

# The Burger Court Opinion Writing Database

*United States v. Marine Bancorporation, Inc.*

418 U.S. 602 (1974)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



file 73-38  
Mortgage Bankers  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

4/30/74

Dear Lewis

I have just finished the  
third round of working out the  
final assignments (complicated  
by the fact that Bill D. has more than  
usual to assign & is taking none  
of his own.)

It is not possible to give  
anyone 4 or even three cases  
on this round - as the enclosed  
schedule reflects. You will be  
well above the median & the  
average.

Your two assignments came after  
Potter urged it & said he'd rather  
not write them. The choice was

• • Valley between the two of you  
& the balanced result cases  
the problem of your  
writing them.

Regards  
Ld. 83

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 18, 1974

Re: 73-38 - U. S. v. Marine Bancorporation

Dear Lewis:

Please join me.

Regards,

WEPB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 17, 1974

RE: No. 73-38 U.S. v. Marine Bancorporation

Dear Byron:

Please join me in your dissenting opinion

in the above case.

Sincerely,

*Bill*

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 10, 1974

73-38, U. S. v. Marine Bancorporation

Dear Lewis,

I think you have done a fine job with this case and I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

No. 73-38

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

United States  
v. Marine Bancorporation, Inc.

From: White, J.

Circulated: 6-17-79

Recirculated: \_\_\_\_\_

MR. JUSTICE WHITE, dissenting.

For the second time this Term, the Court's new antitrust majority has chipped away at the policies of § 7 of the Clayton Act. In United States v. General Dynamics Corp., U.S. (1974), the majority sustained the failing company defense in a new guise. Here, it redefines the elements of potential competition and dramatically escalates the burden of proving that a merger "may substantially lessen competition" within the meaning of § 7.

That we are dealing with a severely concentrated commercial banking market in the Spokane metropolitan area is conceded. The Court also proceeds on the basis that it was open to the Government to make its case by proving that the NBC-WTB merger would probably cause a substantial lessening of competition in either one of two ways. First, it could be proved that NBC, with the resources and desire to enter the Spokane market, would probably have entered the market either by acquiring one of the small Spokane banks or by sponsoring a new bank and ultimately acquiring it. The merger thus deprived the Spokane market of a new competitor, and produced the requisite anti-competitive effect. Second, it could be shown that NBC's resources and interest in entering the Spokane market were so obvious to or recognized by those already in the market that as a potential competitor waiting in the wings, NBC very probably exercised a restraining influence on anti-competitive practices in the concentrated Spokane banking market.

The majority does not quibble about the fact of NBC's resources and its incentive to extend its banking activities into Spokane. NBC is the State's second largest

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 1, 12

To: ✓ The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 73-38

Recirculated: 6-21-74

United States, Appellant, | On Appeal from the United  
v. | States District Court for  
Marine Bancorporation, Inc., | the Western District of  
et al. | Washington.

[June —, 1974]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN  
and MR. JUSTICE MARSHALL join, dissenting.

For the second time this Term, the Court's new anti-trust majority has chipped away at the policies of § 7 of the Clayton Act. In *United States v. General Dynamics Corp.*, — U. S. — (1974), the majority sustained the failing company defense in a new guise. Here, it redefines the elements of potential competition and dramatically escalates the burden of proving that a merger "may substantially lessen competition" within the meaning of § 7.

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 18, 1974

Re: No. 73-38 -- United States v. Marine Bancorporation,  
Inc.

Dear Byron:

Please join me in your dissent.

Sincerely,

*T.M.*  
T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20530

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

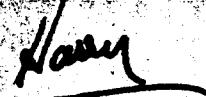
June 17, 1974

Dear Lewis:

Re: No. 73-38 - United States v.  
Marine Bancorporation, Inc.

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 18, 1974

Re: No. 73-38 - U. S. v. Marine Bancorporation

Dear Lewis:

I am sending you by separate note my joinder in this case.

My only concern, and it is a mild one, is that this disposition in the banking area not necessarily be governing in a non-banking case. I feel that this is implicit in the way you have written the opinion, for it stresses the thorough regulation in the banking industry in the State of Washington. We have, however, the Tidewater cases, Nos. 73-1222 and 73-1224, waiting in the wings (they are being held for the bank cases), and I assume that our disposition here is not necessarily governing in Tidewater. If you have any contrary feeling, please let me know.

Sincerely,

*Harry*

*Mr. I've  
so advised*

*Harry.*

Mr. Justice Powell

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

JUN 6 1974

Circulated:

No. 73-38

Recirculated:

United States, Appellant, v. On Appeal from the United  
Marine Bancorporation, Inc., et al. States District Court for  
the Western District of Washington.

[June —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The United States brought this civil antitrust action under § 7 of the Clayton Act, 15 U. S. C. § 18, to challenge a proposed merger between two commercial banks. The acquiring bank is a large, nationally chartered bank based in Seattle, Washington, and the acquired bank is a medium-size, state-chartered bank located at the opposite end of the State in Spokane. The banks are not direct competitors to any significant degree in Spokane or any other part of the State. They have no banking offices in each other's home cities. The merger agreement would substitute the acquiring bank for the acquired bank in Spokane and would permit the former for the first time to operate as a direct participant in the Spokane market.

The proposed merger would have no effect on the number of banks in Spokane. The United States bases its case exclusively on the potential competition doctrine under § 7 of the Clayton Act. It contends that if the merger is prohibited, the acquiring bank would find an alternate and more competitive means for entering the Spokane area and that the acquired bank would ultimately develop by internal expansion or mergers with smaller banks into an actual competitor of the acquiring

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States  
Washington, D. C. 20543

June 19, 1974

MEMORANDUM TO THE CONFERENCE:

Cases Held for the Bank Merger Cases  
No. 73-38, U.S. v. Marine Bancorporation, Inc.  
No. 73-767, U.S. v. Connecticut National Bank

No. 73-1222, Tidewater Oil Co. v. U.S.  
No. 73-1224, Phillips Petroleum Co. v. U.S.

These are consolidated direct appeals from a single judgment of the USDC (C.D. Calif.), and have been held for Marine Bancorporation, No. 73-38 and Connecticut Bank, No. 73-767.

The cases arise from a civil antitrust suit brought by the U.S. pursuant to § 7 of the Clayton Act in an effort to block the acquisition by Phillips of the West Coast gasoline operations of Tidewater. The undisputed product market is motor gasoline and the uncontested geographic market is California. Prior to the merger Phillips operated in all of the continental U.S. except California. The Government relied on the two potential competition theories at issue in the bank merger cases -- the "wings effect" theory and the question reserved in Falstaff Brewing Corp., e.g., likelihood of future deconcentration through independent entry or foothold acquisition.

In a lengthy and carefully drawn opinion, the USDC (J. Ferguson) held for the Government and directed Phillips to divest itself of Tidewater. The court rested its

*pp 2, 8, 18, 32, 35, 36*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 73-38

Circulated:

*6/20/74*

United States, Appellant, } On Appeal from the United  
v. } States District Court for  
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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 10, 1974

Re: No. 73-38 - United States v. Marine Bancorporation

Dear Lewis:

I am happy to join your opinion for the Court in this case. By way of nitpicking, I would prefer to see footnote 8 read a little more neutrally, so that the Court itself does not adopt the criticisms that have been made of the existing Washington banking laws, but my "join" is in no sense conditioned on any such change.

Sincerely,

WR

Mr. Justice Powell

Copies to the Conference