Opinion No. 75-52

September 16, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Herbert H. Hughes Commissioner of Banking Lew Wallace Building Santa Fe, New Mexico 87503

QUESTIONS

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1. Is an electronic terminal, or Customer - Bank Communication Terminal ("CBCT"), which is owned by a state bank and which is used by only that bank's customers a "branch bank"?

2. Is a CBCT which is not owned by a state bank but which is used by the customers of one bank or of several banks within the same geographical area a "branch bank"?

3. Is a messenger service which is owned by a state bank and which is used only by that bank's customers a "branch bank"?

4. Is a messenger service which is not owned by a state bank but which is used by the customers of one bank or of several banks within the same geographical area a "branch bank"?

5. Is a bank employee engaged in the operation of a "branch bank" when he visits the private residences or businesses of his employer's customers to open their accounts, receive their deposits, cash their checks, and the like?

CONCLUSIONS

1. Yes, but see Analysis.

2. See Analysis.

3. Yes, but see Analysis.

4. See Analysis.

5. See Analysis.

OPINION

*{*139}* **ANALYSIS**

The New Mexico statutes which pertain to "branch banking" are as follows.

Section 48-2-16, NMSA, 1953 Comp. provides that:

"A. Banks duly authorized to transact business . . . are authorized to conduct a branch or branches thereof subject to the limitations of section 48-2-17 (NMSA, 1953 Comp.) . . .

* * *

C. As used in this section, 'branch bank' includes any additional house, office, agency or place of business at which deposits are received or checks paid or money lent . . . ."

Section 48-2-17, NMSA, 1953 Comp. provides that:

"Branches . . . shall be authorized *{*140}* to accept deposits, cash checks, buy and sell exchange, make loans and do a general banking business . . . ."

While there are no reported New Mexico judicial opinions interpreting these sections, the United States Supreme Court made a perceptive analysis of that part of the McFadden Act which defines "branch banking" and which is similar to the New Mexico definition. The McFadden Act at 12 U.S.C. § 36(f) provides that a:

"branch . . . shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

In **First National Bank in Plant City v. Dickinson,** 396 U.S. 122, 90 S. Ct. 337, 24 L. Ed. 2d 312 (1969), the court stated that:

"Although the (McFadden Act) definition may not be a model of precision, in part due to its circular aspect, it defines the **minimum content** of the term 'branch'; by use of the word **'include'** the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes **any** place for receiving deposits or paying checks or lending money apart from the chartered premises; **it may include more.** It should be emphasized that, since § 36(f) is phrased in the disjunctive, the **offering of any one of the three services mentioned** in that definition **will provide the basis for finding that 'branch' banking is taking place.** Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding . . . ." 396 U.S. at 135. (Most emphasis is ours.)

As some of your questions concern electronic terminals, or Customer-Bank Communication Terminals (CBCT's), we note that they may be used in the following kinds of transactions:

"Cash withdrawals from demand accounts, savings accounts and credit card accounts; deposit to demand accounts or to savings accounts; transfers from demand to savings, or from savings to demand, or from credit card to demand; payment deduct from demand or from savings." Appendix to the December 12, 1974 Interpretive Ruling of the Comptroller of the Currency of the United States.

In addition, CBCT's may be used for payment transfers from the customer's account into accounts maintained by other bank customers, and there is documentation that banks have permitted the reciprocal use of their respective CBCT's by each other's customers.

QUESTIONS 1.

In **State of Colorado ex rel. State Banking Board v. First National Bank of Fort Collins,** 394 F. Supp. 979 (D. Colo. 1975), the court was presented with similar facts and the same question as you posed. In the use of the unmanned CBCT, the customer was able to withdraw funds from his savings or checking account, charge a withdrawal to his "Master Charge" account or to a prearranged line of credit with the bank, deposit checks or currency, or transfer credit between his accounts.

The court concluded that the CBCT constituted a branch bank under 12 U.S.C. § 36(f) to the *{*141}* extent that it performs that function of receiving deposits. In this regard, it found "no functional difference between the way in which a customer makes a deposit in this machine" and an off premises recpetacle for packages of cash or checks for deposit which was found to be a "branch bank" in the **Dickinson** case. Without elaboration, the court also stated that "(t)he transfer of funds between accounts of the bank customer is not a deposit."

Secondly, the court held that the CBCT is **not** a place at which checks are paid. It quoted a dictionary definition of a check as being "A written order directing a bank . . . to pay money as therein stated. . .," and cited the Uniform Commercial Code definition of a check as ". . . a draft drawn on a bank and payable on demand." (See Section 50 A-3-104 (2) (b), NMSA, 1953 Comp.) The court continued by stating that:

"There is an obvious similarity between the customer's use of this machine to obtain a packet of $ 25.00 with a corresponding debit to his checking account balance and the drawing of a check payable to cash or to himself with the presentation of that check for payment by the drawer bank at a teller station. This sameness in result, however, is not controlling. What is different in the transaction **is the means by which the customer communicates with the bank. To instruct the bank by depressing the keys on this . . . machine is not the writing of an order for the bank to pay upon demand.** It is comparable to the wire transfer of funds by commercial customers, that is not considered to be the payment of a check." 394 F. Supp. at 985. (Emphasis supplied)

The court further held that the CBCT is **not** a place at which there is "money lent" when the customer obtains funds as a charge against his Master Charge account or his

prearranged bank credit account. In both instances "he is drawing against a prearranged line of credit." In this regard the court found:

"no apparent functional difference between the use of a bank credit card and the use of such a card to obtain cash, services, or products from a retail trader who accepts such cards. To conclude that this function of the machine is branch banking would therefore require the conclusion that any such use of bank credit cards is also branch banking." 394 F. Supp. at 985.

A similar question is presently before the United States District Court for the District of Columbia in **Independent Bankers Assoc. of America v. Smith,** Civil No. 75-0089, Filed Jan. 17, 1975, but to our knowledge no decision has yet been reached. We have not found any other judicial interpretations of this question, but, after analyzing the Colorado decision, we have elected to follow its reasoning. Accordingly, we conclude that if it is used to receive deposits, a CBCT which is owned by a bank for the sole use of its own customers should be considered as a branch bank. It is not necessary that a CBCT also provide the other services mentioned in Section 48-2-16 C., **supra,** to be classified a branch bank.

QUESTIONS 2.

To the extent that a CBCT not owned by a bank performs only functions which, under the reasoning of the Colorado case, would not be such to classify it a branch bank, we would again conclude that *{*142}* it was not a branch bank. See also Comptroller's Manual for National Banks, Temporary Insert, Change 75-5, TI 3-34.1, § 7.7491 (a), (b) (4), June 1, 1975.

However, if that CBCT were also used to receive deposits, pay checks or loan money, a further analysis must be made. Rather than making that analysis here, we refer you to our response to the fourth question pertaining to independently owned "messenger services." Our reason is that while there are not reported cases concerning independently owned CBCT's, the rationale of the cases concerning independently owned messenger services should similarly apply.

QUESTIONS 3.

In **Dickinson, supra,** the facts were the same as stated in your third question. The bank argued that its armored car messenger service which picked up deposits was not engaged in branch banking. Each depositor had entered into a contract with the bank stipulating the deposits delivered to the service would not be deemed received until they were physically delivered to the bank. The court found that although the private contractual agreements were binding on the parties under state law, they did not provide an exclusion from the reach of the McFadden Act.

It answered the bank's contention as follows:

"We need not characterize the contracts as a sham or subterfuge in order to conclude that the conduct of the parties and the nature of their relations bring (the bank's) challenged activities within the federal definition of branch banking. **Here, penetrating the form of the contracts to the underlying substance of the transaction, we are satisfied that at the time a customer delivers a sum of money . . . to the armored truck . . . , the bank has,** for all purposes contemplated by Congress in § 36(f) **received a deposit.** The money is given and received for deposit even though the parties have agreed that its technical status as a 'deposit' which may be drawn on is to remain inchoate for the brief period of time it is in transit to the chartered bank premises. The intended deposits are delivered and received as part of a largescale continuing mode of conducting the banking business designed to bring basic bank services to the customers.

"Since the putative deposits are in fact 'received' by a bank facility apart from its chartered place of business, we are compelled . . . to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an 'additional office, or . . . branch place of business . . . at which deposits are received.'" 396 U.S. at 137. (Emphasis supplied.)

QUESTIONS 4.

In the two reported cases dealing with a messenger service owned by an independent agent and serving the customers of one or of several banks within a geographical area, the form of the transaction was penetrated to discover its substance. Again, the bank's customers contractually agreed that the deposits delivered to the messenger would not be deemed made until the cash or checks were delivered to the bank. Theoretically, the messenger service was liable to the customer until the deposit was actually delivered.

*{*143}* In reality, however, the bank in one case assumed the risk of loss of the deposit while in transit by purchasing appropriate insurance, and the service was operated by and at the direction of employees of the bank. Because of these facts, the operation was found to be a branch bank under a statutory definition similar to ours. **Tri-City Bank of Warren v. State,** 38 Mich. App. 703, 197 N.W. 2d 332 (1972).

In the other case, **Jackson v. First National Bank of Gainesville,** 430 F.2d 1200 (5th C.A. 1970), a similar "deposit" contract was used. However, the service was owned and operated by a subsidiary of the bank's holding company. Looking at the "substance" of the operation, it was considered to be a branch. Since Georgia law prohibited the formation of branches by its state banks, this service provided by a national bank, if allowed, would "illegally disrupt the competitive equality between federal and state banks" in that state.

In view of these decisions, your Department should also look beyond the form of an "independent agency" and analyze the substance of the operation. If it is truly independent, i.e. provides its own insurance, is not owned or operated by or at the direction of a bank, and the like, such service is not likely to be labeled a "branch." It

would then be likened to activities of such organizations as the Postal Service, Wells Fargo, Brinks and Purolator. This would be true with respect to both the armored car messenger services and the CBCT services. That the services may be available to the customers of several banks within the same area would not be sufficient to establish the operation as an independent agency.

QUESTIONS 5.

If the employee conduct described in your fifth question consisted of isolated, sporadic and inconsequential transactions, it would not appear to constitute "branch banking" under **Dickinson, supra.** If, however, this operation were a "part of a large-scale continuing mode of conducting the banking business designed to bring basic services to the customers," 396 U.S. at 137, then it may be viewed as being within the extreme limits of the definition of "branch banking."

In conclusion, we are mindful that it is a difficult task to apply the language of our "branch banking" statute to the use of new technology and modes of operation never envisioned by those who wrote the law. Because of this, we believe that it would be an appropriate time for you to consider issuing interpretative regulations regarding these new services.

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