VOLUME NO. 45 OPINION NO. 19

BANKS AND BANKING - Trust company's remote service offices: compliance with branch banking restrictions;
COMMERCE, DEPARTMENT OF - Statutory restrictions on trust company's remote service offices;
MONTANA CODE ANNOTATED - Sections 32-1-107, 32-1-109(2) and (11), 32-1-371(5), 32-1-372;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 76 (1990);
REVISED CODES OF MONTANA, 1947 - Section 5-1028;
UNITED STATES CODE - 12 U.S.C. § 36.

HELD: A trust company is prohibited by Mont. Code Ann. §§ 32-1-371(5) and -372 from establishing remote service offices which would offer less than all services offered at the principal office, and which would not comply with the statutory geographical limitations.

December 10, 1993

Mr. Jon Noel
Director
Department of Commerce
1424 Ninth Avenue
Helena, MT 59620-0501

Dear Mr. Noel:

The Financial Division of the Department of Commerce has requested my opinion regarding the issue of whether Montana law permits a chartered Montana trust company to locate trust officers at remote service offices in cities other than the location of its principal office. According to the company's proposal submitted with your request, the company would maintain telephone listings and office addresses in other cities for its trust officers and would advertise its services. The trust officers would be available to meet with existing and potential clients to discuss trust business. All administrative and operative matters in connection with any trust would be conducted in the company's principal office. Trusts would only be accepted and executed following review by officers in the principal office. All deposits to accounts, reports, statements and investment activity would be conducted and generated by the principal office.

The trust company contends that the remote service locations would not fall within the definition of a branch bank pursuant to Mont. Code Ann. § 32-1-109(3), -371(5) or -372. In my opinion, the statutes prohibit a trust company from establishing any office which offers less than all of the services offered at its principal office, unless such office complies with the statutory restrictions placed upon detached facilities. The trust company may establish a branch office which offers all services available at the main banking house as provided by statute.

The Bank Act (Mont. Code Ann. tit. 32, ch. 1, pts. 1 to 5) applies to all corporations specified in Mont. Code Ann. § 32-1-102, which includes trust companies. Mont. Code Ann. §§ 32-1-101 and -102(1), (4)(c). The term "bank," as used in the Bank Act, includes trust companies. Mont. Code Ann. §§ 32-1-102(1) and -371(1). The Bank Act provides:

> A bank may establish and maintain a branch bank only as provided in 32-1-371 and this section and, in the case of a bank organized under the laws of this state, with the prior approval of the state banking board, provided that nothing in this section prohibits ordinary clearinghouse transactions between banks. [Mont. Code Ann. § 32-1-372(1).]
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> "Branch bank" means a banking house, other than the main banking house, maintained and operated by a bank doing business in the state but does not include a detached facility, as provided for in 32-1-372, or a satellite terminal, as defined in 32-6-103. [Mont. Code Ann. § 32-1-109(2).]
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> "Main banking house" means the principal place of business of a bank in the state. [Mont. Code Ann. § 32-1-109(11).]
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> A branch bank must offer all services offered at a main banking house. [Mont. Code Ann. § 32-1-371(5).]

The statutes permit a bank to establish one detached drive-in and walk-up facility in the same city as the main banking house, subject to certain limitations on location and range of services.

Mont. Code Ann. § 32-1-372(2). The trust company's proposal does not comply with the statutory restrictions for detached facilities. Nor would the proposed remote service office be an electronic satellite terminal under Mont. Code Ann. § 32-6-103. Therefore, the question becomes whether a remote service office would be a "banking house, other than the main banking house," so that the office would constitute a branch bank.

The trust company argues that it is permitted to maintain offices wherever it chooses so long is it does not conduct a "banking business" in them. Leuthold v. Camp, 273 F. Supp. 695 (D. Mont. 1967) (dicta). The company then asserts that the activities conducted at the remote service locations would not, in and of themselves, require a corporation to become chartered as a trust company, since none of the activities are expressly enumerated in Mont. Code Ann. § 32-1-107. Since these activities would not require a separate charter, the argument proceeds, then an office performing these activities cannot be considered a branch bank. I do not agree with this analysis.

First, a similar argument was rejected by the Missouri Court of Appeals in St. Louis Union Trust Co. v. Pemberton, 494 S.W.2d 408 (Mo. Ct. App. 1973). The trust company in that case argued that the statute prohibited only a branch trust company, and not merely a second office where none of the true fiduciary actions or decisions would occur. The court determined:

> The doing of "trust business" is not solely confined to the administration of the assets of a trust or even the probate of an estate. It must of necessity include contact with existing and prospective customers . . . . It is the *getting of business* that St. Louis Union contemplates. . . . Once the advertising becomes effective to induce a customer to appear at the Clayton facility, undoubtedly the initial negotiations for the formation of a trust or the contents of a will (with or without a trust provision) include the ascertaining of the intention of the settlor or the testator in order to draft the instrument. . . . This is the critical stage of the matter of fiduciary undertaking--"the evaluation, discussion and preparation of the estate plan before the document is written. This pre-document period may require several conferences with the testator, settlor beneficiaries, lawyer, trust officers and other representatives of the corporate trustee." . . . While it is true, in some instances, that a trust instrument must be signed by a corporate trustee--which St. Louis Union

> says it will do only at its downtown St. Louis offices, yet many things undoubtedly would be done (with St. Louis Union's representatives) by a settlor or testator at the proposed Clayton facility: besides conferences, the execution of the trust by settlor or testator, and its delivery to St. Louis Union. These prior acts cannot be separated from St. Louis Union's entire fiduciary business, and it is factitious for it to claim that maintaining a constant business contact office at Clayton and the activities to be carried on therein (with definite contact with the public) are "only of the most tangential and peripheral nature." The isolated instances of customer interviews and property transfers taking place in their homes, which St. Louis Union correctly says would not constitute branching, differs vastly from the constant contact with customers in Clayton which St. Louis Union says it will do.

Id., 494 S.W.2d at 416-17. The court concluded that the second office was a "branch" prohibited by statute.

Contact with clients is necessary and incident to conducting a trust business and performing the activities listed in Mont. Code Ann. § 32-1-107. The language of Mont. Code Ann. § 32-1-371(5) is unambiguous that a branch bank must offer all of the services which are offered at the main banking house. It is the general rule that state banks have only those powers which are expressly conferred by statute or such as may be fairly implied from those expressly given. 43 Op. Att'y Gen. No. 76 at 294 (1990). The trust company is therefore prohibited from opening an office which will offer less than full services.

Second, my conclusion finds support in the legislative history of the branch banking statutes. Prior to 1989, Montana law expressly prohibited branch banking. Rev. Codes Mont. (1947) § 5-1028. House Bills 151 and 191 were introduced in the 1989 legislative session, proposing different versions of branch banking. The latter bill proposed a system of "extended teller facilities" which would offer limited services such as deposits, withdrawals, loan payments and cashing of checks. This bill was defeated in the Senate. House Bill 151 was considered at a committee hearing where testimony was offered by a representative of the trust company, who proposed an amendment which would specifically exclude trust companies from the branch banking law. Minutes, House Committee on Business and Economic Development, Jan. 18, 1989, Ex. 15. The trust company representative asserted: "Trust companies fulfill an entirely separate fiduciary service to clients that should not be subjected to the same restrictions imposed on commercial banks.

The service is highly personal and requires significant personal contact with clients available best through a branch office." Id. The proposed amendment was not adopted, and the testimony in the Senate reflects the sponsor's intent that trust companies be included. Minutes, Senate Committee on Business and Industry, Mar. 6, 1989, at 1. House Bill 151 passed. Had the legislature intended to allow branch offices with limited services or to exempt trust companies from the branching restrictions, it had the opportunity to do so. I cannot insert into the statutes what the legislature has omitted. Mont. Code Ann. § 1-2-101.

Finally, the trust company argues that the Department of Commerce has the authority under Mont. Code Ann. § 32-1-362(1) to consent to any activity not expressly allowed by state statute where the activity is permitted to national banks. It is provided in Mont. Code Ann. § 32-1-362(1) that:

> With the consent of the department, every bank organized under the laws of the state shall have power to and may engage in any activity or business in which such bank could engage if it were operating as a national bank. The department may prescribe, amend, and repeal regulations affecting and controlling the exercise of the powers granted by this section, provided that, subject to subsection (2), *such regulations and powers shall not apply to activities which are expressly prohibited or limited by the statutes of the state*.

(Emphasis added.) Thus, the power of the Department of Commerce to consent to an activity is limited by any state law expressly prohibiting or limiting such activity.

Apparently, if federal law were controlling here, the trust company would be allowed to establish remote service offices. The trust company has submitted several interpretive letters from the United States Comptroller of the Currency [OCC], which allow certain "back offices" not determined to be "branch banks" under the McFadden Act of 1927, 12 U.S.C. § 36. However, the federal definition of branch bank differs significantly from the Montana definition. Under the McFadden Act, a branch bank is defined as an office where "deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). The OCC follows a three-prong test to determine whether an office constitutes a branch bank. First, the facility must engage in one of the "core banking activities" listed in 12 U.S.C. § 36(f). Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987). According to the OCC, trust services do not constitute "core banking activities" under the McFadden Act; therefore a national bank is permitted by federal law to establish offices devoted solely to

trust services without the offices being deemed branch banks. Second, it must be "established" by the bank, i.e., owned or rented by the bank. Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). The third requirement is that a facility's location must provide a convenience to bank customers that gives the bank a competitive advantage. First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122, 136-37 (1969). This third test is known as the "public access" test. If a location does not have public access, then it is not a branch bank. The OCC letters submitted by the trust company rely on this third test to exclude a number of "back offices" from the definition of branch bank.

The McFadden Act provides that a national bank may establish and maintain branch banks on the same terms as state banks are permitted to do so under state law. 12 U.S.C. § 36(c). Therefore, the federal law does not preempt state law in this area. Federal law controls only the definition of branch banking as it concerns national banks. Central Bank v. Smith, 532 F.2d 37 (7th Cir. 1976); North Davis Bank v. First Nat'l Bank, 457 F.2d 820 (10th Cir. 1972). National banks may establish branch banks only when, where, and how state law would authorize a state bank to do so. Id.

The Montana statutes do not follow the same pattern as the federal law. While the statutes contain a list of purposes for which a trust company may be formed, Mont. Code Ann. § 32-1-107, there is no list of "core banking activities" which must be performed by a branch bank. Instead, the Montana statute provides that a branch bank must perform all services offered by the main bank. Mont. Code Ann. § 32-1-371(5). A branch bank or office may not offer less than full services. A "branch bank" is broadly defined as "a banking house, other than the main banking house, maintained and operated by a bank doing business in the state." Mont. Code Ann. § 32-1-109(2). While "banking house" is not defined, "main banking house" is defined as "principal place of business." Mont. Code Ann. § 32-1-109(11). Therefore, a "banking house" would be a "place of business." As discussed above, offering services to clients constitutes doing business. The state statutes simply do not lend themselves to an interpretation analogous to the federal interpretation.

The trust company has pointed out that it is placed at a competitive disadvantage if national banks with trust functions may establish remote trust offices and a state trust company cannot. It is beyond my scope of authority to determine whether my interpretation of state law would limit such activities on the part of national banks. If national banks are allowed to establish

remote trust service offices while state banks and trust companies are not, the resulting inequality is a policy consideration which is within the province of the legislature.

THEREFORE, IT IS MY OPINION:

> A trust company is prohibited by Mont. Code Ann. §§ 32-1-371(5) and -372 from establishing remote service offices which would offer less than all services offered at the principal office, and which would not comply with the statutory geographical limitations.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/pjj/pdl