

Approved  1-25-90
Date

MINUTES OF THE HOUSE COMMITTEE ON Commercial and Financial Institutions

The meeting was called to order by Representative Clyde D. Graeber at
Chairperson

3:30 ~~xam~~/p.m. on January 16, 1990 in room 527-S of the Capitol

All members were present except: Mary Jane Johnson, Excused

Committee staff present: Bill Wolff, Research Department
Bruce Kinzie, Revisor of Statutes
June Evans, Secretary

Conferees appearing before the committee: James S. Maag, Kansas Bankers Association
Sue Anderson, Executive Director, Kansas
Independent Bankers Association

The Chairman called the meeting to order at 3:30 P.M.

Representative Eckert moved and Representative Roper seconded the minutes of January 11 be approved. There was no discussion and the motion carried.

The Chairman opened the hearings on HB 2628.

Jim Maag, Senior Vice President, Kansas Bankers Association, was the first conferee, stating that the Kansas Bankers Association supports HB 2628 which will correct a major inequity currently existing in the banking industry of this state. K.B.A. requested that the Committee give this measure prompt consideration. HB2628 would grant state-chartered banks the same branching authority nationally-chartered banks now have in Kansas as the result of action by the Office of the Comptroller of the Currency (OCC) which is the primary regulator for national banks. The OCC action is the result of a Mississippi case several years ago (the Deposit Guaranty case) wherein the federal courts ruled that nationally-chartered banks must be allowed the same branching authority as that granted to state-chartered savings and loan associations within a state if it can be shown that state-chartered savings and loans are engaged in "the business of banking".

HB 2628 simply removes the existing restrictions in K.S.A. 9-1111 on branching and allows state-chartered banks to establish branch offices in the same manner as national banks at any location in the state and in any number, subject to the normal hearing process and approval by the state banking board. The bill would become effective upon its publication in the State Register in order to establish branching equality as soon as possible. (See Attachment #1).

There was discussion concerning the hours of operation and service provided at a branch.

Staff commented that an amendment could be added but the Comptroller of the Currency dictates what national banks can do. This whole situation came about to give the same authority to state banks as national banks have been given. This action had been upheld by the Courts. This will create an equitable playing field for our state-chartered banks. It was stated there are three times as many state-chartered banks as national banks.

The next conferee was Sue Anderson, Executive Director, Kansas Independent Bankers Association, stating that KIBA supports lawmakers correcting branching inequities among financial institutions within the state. There are only two choices as KIBA sees them: (1) To permit state-chartered banks the same branching privileges now available to state-chartered savings and

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON Commercial and Financial Institutions,
room 527-S Statehouse, at 3:30 ~~am~~/p.m. on January 16, 19 .

loan associations, and national banks, or (2) to restrict branching privileges of state savings and loans within Kansas. (See Attachment #2).

KIBA supports HB 2628 authorizing equitable branching privileges for state banks. However, should the scope of such legislation be expanded to encompass interstate banking, KIBA will strongly oppose any such attempt.

Representative King moved and Representative Ken Francisco seconded that HB 2628 be passed out favorably.

Representative Schauf stated she was concerned regarding the criteria for approval by the State Banking Board.

Michael Heitman, Deputy Commissioner, Kansas Banking Commission, stated the Board looks at the need; whether a branch would enhance the public's availability of banking service and better service.

Representative Schauf again stated minimum requirements in the rules and regulations should be considered.

Representative Shallenburger moved and Representative Long seconded that a substitute motion be made to amend on page 5, line 3, by striking all after "(g)"; in line 4, by striking, "ceived at the hearing,"; in line 5, before the period, by inserting: ", after consideration of the application and the evidence received at the hearing, at the next regular meeting of the board held after each member has been furnished a transcript of the hearing"; in line 12, by striking "federal" and inserting "national";. The motion to amend the bill was approved unanimously. (See Attachment #3).

Representative King moved and Representative Francisco seconded that HB 2628 be passed out as amended. The motion carried unanimously.

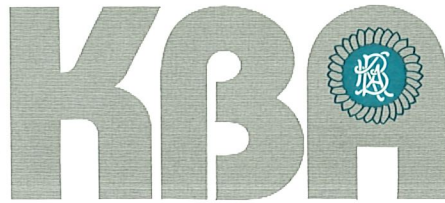
The Chairman announced there would not be a meeting on Thursday, January 18 and the meeting adjourned at 5:00 P.M.

PUBLIC TESTIMONY ON HB 2628

**TO THE
HOUSE COMMITTEE ON
COMMERCIAL AND FINANCIAL
INSTITUTIONS**

KANSAS BANKERS ASSOCIATION

JANUARY 16, 1990



The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

January 16, 1990

TO: House Committee on Commercial and Financial Institutions
RE: **HB 2628** - Branching powers for state-chartered banks

Mr. Chairman and Members of the Committee:

We appreciate this opportunity to appear before the committee in support of **HB 2628** which will correct a major inequity currently existing in the banking industry of this state. We are requesting that the Committee give this measure prompt consideration.

HB 2628 would grant state-chartered banks the same branching authority nationally-chartered banks in Kansas now have as the result of actions by the Office of the Comptroller of the Currency (OCC) which is the primary regulator for national banks. The OCC actions are based on a Mississippi case several years ago (the Deposit Guaranty case) wherein the federal courts ruled that nationally-chartered banks must be allowed the same branching authority as that granted to state-chartered savings & loan associations within a state if it can be shown that state-chartered S&Ls are engaged in "the business of banking". A copy of that decision by the Fifth Circuit Court of Appeals is attached.

On March 30, 1989, Peoples National Bank of Ottawa was granted the authority by the OCC to establish a de novo (new) branch office in Aubry township in southern Johnson County. The establishment of such a branch office violates the branching provisions of the Kansas banking code, but the OCC permitted the Peoples National request on the grounds that they had proven state-chartered S&Ls in Kansas are involved in the business of banking and, therefore, as a national bank Peoples National could not be denied the same branching authority as that granted to state-chartered S&Ls. A copy of the Comptroller's concluding opinion in the Peoples National application is attached.

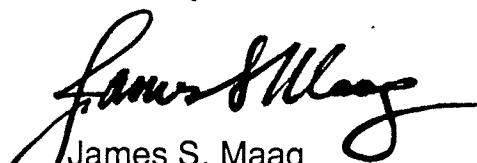
Currently in Kansas, state-chartered S&Ls may branch with no geographical or numerical restrictions. On May 8, 1989, Attorney-General Stephan, in response to a request from State Bank Commissioner Newton Male as to the legality of the OCC's action, stated that "a challenge to the branching authority of Peoples National Bank would be unsuccessful given the current state and federal laws and the Comptroller's interpretation." A copy of the Attorney-General's letter is also attached. Since granting Peoples National their de novo application the OCC has also granted similar branching rights to several other national banks in Kansas.

There is certainly no indication the OCC plans to change its current branching policy and, in fact, their actions in Kansas and other states have not been successfully challenged in the courts (See attached news story concerning a recent Missouri case). Therefore, the KBA believes it is imperative that the Legislature proceed with all due speed to grant branching equality to state-chartered banks.

HB 2628 simply removes the existing restrictions in K.S.A. 9-1111 on branching and allows state-chartered banks to establish branch offices in the same manner as nationally-chartered banks at any location and in any number, subject to the normal hearing process and approval by the state banking board. The bill would become effective upon its publication in the State Register in order to establish branching equality as soon as possible.

Thank you for allowing us to present and discuss this important issue at this early point in the session. Your support for **HB 2628** would be greatly appreciated.

Sincerely,


James S. Maag
Senior Vice President

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4722

THE DEPARTMENT OF BANKING AND CONSUMER
FINANCE OF THE STATE OF MISSISSIPPI, *et al.*,
Plaintiffs-Appellees,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE
CURRENCY OF THE UNITED STATES and
DEPOSIT GUARANTY NATIONAL BANK,
Defendants-Appellants.

Feb. 9, 1987

Anthony J. Steinmeyer, Appellate Staff, Civil Div.,
Dept. of Justice, Washington, D.C., Dan M. McDaniel,
Jr., Asst. U.S. Atty., John F. Daly, Jackson, Miss., for
Controller of Currency.

Luther T. Munford, Lawrence J. Franck, Jackson,
Miss., for Deposit Guar. Bank

Hubbard T. Saunders, Stephen J. Kirchmayr, Jr., Rob-
ert M. Arentson, Jr., Champ Terney, Jackson, Miss., for
Dept. of Banking.

G.E. Estes, Jr., Gulfport, Miss., for Merchants Bank.

John M. Harral, Knox White, Gulfport, Miss., for
Hancock Bank, et al.

W. Joel Blass, Gulfport, Miss., for Gulf Nat'l. Bank.

Appeal from the United States District Court for the Eastern District of Mississippi.

Before POLITZ, RANDALL, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

This appeal by the Comptroller of the Currency of the United States and Deposit Guaranty National Bank of Jackson, Mississippi, from a judgment enjoining the Comptroller and Deposit Guaranty from establishing a branch office in Gulfport, Mississippi, poses a sole question: did the Comptroller err in his interpretation of the term "State bank" as found in 12 U.S.C. § 36(h), when he granted approval of Deposit Guaranty's application to establish the branch? The district court concluded that the Comptroller had erred. We disagree and reverse.

Background

In September 1984 Deposit Guaranty, a national banking corporation chartered under the laws of the United States with its principal office in Jackson, Mississippi, applied to the Comptroller for permission to open a branch bank in Gulfport, Mississippi. Gulfport is more than 100 miles distant from Jackson. During the public comment period following the publication of notice of Deposit Guaranty's application, the Department of Banking and Consumer Finance of the State of Mississippi and several state-chartered commercial banks with offices in or near Gulfport protested. On July 9, 1985, the Comptroller rejected the protests and granted the requested approval. The Department of Banking promptly filed the instant action, seeking to enjoin the opening of the Gulfport branch. Several state commercial banks were allowed to intervene. After reviewing the record developed before the Comptroller, the district court granted the injunctive relief. Both the Comptroller and Deposit Guaranty timely appealed.

Like most states, the State of Mississippi has historically recognized and chartered two kinds of financial institutions, commercial banks and savings associations. The commercial banks are chartered under Miss.Code Ann. § 81-3-3 and are regulated by the Department of Banking. The savings associations are chartered under Miss.Code Ann §§ 81-12-25 to 81-12-43 and are under the authority of the Mississippi Department of Savings Associations, Miss.Code Ann. § 81-12-11. Originally the financial activities of the two institutions differed. In recent years, however, because of changes in state and federal law, the savings associations have become highly competitive with the state banks and other financial institutions, including national banks.

The traditional powers and functions of a bank, constituting the business of banking, are enumerated in the National Bank Act, 12 U.S.C. § 24 (seventh):

- (1) the discounting and negotiating of promissory notes, drafts, bills of exchanges, and other evidence of debt;
- (2) the receiving of deposits;
- (3) the buying and selling of exchange, coin and bullion;
- (4) the loaning of money on personal security; and
- (5) the issuing and circulating of notes under the National Bank Act.

As is noted by the Comptroller and generally acknowledged, items (3) and (5) are of little relevance. Hence, the banking business, reduced to essentials, involves receiving deposits, making commercial loans, and negotiating checks and drafts.

Starting in 1980, Mississippi's statutes and regulations dramatically changed, conferring traditional banking powers upon Mississippi savings associations which are

authorized to: offer negotiable order of withdrawal (NOW) accounts and interest-bearing checking accounts, Miss.Code Ann. §§ 81-12-149, 81-12-151; receive and pay interest on savings deposits and other accounts, Miss. Code Ann. § 81-12-49(d); lend and invest funds, Miss. Code Ann. §§ 81-12-49(p), 81-12-155, 81-12-159; service loans and investments, Miss.Code Ann. § 81-12-49(n); and sell money orders and travelers' checks, Miss.Code Ann. § 81-12-49(l). Under what is sometimes referred to as the "wild card" statute, Miss.Code Ann. § 81-12-49(r), Mississippi savings associations may engage in activity permitted a federally chartered savings and loan association in that state. And, of some significance, savings associations may now use the appellation "savings bank," contrary to the former law reserving the title "bank" for commercial banking institutions. Miss.Code Ann. § 81-3-3; Miss Savings Rule 16.1.

Consistent with the previous sharp separation of functions, banks and savings associations were accorded different treatment. One difference central to the case at bar involves branch units. A savings association may open branches throughout the state, Miss.Code Ann. § 81-12-175, whereas the state commercial banks, since the 1986 amendments, are allowed to open branches only in the county in which the bank's principal office is located, within a 100-mile radius, Miss.Code Ann. § 81-7-7.

The Comptroller is responsible for the supervision of 5,000 national banks chartered under federal law. Congress has empowered the Comptroller to make definitive judgments on the application of national banks for permission to relocate or to open branches, 12 U.S.C. §§ 30, 36. The federal branching provision, commonly referred to as the McFadden Act, permits a national bank to open branches anywhere that a state bank may. The National Bank Act, 12 U.S.C. § 36, provides in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, estab-

lish and operate new branches . . . at any point within the State in which said association is situated 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.

* * * * *

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

In his consideration of the application of Depository Guaranty for permission to open a Gulfport branch, the Comptroller received in evidence a study of the banking industry in Mississippi reflecting that savings associations offered traditional banking services such as, *inter alia* interest-bearing checking accounts, commercial checking accounts, consumer loans, business and construction loans, savings deposits, and related incidental services. After considering the evidence presented, applicable federal and state statutes and regulations, and the relevant jurisprudence, the Comptroller determined that savings associations in Mississippi were engaged in the business of banking and were "State banks" within the meaning of 12 U.S.C. § 36(h). The Comptroller accordingly concluded that "[n]ational banks in Mississippi may, thus, open a branch to the same extent as Mississippi savings associations, i.e., statewide." We are charged to uphold the Comptroller's determination if we find it to be a "permissible construction" of the National Bank Act. See *Chevron v. Natural Resources Defense Council*, 46 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 69 (1984); *Texas v. United States*, 756 F.2d 419 (5th Cir.

cert. denied, — U.S. —, 106 S.Ct. 129, 88 L.Ed.2d 5 (1985). In reaching his conclusion the Comptroller applied a federal definition of banking, eschewed state-applied labels, and looked primarily to the function of the institutions.

Analysis

The threshold issue we confront is whether the Comptroller, in his interpretation and application of a federal statute, in this case 12 U.S.C. § 36(h), should look to state or federal law to define the statute's terms. We conclude and hold that in his interpretation of 12 U.S.C. § 36(c) and (h) the Comptroller may seek the guidance of helpful state law, but is bound to follow federal law in defining terms contained in the federal statute. This includes, of course, the terms "State bank" and "banking business."

The Supreme Court's reasoning in *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966), illuminates our path. The Court there held that national banks in Utah were constrained to establish branches in the same manner as state banks in that state. The Court opined that "[i]t appears clear from . . . the legislative history of § 36(c) (1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." 385 U.S. at 261, 87 S.Ct. at 497. It was this concern for competitive quality that drove the Court's decision in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), wherein it held that the definition of "branch" in 12 U.S.C. § 36 was a matter of federal law.

In *Plant City*, the Court emphasized the importance of employing a federal definition to ensure that national banks would be able to perform the same branching functions as neighboring state banks. The Court relied on the

legislative history of the McFadden Act, codified as 12 U.S.C. § 36, reasoning that to allow the states to regulate banking functions "would make them the sole judges of their own powers. Congress did not intend such an improbable result. . . ." 396 U.S. at 133-34, 90 S.Ct. at 343. The court cited legislative history demonstrating that Congress was concerned that "neither system have advantages over the other in the use of branch banking" and that national banks would be protected "from the unrestricted branch bank competition of state banks." *Id.* at 131, 90 S.Ct. at 342.¹

The principle of competitive equality guided the Comptroller's analysis and informed his decision in the present case. He observed that "the concept of competitive equality requires a federal definition of 'State bank' to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions 'banks' and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks."

We conclude that the Comptroller's use of federal law and the competitive equality standard was legally correct. By doing so the Comptroller was faithful to the congressional mandate and demonstrated considerable expertise in balancing national and state interests in this constantly evolving area.

¹ In other areas traditionally regulated by state law, the Supreme Court has applied federal definitions to federal statutory terms even when the federal statute contains references to state law provisions. See *Chase Manhattan Bank v. City Finance Admin.*, 440 U.S. 447, 99 S.Ct. 1201, 59 L.Ed.2d 445 (1979) (definition of "tax" under federal statute governing state taxation is a question of federal law); *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) (definitions of "insurance" and "annuities" for purposes of federal regulation are questions of federal law even if such definitions work to displace or hinder state regulation).

Function versus Title

Having concluded that the federal definition of banking business controls the meaning of that term in § 36 (h), we must now determine whether the Comptroller correctly placed the Mississippi savings associations within that subsection. The Comptroller looked to function and found as a fact that the savings associations were engaged in the banking business. The district court did not address those factual findings.

We agree with the Comptroller that the language of § 36(h) expressly requires a consideration of function. The statute directs that the term "State bank," as used therein, "shall be held to include . . . corporations or institutions carrying on the banking business under the authority of state laws." We hold that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations, some of which publicly refer to themselves as "savings banks," were actually "carrying on the banking business." This task could only be accomplished by a targeted functional analysis.² The very recent Supreme Court decision in *Clarke v. Securities Industry Association*, — U.S. —, 107 S.Ct. 750, — L.Ed.2d — 1987), implicitly supports the Comptroller's use of this functional analysis methodology.

As noted above, Congress has defined the business of banking, stripped to its essentials, as accepting deposits, paying checks, and making loans. As observed by the Comptroller, these three primary functions are listed in

² Our colleagues in the District of Columbia Circuit used this approach in defining "branch" in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.), cert. denied, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 141 (1976). There, the court determined that all bank offices, state or national, that perform any one of three branch banking services, are "branches" for purposes of the National Bank Act, regardless of the offices' actual labels. Thus, for example, automatic teller machines constitute "branches" for purposes of the Act.

the National Bank Act's definition of branch in 12 U.S.C. § 36 (f).³

As a reviewing court, we must accept the Comptroller's factual findings unless we find that they are arbitrary or capricious. 5 U.S.C. § 706. Our determination must be made on the basis of the administrative record. *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The Comptroller's factual determination that the savings associations are engaged in the banking business is amply supported by the record. These associations, consistent with state law, accept deposits, pay interest on accounts, offer checking accounts, act in a fiduciary capacity, make personal loans, sell money orders and travelers' checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease, and mortgage both personal and real properties. This factual finding by the Comptroller is neither arbitrary nor capricious. It is patently correct.

In reaching our conclusion we are not unmindful of the Garn-St. Germain Act, adopted in 1982, 12 U.S.C. § 1461 *et seq.*, expanding the regulatory scheme for savings and loan associations. That regulatory scheme, intended to ensure that savings and loan institutions main-

³ The Supreme Court has defined "banking business" similarly in antitrust cases. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), the Court stated that of the various banking services and products,

the creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important.

374 U.S. at 326-27, 83 S.Ct. at 1721. The Court has repeated this delineation of banking functions in subsequent antitrust cases, *see, e.g., United States v. Phillipsburg National Bank*, 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970); *United States v. First National Bank*, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1 (1964).

tain their status "as the nation's primary home lender," S.Rep. No. 641, 97th Cong.2d Sess. 88, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3131, differs from the regulation of the traditional bank. The principal difference involves the limits placed on the commercial and consumer loans and investments of the savings institutions, designed to protect their capacity to make needed home loans. That legislation neither proscribes the functional analysis made by the Comptroller nor militates against his interpretation of 12 U.S.C. § 36(h).

The Comptroller did not incorrectly interpret the controlling statutory provisions. His interpretation was more than a mere "permissible construction," all that is required in order to secure this court's deference. See *Chevron v. Natural Resources Defense Council*; *United States v. Riverside Bayview Homes, Inc.*, — U.S. —, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); and *Texas v. United States*. We find the Comptroller's interpretation to be amply supported by the express "language employed by Congress," giving the words it chose their "ordinary meaning." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982).

The district court erred in enjoining the Comptroller and Deposit Guaranty. The injunction imposed is vacated and the judgment is reversed. The Comptroller is entitled to judgment as a matter of law. The matter is returned to the district court for entry of an appropriate judgment.

REVERSED.

The relevant portion of Section 36(c) of the McFadden Act, 12 U.S.C. § 36(c), provides as follows: 6-1

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . (2) at any point within the State in which said association is situated, 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.

Section 36(f) of the McFadden Act, 12 U.S.C. § 36(f), provides as follows:

The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Section 36(h) of the McFadden Act, 12 U.S.C. § 36(h), provides as follows:

The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

Miss. Code Ann. § 81-7-5 (1972) provided as follows:

Branch offices in certain cities—permission of state comptroller—branch offices may make loans.

The state comptroller may permit banks to establish branch offices within the corporate limits of the



MAY 10 1989

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STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
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May 8, 1989

W. Newton Male
State Bank Commissioner
Banking Department
700 Jackson, Suite 300
Topeka, Kansas 66603-3714


Dear Commissioner Male:

My office has reviewed your request of April 19, 1989 regarding the authority of a federally chartered bank to establish branch facilities in the same manner as state chartered savings and loan institutions. It is my opinion that the Stilwell branch of the Peoples National Bank and Trust of Ottawa, Kansas is not an illegal branch.

Enclosed please find a copy of Kansas Attorney General Opinion No. 87-182. In that opinion, I addressed the interpretation of the Comptroller of the Currency of 12 U.S.C. § 36 (1982). The Comptroller has determined that national banks may branch in the same manner as state savings institutions because state savings institutions are generally engaged in the same business as state banks. The Comptroller's interpretation of the federal law was upheld in Dept. of Banking and Consumer Finance v. Clarke, 809 F.2d 266 (5th Cir. 1987), cert. denied, 107 S.Ct. 3240, 97 L.Ed.2d 745. Similar results are found in subsequent federal district court decisions. It appears that a challenge to the branching authority of Peoples National Bank would be unsuccessful given the current state and federal laws and the Comptroller's interpretation.

If you require further assistance in this or other matters, please feel free to contact my office.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas

RTS:MWS:bas

1-10

Branch bank challenges state law

By W. Randolph Heaster
Of the Business Staff

A Kansas bank's branch office sets a precedent that could change state laws regarding the operation of branches, banking observers said Monday.

The Peoples National Bank & Trust of Ottawa has been operating a branch in Stilwell since early April under approval from the U.S. Comptroller of the Currency's office, said Daniel P. Winter, president of the branch office of Peoples National in Louisburg.

The bank headquarters is in Franklin County and the new Stilwell branch in Johnson County, in apparent conflict with Kansas banking laws restricting the ability of banks to establish branches across county lines.

But in a letter to the Kansas banking commissioner last week, Kansas Attorney General Bob

Stephan said that under current law he did not think that the Peoples National branch was illegal.

Because it has a national charter, Peoples National does not come under the same provisions in the Kansas law as do state-chartered banks, said Newton Male, the Kansas banking commissioner.

As a result of Peoples National's move, banks with national charters can establish branches all over Kansas without regard for state banking regulations, according to banking industry experts.

"This puts all state-chartered banks at a competitive disadvantage," Male said. "I would say it's up to the state Legislature to make a change."

But the Legislature's next session doesn't start until January, so nationally chartered banks will have an advantage over state banks for at least several months, said Harold

Stones, executive director of the Kansas Bankers Association.

There are more than 400 state-chartered banks and about 200 national banks in Kansas, Male said.

Stones said he sent Stephan's ruling to association members last week but had not yet received strong negative reactions from state-chartered banks.

"It doesn't seem that there is very much state banks can do," said George Walden, president of the Kansas Independent Bankers Association, which represents mostly small banks. "It looks like Peoples National is home free."

Walden is also president of Garden Plain (Kan.) State Bank.

Many banking observers said the next likely step was for the Kansas Legislature to give state-chartered banks the same branching privileges

See BANK, D-17, Col. 1

Branch bank challenges law about crossing county lines

Continued from Page D-3

as national banks.

Until Peoples National opened its branch in Stilwell, all Kansas banks were limited to establishing branches by buying failed banks or merging with other banks to create branches in other counties, Male said. Peoples National took over a failed bank in Louisburg to start its branch there.

A bank also could establish a branch in a bordering county that did not already have a bank, Male said.

"We decided that there was another way to skin the cat," Winter said.

Winter said that in its application to the comptroller of the currency, Peoples National argued that savings and loan associations had the freedom to open branches statewide without restrictions. Because thrifts operate similarly to banks, Winter said Peoples National argued that banks should have the same ability.

The comptroller approved Peoples National's application in March.

But a similar move by First National Bank & Trust Co. of Columbia, Mo., is being challenged in Missouri by the state's finance division and others.

That lawsuit, which contends that branching into different counties is illegal, was filed in January in U.S. District Court in Kansas City, said Earl L. Manning, commissioner of the Missouri Division of Finance.

In a similar case in Mississippi, a federal court in 1987 upheld the right of nationally chartered banks to branch statewide.

Missouri and Kansas aren't the only states that are coping with challenges to branching restrictions since that ruling, Male said. Other states that have allowed more liberal branch banking include Tennessee, Texas, Louisiana and Florida.

Expanding with a branch as opposed to opening a separate bank can be advantageous because capital requirements are not increased with a branch, Winter said.

Because Kansas law restricts branching, Peoples National sought federal approval, Winter said.

Robert W. Asmann, executive vice president of the rapidly expanding Fourth Financial Corp. of Wichita, said his bank holding company does not have an official position on the Peoples National ruling, but Fourth Financial generally favors the liberalization of banking laws.

In its recent expansion, Fourth Financial has bought existing banks that already have significant market shares.

"To go into a well-established area and open a branch is not something we'd be inclined to do," Asmann said.

DECISION OF THE COMPTROLLER OF THE CURRENCY
ON THE APPLICATION OF PEOPLES NATIONAL BANK
AND TRUST COMPANY, OTTAWA, KANSAS,
TO ESTABLISH A BRANCH OFFICE IN JOHNSON COUNTY, KANSAS

I. BACKGROUND

By application dated August 10, 1988, as supplemented November 2, 1988, Peoples National Bank and Trust Company, Ottawa, Kansas (PNB), requests approval to establish a branch near the intersection of U.S. 69 Highway and 199th Street in Johnson County, Kansas. PNB's main office in Ottawa, Kansas, is located in Franklin County, which borders the southwest corner of Johnson County.

Notice of PNB's branch application was published on August 10, 1988 in the Kansas City Times, a newspaper published daily in Kansas City, Missouri. No comments or protests to the application were received.

V. CONCLUSION

Based on my determination that Kansas savings and loans associations are authorized to carry on the banking business and are carrying on that business, I conclude that such associations are "State banks" for purposes of 12 U.S.C. s 36(h). A national bank in Kansas may therefore branch to the same extent and subject to the same conditions imposed on savings and loans associations under Kansas law. Accordingly, because PNB's application conforms to the policies of this Office and is consistent with applicable law, the application is approved.

J. Michael Shepherd
J. Michael Shepherd
Senior Deputy Comptroller for
Corporate and Economic Programs

March 30, 1989
Date

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St Louis Post-Dispatch 12/5/89

State Loses On Bank Challenge

By Jim Gallagher
Of the Post-Dispatch Staff

A federal court has refused to halt the U.S. Comptroller of the Currency's efforts to overturn Missouri's branch banking regulations.

If not blocked by higher courts, the move would let Missouri's 90 national banks place branches anywhere in the state.

"It would change the chemistry of banking as we've known it in Missouri," said Robert Crawford, executive vice president of the Missouri Bankers Association.

Under state law, outstate banks cannot set up branches outside their own counties. St. Louis and Kansas City banks have permission to cross county lines.

The case stems from efforts by First National Bank & Trust Co. of Columbia to open branches in Jefferson City

and Fulton. The Comptroller of the Currency, the federal agency that regulates national banks, joined First National in the legal battle.

A federal judge in Kansas City on Nov. 20 rejected the Missouri Finance Division's request for an injunction blocking the move. Earl Manning, Missouri commissioner of finance, said the ruling would be appealed.

The comptroller argues that Missouri law discriminates in favor of savings and loan institutions. S&Ls can set up as many branches as they want, wherever they want in the state.

S&Ls these days behave much like banks, the comptroller argued, and banks should have as much freedom.

Manning said a victory by the comptroller would set up a two-tier banking system in the state. National banks would be free to branch across the state. But Missouri's 470 state-

chartered banks would still be bound by the state's branching limits.

A national bank from another county could set up a branch across the street from a state bank, but the state bank couldn't retaliate, Manning said.

Banking analyst Anthony Polini of A.G. Edwards & Sons Inc. said he doubts that a comptroller's victory would make much difference in the state's banking scene.

Banks that want to expand already find ways around the law — often by setting up a whole new bank in the target county using same name as the parent bank.

The system makes for some inefficiencies. Customers of Mercantile Bancorporation's Jefferson County bank, for instance, can't make deposits at Mercantile Bank branches in St. Louis.

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Kansas Independent Bankers Association

Topic: Branch Banking Legislation

The Kansas Independent Bankers Association (KIBA) supports lawmakers correcting branching inequities among financial institutions within the state. There are only two choices as we see them: 1) To permit state chartered banks the same branching privileges now available to state chartered savings and loan associations, and national banks, or 2) To control branching privileges of state savings and loans within the state, The bill before you authorizes option one.

In granting any type of additional banking powers, prudence should be used, whether it be branching privileges or other areas. Under no circumstance do we want to see banks in the tenuous position that the nation's savings and loan industry has found itself in of late.

Members of the KIBA, are disappointed that the banking law of the state is being directed by the interpretive ruling of the current Comptroller of the Currency which allows national banks to branch based solely on state chartered savings and loan branching authority. Nevertheless, the courts have agreed to date with that ruling and you as state legislators are the only ones who are in a position to challenge the comptroller's authority for Kansas.

KIBA supports House Bill #2628 authorizing equitable branching privileges for state banks. However, should the scope of such legislation be expanded to encompass interstate banking, KIBA will strongly oppose any such attempt. Interstate banking is a separate structure issue and must be decided on its own merits after proper debate and thorough review of the facts and subsequent effect on the people and the economy of Kansas.

Atch #2