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ATTORNEY GENERAL OPINION NO. 81-157

Roy P. Britton
State Bank Commissioner
Suite 600
818 Kansas Avenue
Topeka, Kansas 66612

Re: Banks and Banking -- Branch Banking -- Armored
Car Service

Synopsis: Where a customer of a bank contracts with an independent armored car service to transport the customer's money to the bank for deposit therein, the bank's reimbursement of the customer for the costs of such service does not constitute "branch banking" within the prohibitions thereof in the state banking code. Cited herein: K.S.A. 1980 Supp. 9-1111.

* * *

Dear Mr. Britton:

On your behalf, Carl R. Sandstrom, Assistant Bank Commissioner, has requested our opinion as to whether a state bank may pay the costs of an independently operated armored car service used by one of its commercial customers to transport moneys to the bank for deposit. The question arises in light of the prohibition against branch banking found in K.S.A. 1980 Supp. 9-1111, which provides in relevant part:

"The general business of every bank shall be transacted at the place of business specified in its certificate of authority, and it shall be unlawful for any bank to establish and operate any branch bank, or branch office or agency or place of business except as herein-after provided:"

As exceptions to the foregoing prohibition, this statute permits certain banking activities to be conducted at attached

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auxiliary teller facilities, detached auxiliary banking services facilities and remote service units. However, with the exception of these specifically designated facilities, a state bank is prohibited from establishing or operating branch banks, and the question presented for our review is whether the proposed arrangement for paying a customer's costs of using an armored car service violates this prohibition.

It is our understanding that a commercial customer of the bank in question is currently using an armored car service to pick up and transport to the bank the customer's daily checking account deposit, and the customer has requested the bank to pay the charges for such service. Beyond that, we are not advised as to the details of such arrangement.

An apparently similar question was considered in Attorney General Opinion No. 76-102. There, Attorney General Schneider concluded that "payment by the bank for the armored car service which is furnished by or under contract with the depositor does not constitute 'branch banking,' or the receipt of deposits at a place other than the main banking premises." Id. at 2, 3. There, as here, the issue was whether the armored car service was the agent of the bank, such that the pick up of the customer's daily deposit by the armored car constituted receipt of such deposit by the bank. The rationale for the conclusion reached in the prior opinion was expressed thusly:

"Clearly, as described, the carrier will not act as the agent of the bank, but of the depositor. No monies, checks, or other deposits come into the actual or constructive custody of the bank or any of its employees until receipt at the main banking office. The fact that the bank bears the cost of the armored car service, whether it is provided by . . . [the customer] itself, as the depositor, or by an independent contractor whose services are procured by the depositor, does not alone compel the conclusion that the deposits so transported are received by the bank upon delivery to the carrier for transit to the main banking premises." Id. at 2.

We concur in that conclusion, and assuming the identity of facts considered in the prior opinion with those giving rise to your inquiry, we would affirm the prior opinion's applicability to the question presented here for review.

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In reaching this conclusion, we have reviewed First National Bank in Plant City v. Dickinson, 396 U.S. 122, 24 L.Ed. 2d 312, 90 S. Ct. 337 (1969), in which the U.S. Supreme Court concluded that an armored car messenger service operated by a national bank constituted a "branch bank," within the meaning of the McFadden Act of 1927 at 12 U.S.C. §36. The Court concluded that delivery of customers' deposits to the armored car constituted receipt of such deposits by the bank, thereby constituting the operation of a branch bank which was prohibited by the law of the state in which the national bank was located.

In that case, the bank and its customers had agreed, through carefully drawn contracts, that the moneys received by the armored car would not be deemed deposited with the bank until the moneys actually arrived at the bank. However, even though the Court found that such contracts were valid in establishing when the debtor-creditor relationship existed between the bank and one of its customers, it concluded that the circumstances surrounding the bank's operation of the armored car compelled the conclusion that the receipt of moneys by the armored car constituted receipt of deposits by the bank. 24 L.Ed.2d at 322. As stated by the Court:

"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 First National'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 either 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 large-scale continuing mode of conducting the banking business designed to bring basic bank services to the customers." Id.

One of the distinguishing features of this case is the fact that the Court was faced with an unequivocal prohibition against off-premises banking by the State of Florida and a ruling of the Comptroller of the Currency that national

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banks could provide armored car messenger services. As a result of this conflict, there were at issue in this case the question of "competitive equality" between state and national banks, as set forth in the McFadden Act, and the question of whether state or federal law is to be applied in determining whether services offered by a national bank constitute branch banking within the meaning of 12 U.S.C. §36(c). These issues are not involved in your inquiry.

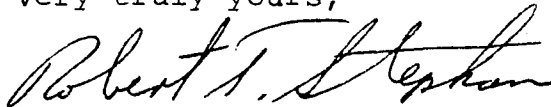
Moreover, we agree with the conclusion reached in Opinion No. 76-102 that this case is factually distinguishable from the situation reviewed in that prior opinion. Such distinction is explained by the following statement on page 2 of that opinion:

"There, the armored car was owned and controlled by the bank; the teller and driver-guard were bank employees; the bank assumed complete responsibility for the monies, checks and deposits during transit by an insurance policy purchased and paid for by the bank; the truck for [bore] the name of the bank, had two-way radiophone communications with the bank and all of its movements were directed by the bank."

Similarly, we believe that the facts considered here are distinguishable from those giving rise to the Plant City decision. We do not believe that where the armored car service is truly independent of the bank's operation, and the bank's only involvement is reimbursing the bank's customer for the cost of such service, that the armored car service can be deemed an agent of the bank.

In summary, therefore, it is our opinion that, where a customer of a bank contracts with an independent armored car service to transport the customer's money to the bank for deposit therein, the bank's reimbursement of the customer for the costs of such service does not constitute "branch banking" within the prohibitions thereof in the state banking code.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General