banks compete with thrifts in offering same services). For example, all financial institutions can offer interest bearing checking accounts. *See* 12 U.S.C. § 1832 (Supp. IV 1980) (interest-bearing negotiable withdrawal instruments).

84. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 629-32 (1974) (bank regulations concerning new entry restrictions on growth due to policy to insure bank safety).

85. *See* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 805-06 (D.N.J. 1980) (higher the loan activity, the more competitive the market).

86. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 632 n.34 (1973) (much advertised distinctions in services offered show competition).

87. *See* FTC v. Proctor & Gamble Co., 386 U.S. 568, 597-98 (1967) (Harlan, J., concurring) (economies achieved by one firm may stimulate other firms, creating competition).

88. *See* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 799-801, 804-06 (D.N.J. 1980). *See generally* Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?*, 36 BUS. LAW. 1537, 1540-53 (1981) (factors to consider in product market).

89. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1267-68 (5th Cir. 1981).

90. *Compare* United States v. Falstaff Brewing Corp., 410 U.S. 526, 534 n.13 (1973) (number of potential competitors must not be so large that removal of one would be insignificant) *with* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297, 372-75 (1981) (charts indicating regulatory agencies have approved 2,793 bank

companies[91] ensure there will always be, as the Fifth Circuit noted, "[a] significant number of large Texas bank holding companies [that] remain as possible entrants."[92]

Furthermore, proving a "reasonable probability"[93] exists that an acquiring firm, if prevented from merging, would enter the market independent[94] lends itself to mere speculation.[95] Instead, "clear proof" of probable entry should be required.[96] This "clear proof" of probability of entry measure recognizes the inherent lack of accuracy of future projections.[97] By adopting such a standard, the courts will avoid consideration of mere ephemeral possibilities as opposed to realistic probabilities of anticompetitiveness.[98]

Because banking regulations controlling entry and branch operations make it highly improbable that independent entry will substantially increase competition,[99] requiring that the government prove that indepen-

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mergers from 1960 to 1979).

91. *See* Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 Bus. Law. 297, 372-75 (1981) (chart showing over 2,700 bank mergers approved since 1960); *cf.* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 806-07 (D.N.J. 1980) (bank market had numerous potential entrants).

92. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1267 (1981); *cf.* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 806-07 (D.N.J. 1980) (potential bank entrants numerous in surging economy).

93. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1268 (5th Cir. 1981). The *Mercantile* court purported to adopt the "reasonable probability" standard from the Second Circuit. *Id.* at 268. The Second Circuit, however, adopted a "clear proof of a reasonable probability" standard. *See* United States v. Siemens Corp., 621 F.2d 499, 506-07 (2d Cir. 1980). This standard is similar, if not the same as the Fourth Circuit's "certainty" or "clear proof" requirement. *Compare* United States v. Siemens Corp., 621 F.2d 499, 506-07 (1980) (clear proof of reasonable probability) *with* FTC v. Atlantic Richfield Co., 549 F.2d 289, 294-95 (4th Cir. 1977) (entry must appear certain or be shown by clear proof).

94. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1268 (5th Cir. 1981).

95. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 575 (1973) (Rehnquist, J., dissenting) (evidence of economic forecasts in potential competition amount to guesswork).

96. *See* FTC v. Atlantic Richfield Co., 549 F.2d 289, 294-95 (4th Cir. 1977).

97. *Id.* at 294-95; *see also* Kaplan, *Potential Competition and Section 7 of the Clayton Act*, 25 Antitrust Bull. 297, 320-22 (1980); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1384, 1386 (1965).

98. *See* FTC v. Atlantic Richfield Co., 549 F.2d 289, 294-95 (4th Cir. 1977).

99. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 636-37 (1974) (independent entry not likely to result in deconcentration); United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 808 (D.N.J. 1980) (effects of independent entry not likely to be significant). The *Mercantile* court also noted independent entry was probably not going to significantly increase competition. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1271 (5th Cir. 1981). *See generally* Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?*, 36 Bus.

dent entry will result in a "substantial likelihood of ultimately producing deconcentration or other procompetitive effects"[100] is a burden the government cannot meet.[101] A projection that a small de novo entry[102] or toehold acquisition[103] under branch banking prohibitions will have a future procompetitive impact is conjecture.[104] Conversely, a more reliable projection of future procompetitive impact is that an acquiring firm's introduction into the market by way of the litigated merger may add an aggressive competitor to the market thereby increasing competition and outweighing any remote results of independent entry.[105]

Finally, the *Mercantile* court made no findings as to the relevant product market applicable to banks.[106] Following long established precedent,[107] the court simply assumed the relevant product was commercial banking.[108] This assumption ignores the competitive impact caused by thrift institutions in the particular geographic market, distorting the analysis of competition within the market.[109] For example, all depository

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LAW. 1537, 1549 n.57 (1981) (government has never won a bank potential competition case).

100. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1270 (5th Cir. 1981) (quoting United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633 (1974)).

101. *See, e.g.*, FTC v. Atlantic Richfield Co., 549 F.2d 289, 298 (4th Cir. 1977) (no proof of procompetitive independent entry); United States v. Consolidated Foods Corp., 455 F. Supp. 108, 139 (E.D.Pa. 1978) (requirements not met); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 769 (D. Md. 1976) (government failed to meet requirements).

102. *See* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 742 (D. Md. 1976) (de novo entry accomplished by internal expansion of company).

103. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 625 (1974) (toehold acquisition is an acquisition of small, existing firm already in market).

104. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (§ 7 does not prohibit possibilities); *cf.* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 637 (1974) (independent entry not likely to result in deconcentration).

105. *See* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 808 (D.N.J. 1980) (merger offers immediate benefits).

106. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1266-67 (5th Cir. 1981) (concentration ratios included only banks implying the assumption that the product market was banking). The relevant product market is the particular line of commerce or type of product produced by each of the merging firms. *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618-19 (1974) (commercial banking); United States v. Falstaff Brewing Corp., 410 U.S. 526, 527 (1973) (beer production and sale); FTC v. Proctor & Gamble Co., 386 U.S. 568, 571 (1967) (household liquid bleach).

107. *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618-19 (1974) (product market is commercial banking); United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 359-62 (1970) (relevant product market is banking); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356 (1963) (market is banking).

108. *See* Mercantile Tex. Corp. v. Board of Governors, 638 F.2d 1255, 1266-67 (5th Cir. 1981) (concentration ratios included only banks).

109. *See* Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?*, 36 BUS. LAW. 1537, 1545 (1981) (Federal Reserve Board noting thrift institutions' impact on market lessens severity of merger) (quoting First

institutions can offer interest-bearing checking accounts to the public.[110] Certain thrift institutions can exercise trust and fiduciary powers and offer credit card services.[111] Thrift institutions can also offer the same services as to the household customer banks.[112] In Texas, there may be an even greater competitive impact since thrift institutions can establish branch offices while banks are prohibited from doing so.[113] In view of this likelihood of competitive influence, the *Mercantile* court should have addressed the issues and instructed the parties to investigate the particular markets.[114]

The court in *Mercantile Texas Corp.* furthered the confusion surrounding the theoretically unsound actual potential entrant theory. The inability of this doctrine to proscribe mergers should be evidence to the court that the theory should be rejected as an inoperable tool in the government's arsenal of antitrust prohibitions. Furthermore, the *Mercantile* court's failure to adopt a realistic view of the banking relevant product market impedes the factfinder from accurately assessing the competitiveness of the market. The result of the court's decision is confusion and inaccuracy in the application of antitrust laws to proposed bank mergers.

Terry E. Mitchell

Bancorporation of N.H., Inc., 64 FED. RESERVE BULL. 967 (1978)). Thrift institutions are savings and loan associations, savings banks and similar institutions. *See* Comment, *Third Party Payments for Thrift Institutions—The Latest Round,* 12 AKRON L. REV. 689, 689 (1979).

110. *See* 12 U.S.C. § 1832 (Supp. IV 1980) (interest-bearing negotiable orders of withdrawal).

111. *See id.* § 1464 (b)(4),(n) (Board may allow associations to offer credit cards and trust services).

112. *See* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 800 (D.N.J. 1980).

113. *Compare* TEX. CONST. art. XVI § 16 (no bank branches) *with* TEX. REV. CIV. STAT. ANN. art. 2461-2.08 (Vernon Supp. 1980-81) (credit unions have branches).

114. *See* Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?,* 36 BUS. LAW. 1537, 1540-53 (1981).