Off-Premises Customer-Bank Communication Terminals: New Growth on the Old "Branch" Doctrine

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Colorado law, like that of many states, provides for "unit" banking: in general, with but one minor exception for a limited-purpose "detached facility," it prohibits any bank situated in Colorado from doing business at any "branch" location separate and apart from its main office.[1] On August 20, 1976, the United States Court of Appeals for the Tenth Circuit ruled, in *Colorado ex rel. State Banking Board v. First National Bank of Fort Collins,*[2] that First National's establishment of an Automated Teller Machine ("ATM") approximately three miles away from its main office constituted branch banking in violation of applicable Colorado and U.S. statutes. In so doing, the Tenth Circuit became the fourth federal appellate court to rule that national banks' off-premises Customer-Bank Communication Terminals ("CBCTs")[3] are branch banks within the meaning of federal law.[4]

The legal status of such devices became a matter of concern among banking interests as the result of an interpretive ruling promulgated late in 1974 by the United States Comptroller of the Currency.[5] He declared that off-premises CBCTs do not constitute bank branches and therefore may be established and operated by national banks without regard for state and federal branching restrictions to which national banks are otherwise subject by virtue of the McFadden Act.[6] The purported effect of the Comptroller's ruling was to authorize national banks to engage electronically in off-premises banking transactions which, in those states restricting branch banking, were prohibited to state banks. As a result, in an effort to preserve state banks' "competitive equality" with national banks, lawsuits attacking the ruling as violative of state and federal law were filed in several federal courts.

This article, focusing on the Ft. Collins case, analyzes the opinions of those federal trial and appellate courts which have considered whether CBCTs are branch banks, and seeks to demonstrate that the manner in which this issue has been resolved by the courts can materially affect both the speed and direction of the development and implementation of Electronic Funds Transfer ("EFT") systems of which CBCTs are a part.

The Federal Statutory Law

The McFadden Act, Section 36 of the National Bank Act, deals with the subject of branching by national banks. Section 36(c) permits the law of a state to determine whether a branch of a national bank

may exist within that state, and if so, where it may be located[7] and, impliedly, upon what conditions and in what manner it may be operated.[8] However, Section 36(f) delimits the activities which constitute branch banking insofar as national banks are concerned. In pertinent part, it provides, "The term 'branch'. . . shall be held to *include* any branch bank, branch office, branch agency, additional office or any branch place of business located in any State . . . at which *deposits are received*, or *checks paid*, or *money lent*."[9] Consequently, in litigation over participation by national banks in EFT systems in states imposing limitations on branching, the central issue has been whether deposits are received, checks are paid or money is lent at off-premises CBCTs, thus constituting such facilities branch banks.

The Federal Case Law

The definitive interpretation of the McFadden Act was set forth by the Supreme Court in *First National Bank of Logan v. Walker Bank & Trust Co.*[10] and *First National Bank in Plant City v. Dickinson.*[11] In *Walker Bank* the Court determined that the entire legislative purpose of the Act was to place national banks on a footing of "competitive equality" with state banks regarding branch banking by granting them specific authority, which they had previously lacked, to engage in branching to the same extent that state banks were authorized to do so. In *Plant City* the Court, relying on the legislative comment of Rep. McFadden that a branch is "(a)ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting (*sic*) *any* business carried on at the main office . . . ,"[12] stressed that the definition of a "branch" set forth in Section 36(f) constitutes merely the *minimum* content of that term and must not be given a restrictive meaning which would frustrate the foregoing legislative purpose. Thus, with respect to whether off-premises activities by national banks constitute branching, the Court emphasized that the decisive factor is whether the banks in question thereby achieve a *competitive advantage* over state banks prohibited from providing such off-premises services.

The Fort Collins Case

It was against this backdrop that Judge Richard P. Matsch of the United States District Court for Colorado was called upon, in the Fort Collins case, to render the very first judicial assessment of the validity of the Comptroller's ruling and the status of a national bank's off-premises CBCT. There Colorado banking authorities sought to preclude First National's operation of the off-premises ATM, alleging that it was violative of both Colorado law restricting branch banking[13] and federal law making such restriction applicable to national banks in Colorado.[14]

In his ground-breaking opinion, Judge Matsch first took note of the Supreme Court's finding in *Walker Bank* that the intent of Congress in enacting the McFadden Act was to place national banks on a footing of "competitive equality" with state banks concerning branch banking. He likewise noted that in *Plant City*, a case involving a stationary off-premises receptacle for the receipt of packages containing cash or checks for deposit, the Supreme Court gave further definition to that standard. There the Court rejected the argument that deposits could not be considered "received" until taken to the bank and verified, reasoning that since convenience to the customer is not dependent on the timing of the actual establishment of the debtor-creditor relationship, the goal of "competitive equality" would be frustrated if national banks alone were able to provide the service of accepting monies for deposit at locations separate from their main offices.

With the foregoing rationale in mind, Judge Matsch could see no difference between the depository function of the ATM in question and that of the deposit receptacle which was the subject of the decision in *Plant City*. As a result, notwithstanding his apparent recognition of the fact that mailboxes are not considered branches even though they too are commonly used to accept deposits for ultimate transmission to a bank, he concluded that the ATM was, within the meaning of Section 36(f), a place at which deposits were "received."

Without any explanation, however, Judge Matsch ruled that the utilization of the ATM by First National's customers merely to transfer funds between their own accounts at the bank did not constitute the making of a "deposit." Evidently this conclusion was based on his perception that it is a common (and analogous) banking practice for customers to transfer funds between accounts in different banks through communications by wire or telephone without the telegraphs or telephones so utilized being deemed branch banks.

Apparently assuming, without deciding, that withdrawals from *savings* accounts do not constitute the paying of checks because checks are not drawn thereon,[15] Judge Matsch next considered only the legality of the use of the ATM to make cash withdrawals from *checking* accounts. Although noting the obvious similarity of result between customers' use of the ATM to obtain cash and their drawing and presentment of checks at the bank for the same purpose, he deemed the controlling difference to be the *means* by which the customers communicated with the bank. Relying upon both the dictionary and UCC definitions of a check, Judge Matsch concluded that instructing the bank to pay out cash by depressing keys on the machine did not constitute the writing of an order drawn on the bank and payable as stated; rather, such use of the ATM was comparable to the wire transfer of funds not normally considered to be payment of a "check." Consequently, he ruled that use of the ATM to withdraw cash from checking accounts did not make that device a place at which "checks" were paid. Thus, he did not reach the question where "payment," if it occurred, took place.

The final function evaluated by Judge

Matsch was the utilization of the ATM by First National's customers to obtain cash advances on prearranged credit accounts (whether charge accounts or lines of credit in conjunction with checking accounts). He could find no apparent functional difference between such use of lines of credit and the use of bank credit cards (or, presumably, overdraft credit checks or debit cards) to obtain cash, services or products from retail merchants who accept them.[16] Thus, in Judge Matsch's view, to conclude that obtaining cash advances on prearranged credit accounts constituted branch banking would have required a similar determination that use of bank credit cards in retail establishments also constitutes branch banking. As a result, he ruled that performance of such function did not constitute the "lending" of money at the ATM. Judge Matsch found further support for this conclusion in the fact that it is common banking practice (and not regarded as branching) to extend lines of revolving credit to customers who sign master notes for the full amount to be borrowed, but who then request as needed, frequently by telephone and sometimes on a daily basis, the actual advance of funds to be made by credits to their checking accounts.

Based upon the foregoing evaluation, Judge Matsch held that use of the ATM to transfer funds between accounts, withdraw cash from existing account balances, and obtain cash advances on prearranged credit accounts did not constitute branching. He further held, however, that use of the ATM to "receive" deposits constituted branch banking within the meaning of Section 36(f) and that the machine in question was therefore subject to Colorado branching restrictions to the extent it performed the depository function. Thus, since it was located beyond the geographical limit permitted by Colorado law for a detached facility, Section 36(c) prohibited its operation for that function only. Consequently, First National was able to continue operating the ATM without the deposit function while awaiting the outcome of cross-appeals to the Tenth Circuit. Moreover, during that interim, the bank implemented a plan to enable customers of other banks to make cash withdrawals through the ATM from their deposit accounts at such other banks.[17]

On appeal, the Tenth Circuit concurred with Judge Matsch's conclusion that the deposit function performed by the ATM was illegal. Without offering any further explanation, the appellate court simply deemed *Plant City* to be controlling in that regard. However, it disagreed with the remainder of Judge Matsch's findings, holding that even cash withdrawals (apparently including cash advances) and transfers of funds between accounts constitute branching when accomplished by means of an off-premises CBCT.

In this latter context the circuit court, as Judge Matsch, took note of the Supreme Court's determination in *Walker Bank* that the Congressional intent in enacting the McFadden Act was to place national and state banks on a footing of competitive equality insofar as branch banking was concerned. However, citing the Supreme Court's emphasis in *Plant City* that the term "branch" is not to be given a restrictive meaning which would frustrate that Congressional intent, the appellate court scored, as exalting form over substance, the trial court's holding that transferring funds and obtaining cash are not activities encompassed by Section 36(f). Thus, again citing *Plant City*, the circuit court cautioned that in assessing whether off-premises CBCTs constitute branches it is not necessary to determine whether their activities fit "neatly" and "precisely" into the traditional molds set forth in Section 36(f), since the functions set forth therein are *not* the *only* indicia of branch banking;

that provision merely indicates the *minimum* content of the term "branch." As a result, relying on *Plant City's* quotation of the legislative comment of Rep. McFadden in explication of the scope of Section 36(f), the appellate court concluded that separate banking locations constitute branches if *any* business normally conducted at main banking offices is transacted there.

The Weight of Other Judicial Authority

In essence, the foregoing divergence in the holdings of the trial and appellate courts in the Ft. Collins case is the result of differing views on the applicability of *Plant City* to the monetary transfer, check payment and money lending functions. Judge Matsch essentially viewed *Plant City* as limited to its own factual setting, the receipt of deposits, while the circuit court found its rationale logically applicable to the other functions as well and extended it to encompass them. In this context, however, it would seem that the crucial underlying question is not whether the *Plant City* doctrine is applicable only to certain CBCT functions and not to others, but whether it is applicable at all to EFT systems. If it is, then logic would dictate that its "competitive equality" standard be applied comprehensively to all functions performed by CBCTs.

With one minor exception,[18] all other federal courts to consider the CBCT-branch banking question have viewed *Plant City* as setting forth precepts which are applicable to EFT systems.[19] Moreover, only the trial court in one additional case has failed to apply the *Plant City* interpretive standard to all aspects of CBCT operations and that decision, like the one in the Ft. Collins case, was reversed in pertinent part on appeal.[20] Thus, at present, the four federal appellate courts which have considered the issue—the Courts of Appeals for the District of Columbia, Seventh, Eighth and Tenth Circuits—are in agreement that *Plant City* is applicable to the EFT area, that its precedential value is not limited to the deposit function but extends to all types of activities performed by CBCTs, and that it prohibits national banks from offering any such services off-premises where state banks are not able to do so.

The import of the foregoing agreement among the circuits is substantial. On the one hand, it may well have already caused the Supreme Court to refuse to review three of the cases in question,[21] thus indicating an intent to leave undisturbed the present weight of authority. On the other hand, even in the now-improbable event the Court does agree to hear the remaining case, from Ft. Collins,[22] it makes it unlikely that the Court will reverse the conclusion reached unanimously by those Courts of Appeals which have considered the CBCT-branch banking issue. This is particularly true inasmuch as certain courts, in applying the McFadden Act to off-premises CBCTs, have recognized the stifling effect such action will have on the development and implementation of EFT systems, yet have agreed that any change in the law must come from the legislative rather than the judicial branch of government.[23]

The Impediment to the Development of EFT Systems

Assuming, as a result of the foregoing, that national banks' off-premises CBCTs are branches for purposes of federal law, where state-chartered banks are authorized to establish off-premises CBCTs for the provision of certain banking services then, by virtue of the operation of Section 36(c), national banks may do the same.[24] However, since Section 36(f) delimits the activities which constitute branching for national banks, virtually any state law applicable to off-premises CBCTs is, for federal law purposes, a part of the branch banking law of the state in question, whether or not the state defines CBCTs as branches; as a result, such state law is incorporated into the National Bank Act through Section 36(c).[25] Thus, a national bank seeking to establish off-premises CBCTs would normally have to meet the capitalization and surplus requirements,[26] as well as the application, notification and other criteria,[27] set forth in the banking statutes of a particular state for the establishment of such devices. Moreover, for each such "branch" in the form of an off-premises CBCT that a national bank wishes to establish, it must additionally meet all the criteria specifically prescribed by the National Bank Act, including filing a branch application with and securing the approval of the Comptroller, as well as satisfying the minimum capitalization and surplus requirements established by federal law for national bank branches.[28]

Consequently, while state banks seeking to establish off-premises CBCTs would merely have to meet their own state's requisites, national banks would have to meet both state and federal criteria.[29] To the extent that state standards are as rigorous as those imposed by federal law, both state and national banks would be more or less similarly encumbered.[30] However, in many states where legislation authorizing EFT systems has been enacted,[31] off-premises CBCTs are specifically defined as not constituting branches for purposes of state law,[32] thus negating any possible application to CBCTs of state criteria pertaining to the establishment of "brick-and-mortar" branches. Even in such states, however, where a national bank wishes to establish branches in the form of off-premises CBCTs, federal law requires minimum capitalization of fifty, one hundred, or two hundred *thousand* dollars, depending upon the population of the locale in question, and minimum paid-in surplus of 20 percent of the required capitalization.[33]

Thus, in most states which have adopted EFT-enabling legislation, as well as in states where administrative or judicial interpretation of existing law would authorize off-premises CBCTs[34] and the requirements for the establishment thereof are less onerous than those imposed by federal law, national banks will be at a competitive *disadvantage* because of the capitalization and surplus requisites they alone must satisfy.[35] The anomalous effect, then, of the judicial determination that off-premises CBCTs

are branches for purposes of federal law seems to be to defeat the very principle of "competitive equality" for national banks which the McFadden Act sought to ensure.[36]

In an effort to combat this competitive disadvantage, the Comptroller of the Currency recently adopted certain new regulations designed to mitigate the effect of the classification of national banks' off-premises CBCTs as branches.[37] Simplified procedures involving significantly less paperwork, investigation, effort and cost have been implemented to govern national banks' applications to establish off-premises CBCTs as branches in states permitting either operation of off-premises CBCTs or traditional branching.[38] Among other things, a simplified application form has been adopted for the establishment of CBCT branches[39] and a simplified notice procedure has been provided with respect to such applications.[40] Moreover, the application fee for a CBCT branch has been reduced to $200 from the $500 fee required for a traditional branch[41] and, where two or more national banks propose to share a CBCT branch, only one application (and, presumably, only one fee) need be filed.[42]

Additionally, allocation of capital is permitted among a national bank's branches, whether traditional or CBCT, within a single city, town or village.[43] However, Section 36(d) still requires an aggregate capitalization in an amount no less than the capitalization required for separate national banks equal in number to and situated in the same locations as the establishing national bank and its branches.[44] Consequently, of greater import is the fact that for a shared CBCT branch the required capitalization may be apportioned among all national banks participating therein,[45] thus lessening significantly the impact of that requirement on any one national bank.

Nevertheless, the foregoing changes serve to lighten only minimally the substantial burdens born by national banks alone and therefore make only limited inroads upon the competitively advantageous position occupied by state banks with respect to off-premises CBCTs. Although the apportionment of the capitalization requirement among participating national banks makes good sense and should have the effect of encouraging national banks to cooperate in establishing shared CBCT branches, the allocation of the capitalization requirement among a national bank's main office and its branches appears likely to have little impact since the total amount of capital required by law remains the same. In either case, national banks continue to be subject to obligations which do not apply to state banks. Consequently, in the absence of federal legislation to ameliorate the effects of the McFadden Act,[46] national banks' ability to participate in EFT systems seems certain to continue to be impeded significantly.

Concomitant with the resulting reduction of the competitive threat from national banks with respect to the establishment of EFT systems, state banks would seem likely both to exert relatively less pressure on state authorities for the enactment of legislation authorizing off-premises CBCTs and to make less effort to develop and implement EFT systems in states where they are authorized.[47] As a result, to the extent that most national banks generally tend to have greater assets than most state banks, and so tend to be more able and therefore more willing than state banks both to invest the money necessary for the development and implementation of EFT systems and, where necessary, to seek enabling legislation therefor, establishment of off-premises CBCTs by banks could be substantially inhibited.

A Potential Mitigating Factor

Of crucial import in this regard, however, is a distinction recognized in two of the federal court decisions rendered thus far in the CBCT cases. The principle enunciated there is significant because of its potential mitigating effect on the adverse impact of the judicial classification of off-premises CBCTs as branches under federal law. Both the trial court in *Illinois ex rel. Lignoul v. Continental Illinois National Bank & Trust Co.*[48] and the appellate court in *Independent Bankers Association of America v. Smith*[49] perceived that a determination that off-premises CBCTs constitute branch banks could extend only to such devices which are owned or leased, and which are therefore "established" or "provided," by the bank of which they are alleged to be a branch.[50]

Those two courts seized upon this distinction as a means of explaining why mailboxes, telephones, telegraphs and even retail establishments—all of which, like CBCTs, are commonly utilized by bank customers to effect banking transactions—are not deemed to be branch banks. In essence, those courts indicated that where a mechanism or device is properly established by an entity, whether business or financial, for its own internal purposes, its incidental utilization by customers of a bank also to perform banking transactions does not make it a branch of that bank.

Since none of the CBCT cases decided thus far have involved anything other than bank-owned CBCTs, this distinction remains dictum only. Still, both courts *specifically* limited their holdings that off-premises CBCTs are branches to those situations where the devices are owned or rented and so are "established" or "provided" by the banks in question. Now that the Tenth Circuit has ruled that all functions performed by a national bank's off-premises CBCT constitute branching, this distinction would seem to be of great significance for national banks located in Colorado.

Indeed, this very principle explains why several Affiliated Bankshares of Colorado ("ABC") banks[51] on the one hand, and numerous United Banks[52] on the other hand, are legally able, on a reciprocal basis, to allow their customers who maintain accounts at one participating bank within the particular chain to make withdrawals from those accounts through ATMs located at the other participating banks in the chain,[53] and why those banks could also allow such customers to make deposits to and transfers between their accounts in the same fashion.[54] Moreover, the same holds true for the American Express program of a somewhat similar nature whereby cardmembers can obtain travelers checks at what are essentially American Express-owned ATMs[55] and have the amount thereof debited to their checking accounts. Finally, it explains why bank-issued credit cards, or checks or debit cards utilizing a prearranged line of overdraft credit, may be used at retail locations to purchase goods and services, and why they could also be utilized to obtain cash advances there.[56]

In each of the foregoing instances, the activities involved do not constitute branching because the bank in question has not "established" or "provided" the place at which the transaction is entered into.[57] Any other interpretation would preclude the new reciprocal on-premises ATM programs as well as banking by mail, telephone or telegraph transfers of funds, and utilization of bank credit or debit cards or checks for any purpose at retail establishments.

There is an as-yet unrecognized aspect of the foregoing precept which appears to be of great potential significance for national banks desiring to participate immediately in EFT systems. Increasingly, retail sellers of goods or services own (or often lease from independent third-party suppliers not connected with banks) internal point-of-sale ("POS") systems

featuring electronic cash register terminals linked to one or more central computers on either a store- or region-wide basis. These systems presently are utilized to accomplish a host of internal functions including, but not limited to, in-house check or credit authorization or verification, sales recording, and inventory control. However, they are also capable of being linked to the computers of banks and national credit card systems to perform banking and credit card transactions. Thus, applying the distinction noted above, the offering of banking services through retailer-owned POS terminals situated in retail establishments seemingly would not constitute branching because banks would not "own" the "facilities" in question (*i.e.*, banks would own neither the retailer nor the equipment). Therefore, such an arrangement would run afoul of neither state branching restrictions nor federal branching requirements regarding notice, approval, and capitalization and surplus minimums.

Prognosis for Change

Although the potential effect of the implementation of such an approach by national banks in conjunction with retailers would be to accomplish indirectly what the courts and statutes have precluded them from accomplishing directly, the likelihood of its success is not entirely predictable at the present time. On the one hand, since it is generally only the larger retailers who tend to have such POS systems currently in operation, the immediate impact might not be all that great. On the other hand, with more and more retailers installing sophisticated electronic cash registers, computers and internal POS systems each year, as time passes such a program would be likely to have an ever-increasing effect.

As a result, banking officials in non-branching or limited-branching states not having EFT-enabling legislation would undoubtedly come under very heavy pressure to interpret their own laws in a fashion allowing state banks also to participate in such EFT systems. Absent favorable regulatory rulings, legislatures in such states clearly would become the next targets of pressure by state banks and would likely be influenced to pass, as virtually half of the legislatures in the country have already done,[58] EFT-enabling legislation.[59] Such developments would also lead to pressure on Congress to enact federal legislation to regulate the participation of national banks in such retailer-owned EFT systems.

Consequently, the widespread implementation of an approach designed to capitalize on this judicially-recognized distinction ultimately might force the legislative overhaul of banking law at both the state and federal levels which is obviously necessary in order to permit banks properly and fully to utilize modern electronic technology. Because it appears that neither judicial fiat nor legislative action constitute a likely overall solution at this point in time, such a course of action may be the only viable alternative available to national banks in the immediate future.

NOTES

1. C.R.S. 1973, § 11-6-101(1). *See* note 13 *infra*.

2. 540 F.2d 497 (10th Cir. 1976), *aff'g in part, rev'g in part* 394 F. Supp. 979 (D. Colo. 1975) (hereinafter State Banking Board v. First Nat'l. Bank).

3. In general, CBCTs are mechanical or electronic machines or devices which bank customers may utilize to perform a number of banking transactions, including: making deposits; transferring funds among accounts; making cash withdrawals from existing account balances; obtaining cash advances pursuant to prearranged lines of credit; and making payments on obligations either to the bank or to third parties (*e.g.*, utilities, retailers, etc.). These machines are of two types: Automated Teller Machines ("ATMs"), which are unmanned, customer-operated devices, and Point-of-Sale ("POS") terminals, which are electronic cash registers operated by retail employees. Either type may be "on-line" (*i.e.*, linked by electronic means directly to the computer center of a bank or a consortium of banks) or "off-line" (*i.e.*, not so linked).

4. *See* Independent Bankers Association of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976) (hereinafter IBAA v. Smith); Illinois ex rel. Lignoul v. Continental Illinois Nat'l. Bank & Trust Co., 536 F.2d 176 (7th Cir. 1976) (hereinafter Lignoul v. Continental Illinois); Missouri ex rel. Kostman v. First Nat'l. Bank in St. Louis, 538 F.2d 219 (8th Cir. 1976) (hereinafter Kostman v. First Nat'l. Bank).

5. 12 C.F.R. § 7.7491 (39 FR 44420, December 24, 1974), *amended*, 12 C.F.R. § 7.7491 (40 FR 21703, May 19, 1975) (requiring an establishing national bank to share, with local financial institutions authorized to receive deposits, any such facility located more than 50 miles from a main or branch office of the establishing bank), *suspended*, 12 C.F.R. § 7.7491 (40 FR 49077, October 21, 1975), *rescinded*, 12 C.F.R. § 7.7491 (41 FR 36198, August 27, 1976).

6. 12 U.S.C. § 36.

7. "A national banking association may . . . establish and operate new branches . . . at any point within the State . . . if such establishment and operation are at the time authorized to State banks by the *statute law* of the State in question by language *specifically granting such authority affirmatively and not merely by implication or recognition*, and subject to the restrictions as to location imposed by the law of the State on State banks. . . ." [12 U.S.C. § 36(c)(2). (Emphasis added.)]

8. *See* Independent Bankers of Oregon v. Camp, 357 F. Supp. 1352, 1356 (D. Ore. 1973) (since Section 36(c) permits national banks to establish and operate branches only to the extent state law expressly permits state banks to do so, by implication state law restrictions of various types on branch banking, *including restrictions on* the *method of operation* of branch banks, are equally applicable to national banks). *See also* First Nat'l. Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 262 (1966) (a *method of operation* which is "part and parcel" of a state's scheme restricting branch banking is encompassed by Section 36(c)), and First Nat'l. Bank in Plant City v. Dickinson, 396 U.S. 122, 130, 133 (1969).

9. 12 U.S.C. § 36(f). (Emphasis added.)

10. 385 U.S. 252 (1966), *reh. denied*, 385 U.S. 1032 (1967).

11. 396 U.S. 122, *reh. denied*, 396 U.S. 1047 (1969).

12. *Id.* at 134, n. 8, citing 68 Cong. Rec. 5816 (1927). (Emphasis added.)

13. C.R.S. 1973, § 11-6-101(1) requires that every bank be conducted at a single place of business and prohibits maintenance of a "branch" at any other location. However, it authorizes operation of one "detached facility," located within 3,000 feet of a bank's main office, which may be utilized only to receive deposits, issue money orders and cashiers' and travelers' checks, cash checks, make change, receive note payments, receive and deliver cash, instruments and securities, and disburse loan proceeds by machine. Any other separate facility, agency, or paying or receiving station operated by a bank or its agent constitutes a branch and is prohibited. At the time it established the ATM in question, First National already operated one such legally authorized detached facility within the prescribed distance from its main premises.

14. 12 U.S.C. §§ 36(c), (f).

15. Although those unschooled in banking law and practices might disagree, thinking that certified or cashiers' checks may be drawn against savings accounts, they would be incorrect. A certified check is drawn only against an account holder's checking account, while a cashier's check is drawn against the bank's own funds and may even be purchased by one who is not an account holder.

16. In states, like Colorado, which have adopted the Uniform Consumer Credit Code ("UCCC"), bank credit cards and overdraft credit checks (or debit cards) utilized to obtain cash, goods or services constitute loans. UCCC § 3-106. However, Judge Matsch's analogy is not perfect: in practice, cash advances may be obtained from merchants by means of overdraft credit checks, but not by means of bank credit (or debit) cards.

17. With regard to the legality of similar

However, Sen. William Proxmire, Chairman of the Senate Banking, Housing and Urban Affairs Committee, is known to favor an overall revision of the country's financial institutions and is adamantly opposed to a piecemeal approach to resolution of financial institution problems. Thus, it is conceivable he would seek to keep any sort of McFadden Act reform legislation "bottled-up" in his committee for the time being. It is possible, then, that a piecemeal attempt to reform the McFadden Act will not be successful. *See* "Piecemeal Legislation Success Is Doubted," *American Banker*, November 16, 1976, at 30. Moreover, as a practical matter, a comprehensive revision of the laws governing the nation's financial institutions is not likely to receive serious consideration until after the NCEFT submits its final report late in 1977. Consequently, enactment of federal legislation in this area may not come before 1978.

47. The virtually unrestricted offering of off-premises financial services by federal thrift institutions through Remote Service Units ("RSUs") would still, of course, present a competitive stimulus to state banks in the area of EFT systems development and implementation. However, that aspect of the CBCT question has not been overlooked by the two major national bankers associations.

In Independent Bankers Association of America v. Federal Home Loan Bank Board, No. 76-0105 (D.D.C., filed January 19, 1976), the IBAA is challenging the authority of federal savings and loan associations to provide off-premises financial services through RSUs. It is alleging that such practices are violative of the Home Owners Loan Act, 12 U.S.C. § 1461 *et. seq.*, on the ground that such services (*i.e.*, in essence, the offering of interest-bearing demand deposit type accounts) are not within the statutory purpose or authority of that Act. Similarly, in American Bankers Association v. National Credit Union Administration, No. 76-1661 (D.D.C., filed September 7, 1976), the ABA is attacking the authority of federal credit unions to offer share draft accounts and other accounts of a similar nature (*i.e.*, EFTS transaction accounts). It is alleging that such practices are violative of the Federal Credit Union Act, 12 U.S.C. § 1751 *et. seq.*, on the ground that the offering of such accounts is beyond the scope of the powers conferred on federal credit unions by that Act.

Should the IBAA and ABA ultimately prove successful in their efforts in this regard, the effect would be to remove the only remaining competitive stimuli of any significance in the EFT arena. Development and implementation of EFT systems could then possibly languish for some time to come.

48. 409 F. Supp. 1167 (N.D. Ill. 1975).

49. 534 F.2d 921 (D.C. Cir. 1976).

50. The Comptroller of the Currency, in his recently-adopted regulations pertaining to CBCT branches, has also recognized this principle. *See* 41 FR 48333.

51. Via the "Pocket Teller" service which allows customers to utilize either Pocket Teller cards to access their deposit accounts, or personal lines of credit connected therewith, through ATMs at eight Colorado locations: the Greeley, Lakeside, Security, and University National Banks and the First National Banks located in Boulder, Colorado Springs, Englewood, and Loveland.

52. Via the "United MiniBank" program which allows customers to utilize Guaranteed Check or United Banks cards to access their deposit or Master Charge accounts through ATMs at twelve locations throughout Colorado: the Aurora, Boulder, Broomfield, Denver, Lakewood, Littleton, Monaco, Skyline, Colorado Springs, Ft. Collins, Greeley and Longmont United Banks.

53. These arrangements are similar to the one implemented by the First National Bank of Fort Collins prior to the appellate court decision in State Banking Board v. First Nat'l. Bank (*see* text accompanying note 17 *supra*), except that the latter plan involved no reciprocity and the ATM there in question was not located on the premises or at a legally authorized branch of a financial institution.

54. The trial court in Lignoul v. Continental Illinois specifically approved a similar sort of arrangement between banks and savings and loan associations ("S & Ls") whereby S & L depository account holders could first open and then make deposits to bank checking accounts through their S & Ls. There the court ruled that such an arrangement did not constitute branching because the banks did not "own" the "facilities" (*i.e.*, the S & Ls) at which the deposits were made. 409 F. Supp. at 1180.

55. These "American Express Cardmember Travelers Cheque Dispensers" are now located in several major airports around the country, including Stapleton International Airport in Denver.

56. There is no real difference, at least in Code (UCCC) states, between the purchase and cash-advance functions of bank credit cards or of checks or debit cards utilizing a pre-arranged line of overdraft credit. *See* note 5 *supra* and accompanying text.

57. Thus, it would seem that the free provision of financial services by a bank (or, for that matter, a thrift institution) to other banks (and their customers) at an ATM on its main premises or at a legally authorized branch or "detached facility" would be permissible. It would not constitute the ATM in question a branch of any of the participating banks as long as neither the ATM itself nor the bank (or thrift institution) operating it were owned or leased by the banks receiving the banking services.

58. *See* note 31 *supra*.

59. This is exactly what transpired in the one situation where a court ruled that a national bank's off-premises CBCTs are not branches for any purpose. State Banking Board v. Bank of Oklahoma, 409 F. Supp. 71 (N.D. Okla. 1975). There, less than one month after the trial court rendered its decision, an EFTS enabling act for Oklahoma banks was introduced in the state legislature. While a notice of appeal was subsequently filed in the case, it was dismissed by stipulation of the parties two days after the Governor of Oklahoma signed that legislation into law (Chap. 31, Okla. Laws of 1976).

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wide variety of law practice problems when representing elderly clients. Topics to be discussed include: Pension Reform and Social Security; Health Services; Age Discrimination; Commitment and Competence; and Estate Planning.

Annual Tax Institute: April 30, 1977, Denver

Co-sponsored by the tax section, this program will focus on the major changes brought about by the 1976 Tax Reform Act.

Bankruptcy Practice: May 7, 1977, Denver

A review of basic bankruptcy laws including both Consumer and Business Bankruptcy; Creditors' Rights; and Practice in the Bankruptcy Court.

Family Law: May 28, 1977, Denver

This very popular law practice area will be examined not only for current developments in Dissolution, Custody, Temporary Orders, Support and Drafting of Agreements, but it will also focus on organizing an efficient law office system for handling these cases.