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Definition of a Branch Under the McFadden Act: *St. Louis County National Bank v. Mercantile Trust Company*

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ruled. Failure to do so would result in a serious diminution in the efficacy of the gift tax, allowing taxpayers the possibility both to transfer large sums without payment of tax and to avoid the effect of the progressive income tax rates through income splitting schemes.

THOMAS F. DAILEY

Definition of a Branch Under the McFadden Act: *St. Louis County National Bank v. Mercantile Trust Company*¹—Mercantile Trust Company (Mercantile) is a national banking association with its principal office located in St. Louis, Missouri.² In February of 1970, Mercantile, which is engaged in the banking business and operates a trust department, opened a trust office in Clayton, Missouri, a suburb of St. Louis.³ Prior to opening the Clayton office, Mercantile received notice from the Comptroller of the Currency of the United States (the Comptroller) approving the establishment of the trust office so long as Mercantile did not accept deposits, make loans or pay checks at the location. Performing such activities would bring the office within the definition of a branch set forth in 12 U.S.C. § 36(f).⁴ Moreover, the establishment of such a branch office is subject to the limitations of 12 U.S.C. § 36(c)⁵ which permits national banks to establish branches only if they are authorized for state banks by the law of the state in which the national bank intends to open a branch.⁶ Since Mercantile intended to open an office in Missouri and since Missouri law prohibits branching,⁷ if the Comptroller considered Mercantile's office a branch, its

¹ 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977).

² *Id.* at 717.

³ *Id.*

⁴ *Id.* Section 36(f) provides:

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.

12 U.S.C. § 36(f) (1970).

⁵ 548 F.2d at 717. See note 6 *infra*.

⁶ Section 36(c) provides in pertinent part:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (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.

12 U.S.C. § 36(c) (1970).

⁷ The relevant Missouri statute, MO. REV. STAT. §362.105.1 (1) (1969) provides that "... no bank or trust company shall maintain in this state a branch or trust company, or receive deposits or pay checks except in its own banking house . . ." In *St. Louis Union Trust Co. v. Pemberton*, 494 S.W.2d 408 (Mo. App. 1973) a trust company sought, via a declaratory judgment in state court, the authority to establish an office in Clayton to be used in connection with its exclusive trust business in downtown St. Louis. The company argued that the ref-

establishment would be prohibited under section 36(c). Therefore the Comptroller's ruling that the office was not a branch was crucial for Mercantile.

Relying on the Comptroller's ruling, Mercantile opened its Clayton office, with five full time employees.⁸ From the spring of 1970 until March of 1973 a trust officer administered approximately 500 living and testamentary trusts, managing agency, and safekeeping accounts.⁹ No checks were paid, no money was lent, and no deposits were received.¹⁰

St. Louis County National Bank—a state chartered bank—filed suit in the United States District Court for the Eastern District of Missouri seeking both a declaratory judgment that Mercantile's Clayton trust office was illegal and an injunction against continued use of the office.¹¹ The district court granted the injunction, finding that the office was a branch within the meaning of section 36(f), and thus was subject to section 36(c)'s limitation.¹² Since Missouri law prohibited branches, Mercantile was prohibited

erence to "trust companies" in section 362.105 could only reasonably be interpreted to apply to trust companies which are engaged in the banking business and not to companies exercising trust powers exclusively. *Id.* at 409-10. The Missouri Court of Appeals rejected this argument and interpreted the statute to apply an antimonopolistic measure to "all banks, banks exercising trust powers, and trust companies not exercising banking powers." *Id.* at 413. It saw St. Louis Union's reading of the statute as allowing a bank which exercised trust powers to incorporate separately its trust department and thus establish many branches as "pure" trust businesses. The court feared that St. Louis Union, "after establishing its proffered branch, could start exercising its chartered banking powers [to conduct trust business], thus placing itself in the same position as those bank-trust organizations to which it contends Sec. 362.105 applies only, thus being able to do what the latter could not do." *Id.* The court decided that such a result was not in keeping with the intent of the statute. *Id.*

St. Louis Union also argued that the statute prohibited only a branch trust company, and not merely a second office. It claimed that none of the true fiduciary activities or decisions would occur in Clayton, but would be done solely at the downtown office. *Id.* The activities which were to be performed in Clayton included interviewing and consulting with prospective customers, consulting with current customers, carrying on record keeping, performing all operations in acting as transfer agent, acting as paying agent, carrying on a general real estate business, and giving investment advice with respect to securities and property. *Id.* at 413-14. The court considered these activities sufficient evidence that the Clayton office was a "branch" trust company as prohibited by section 362.105. *Id.* at 416. Accordingly, the court affirmed the denial of St. Louis Union's requested declaratory judgment.

Thus, if Mercantile were a state bank, its Clayton office which would perform trust services would be considered a "branch" under Missouri law. As such it would be prohibited by section 362.105.

⁸ 548 F.2d at 717.

⁹ *Id.*

¹⁰ *Id.* Mercantile did a substantial amount of trust business at its main office in St. Louis. *Id.* at 719. The circuit court found the activities performed by Mercantile at its Clayton office could be summarized as follows:

(1) Consult[ing] with customers and prospective customers about the trust services offered by Mercantile; (2) discuss[ing] accounts with principals and beneficiaries of existing trusts; (3) review[ing] with customers and their representatives proposed trust instruments; (4) provid[ing] a place for persons to execute wills and trusts which name Mercantile as fiduciary; (5) review[ing] wills on file for present customers; and (6) research[ing] estate and trust problems . . . with customers and their representatives.

Id.

¹¹ St. Louis County National Bank v. Mercantile Trust Co., 420 F. Supp. 510 (E.D. Mo. 1976). James E. Smith, the then Comptroller, was joined with Mercantile as a defendant. Clayton Trust Company and William R. Kostman, Director of the Division of Finance for the State of Missouri, intervened as plaintiffs. *Id.* at 512.

¹² *Id.*

CASENOTES

from the continued use of its trust office.¹³ The court also found that as a trust office, the Clayton office was established in contravention of Missouri law.¹⁴ Consequently, the office was prohibited by 12 U.S.C. § 92(a),¹⁵ which authorizes the Comptroller to permit national banks to exercise trust powers only when such exercise is not in contravention of state or local law.¹⁶

Mercantile appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit. With one judge dissenting, the Eighth Circuit affirmed the district court decision¹⁷ and HELD: (1) the establishment of such a permanent place of business as undertaken by Mercantile is a branch as contemplated by 12 U.S.C. § 36(f) and thus is subject to section 36(c)'s prohibition against branches which are not authorized for state banks, and (2) Mercantile's exercise of fiduciary powers at its Clayton trust office is in contravention of Missouri state law and hence in contravention of 12 U.S.C. § 92(a).¹⁸

In finding that the office was prohibited because it was a branch, the circuit court based its decision on its interpretation of both legislative history and Supreme Court decisions which show that 12 U.S.C. §§ 36(f) and (c) were intended to foster "competitive equality" between national and state banks insofar as branching is concerned.¹⁹ In light of recent Supreme Court decisions, the court concluded that the three routine banking functions of receiving deposits, paying checks and lending money delineated in section 36(f) are not the only indicia of branch banking and that on the facts of the case before it, the Clayton office, by performing trust services, constituted a branch.²⁰

In analyzing the separate issue as to Mercantile's trust powers, the court determined that section 92(a) permits a state to limit nondiscriminately the location where such fiduciary powers can be exercised.²¹ Since in

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 92(a) provides as follows:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

12 U.S.C. § 92(a) (1970).

Section 92(b) provides as follows:

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

12 U.S.C. § 92(b) (1970).

¹⁶ 420 F. Supp. at 516.

¹⁷ 548 F.2d at 720.

¹⁸ *Id.* at 719-20.

¹⁹ *Id.* at 718-19.

²⁰ *Id.* at 719.

²¹ *Id.* at 720.

this case a state bank could not operate such an office performing fiduciary functions, the court concluded that section 92(a) prohibited Mercantile from doing so.²²

Judge Henley dissented on both the branching issue under section 36(f) and the fiduciary issue under section 92(a). With respect to the branching issue, the dissent expressed the view that the majority was allowing state definition of what constitutes a branch to control the federal question of interpreting section 36(f).²³ Judge Henley disagreed with the expansive reading the majority gave to section 36(f), believing that if Congress had intended to include trust services in the definition of a branch, it would have done so.²⁴ Accordingly, Judge Henley concluded, since Congress did not indicate that offices performing trust services were branches under 36(f), it was improper for the court so to decide. The dissent also took issue with the majority's reading of section 92(a), noting that 92(a) says nothing about where fiduciary services may be offered by national banks.²⁵ Judge Henley believed that unless prohibited by Congress, a federal bank is not prevented from engaging in particular activity merely because such activity is denied to state banks.²⁶ Thus, he concluded that the majority was unwarranted in extending Missouri's prohibition against the operation of trust offices to federal banks.

The *St. Louis County* case is significant because in finding that the trust office, which performed none of the three functions listed within section 36(f), was a branch, the Eighth Circuit has expanded the concept of a branch under section 36(f) beyond previous definition. Although prior cases have held that armored cars,²⁷ secured receptacles,²⁸ and computer terminals²⁹ are branches, each of these decisions has relied upon the functional definition given in section 36(f). The *St. Louis County* court, however, has added a fourth activity which is not in the statutory definition—trust services. Significantly, the court arrived at this definition while maintaining that state law was not relied upon in determining the content of the term branch in section 36(f).

This note will first discuss the issue of whether the Clayton office was a branch as defined in section 36(f). This discussion will focus on the history of the doctrine of "competitive equality" that the majority found so persuasive. It will then discuss cases that have applied a "competitive equality" analysis in other controversies arising under 12 U.S.C. § 36(f) and will compare those decisions to the extension given section 36(f) by the *St. Louis County* court. The note will then suggest pitfalls that could arise as a result of this extension. The reasoning of the *St. Louis County* court in applying section 92(a) to the trust office will also be discussed. This note will argue that the court was correct in its extension of section 36(f) despite the possi-

²² *Id.*

²³ *Id.* at 721 (Henley, J., dissenting).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See, e.g.,* First Nat'l Bank v. Dickinson, 396 U.S. 122, 137-38 (1969).

²⁸ *Id.*

²⁹ *See, e.g.,* Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir., cert. denied, 429 U.S. 862 (1976)).

bility of future difficulties, but that such an extension may have been unnecessary. It will be suggested that the restrictions imposed upon national banks by 12 U.S.C. § 92(a) provided sufficient grounds to decide the case, and thus that the possible future problems caused by the extension of section 36(f) could have been avoided.

I. MERCANTILE'S TRUST OFFICE AS A BRANCH UNDER 12 U.S.C. §§ 36(c), 36(f)

A. *History and Development of "Competitive Equality"*

The *St. Louis County* decision was based on the legislative history of section 36(f) and the interpretation of 36(f) by courts concerned with maintaining "competitive equality" between state and national banks. Therefore the history and development of the doctrine of "competitive equality" is pertinent to a discussion of *St. Louis County*.

The doctrine of "competitive equality" developed as a reaction to several events in the history of branch banking. The first such event was a 1911 opinion of the Attorney General which restricted each national bank to one "office or banking house located in the place specified in its organization certificate."³⁰ Despite this opinion, national banks, in order to compete with state banks, offered off premises paying and receiving facilities known as "teller windows."³¹ In *First National Bank v. Missouri*,³² however, the Supreme Court held that national banks had no authority to utilize these facilities.³³ Being limited to one office or banking house, national banks were thus placed at a disadvantage in those states which allowed state branch banking.

Recognizing both that the *Missouri* decision handicapped national banks, and that "permission for national banks to meet the competition of State banks engaged in branch banking . . . is absolutely vital to the maintenance of the national banking system,"³⁴ Congress passed the McFadden Act in 1927.³⁵ At the time of enactment, Representative McFadden, the author of the bill, described the main purpose of the act as follows: "As a re-

³⁰ 20 OP. ATTY GEN. 81 (1911) *construing* Act of 3 June 1864, ch. 106, § 8, 13 Stat. 101 (now codified at 12 U.S.C. § 81).

³¹ In a 1923 opinion of the Attorney General, these windows received a limited approval. See 34 OP. ATTY GEN. 1 (1923).

³² 263 U.S. 640 (1924).

³³ *Id.* at 656-58.

³⁴ 65 CONG. REC. 11298 (1924).

³⁵ Act of 25 Feb. 1927, ch. 191, § 7, 44 Stat. 1224.

The *First National Bank* Court was resolving the attorney general's conflicting interpretations of the National Bank Act of 1864 regarding the power of national banks to establish branches. 263 U.S. at 658 & n.1. The opinion placed national banks at a handicap in states where branching was permitted for state chartered banks. In describing the conditions after the decision, a House Report said that "[t]he present situation is intolerable to the national banking system. The bill [which became the McFadden Act] proposes the only practicable solution . . . by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." H.R. REP. NO. 83, 69th Cong., 1st Sess. 7 (1926). For a further discussion of the history leading to the passage of the McFadden Act, see *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921, 930-32 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); 39 Fed. Reg. 44416 (1974).

sult of the passage of this act, the national bank act has been so amended that *national banks* are able to meet the needs of modern industry and commerce and *competitive equality* has been established among all member banks of the Federal Reserve system."³⁶

Thus the concept of "competitive equality" in branch banking was conceived. In the 1966 case of *First National Bank v. Walker Bank & Trust Co.*,³⁷ the Supreme Court applied this principle of "competitive equality" to section 36(c). In *Walker*, two national banks attempted to establish branches in a manner which was prohibited to Utah state banks.³⁸ A Utah statute permitted branch banking only to the extent that an existing bank acquired a bank which itself had been operating for five years.³⁹ The Comptroller argued that since the Utah statute permitted some type of branching, section 36(c) did not prevent federal banks from branching.⁴⁰ Furthermore, the restriction limiting branching solely to the takeover of an existing bank, the Comptroller maintained, was not applicable to national banks.⁴¹ The Supreme Court rejected this argument and read the legislative history of the McFadden Act to mean that state and national banks should compete on the basis of "competitive equality," thereby precluding one system from having branching privileges not available to the other.⁴² Accordingly, the Court stated:

It 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 It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption.⁴³

Moreover, the Court concluded, the concept of "competitive equality" required that state law control as to the "method" of branching allowed. Such method, the Court held, was part and parcel of Utah's policy, "and was absorbed by the provisions of §§ 36(c) (1) and (2), regardless of the tag placed upon it."⁴⁴ The Court then determined that a state's control of branching "method" included control as to how, where, and when a national bank may branch.⁴⁵

Thus, the *Walker* Court established that "competitive equality" is to be a factor in interpreting sections 36(c) (1) and (2) of the McFadden Act, and that the restrictions imposed upon state banks as to whether and where they may branch apply to national banks. However, it did not decide to what extent competitive equality applied to the *definition* of a branch under section 36(f). That issue was addressed three years later in *First National Bank v. Dickinson*.⁴⁶

³⁶ 68 CONG. REC. 5815 (1927) (emphasis added).

³⁷ 385 U.S. 252 (1966).

³⁸ *Id.* at 253.

³⁹ *Id.*

⁴⁰ *Id.* at 261.

⁴¹ *Id.*

⁴² *Id.* at 259-61.

⁴³ *Id.* at 261.

⁴⁴ *Id.* at 262.

⁴⁵ *Id.*

⁴⁶ 396 U.S. 122 (1969).

CASENOTES

In *Dickinson* a national bank had received permission from the Comptroller to operate two services for the convenience of its customers: one was an armored car service which delivered cash and received funds for deposit on a daily basis and the other was an off premise receptacle for the receipt of packages containing cash and checks for deposit.⁴⁷ The Florida Banking Commissioner advised the bank that the proposed depository under construction and the armored car service each would violate Florida's prohibition against branch banking.⁴⁸ The bank then sought, in federal court, a declaratory judgment that its proposed services did not constitute branching and were, therefore, permitted under federal law despite Florida's prohibition on branch banking.⁴⁹

Chief Justice Burger, writing for the Court, recognized that in fostering competitive equality, the "[McFadden Act] has incorporated by reference the limitations which state law places on branch banking activities by state banks."⁵⁰ He described "[t]he mechanism of referring to state law [as] simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation."⁵¹ However, the *Dickinson* opinion explicitly rejected any contention that a state's definition of branch "must control the content of the federal definition of § 36(f)."⁵² The Chief Justice made it very clear that the definition of a branch under section 36(f) was a matter of federal law:

Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank, supra*, for in § 36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch."⁵³

This language suggests that even though state law may be influential in deciding if a national bank may open a branch under section 36(c), it should not be controlling in deciding what a branch is under section 36(f).

The Court then addressed the question of the proper definition of "branch" under section 36(f). In searching legislative history for guidance in interpreting section 36(f), the Court noted that Representative McFadden had described a branch as "[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 any business carried on at the main office . . ."⁵⁴ Relying on this description, the Court stated, in language that has particular significance to the *St. Louis County* decision, that section 36(f):

⁴⁷ *Id.* at 125, 127.

⁴⁸ *Id.* at 129.

⁴⁹ *Id.*

⁵⁰ *Id.* at 131.

⁵¹ *Id.* at 133.

⁵² *Id.*

⁵³ *Id.* at 133-34.

⁵⁴ *Id.* at 134 n.8, quoting 68 CONG. REC. 5816 (1927).

defines the minimum content of the term "branch" [and] by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.⁵⁵

Furthermore, the Chief Justice stated that the definition of branch must not be given a restrictive meaning which would frustrate the congressional intent of "competitive equality" found by the Court in *Walker*.⁵⁶ In construing "branch" under section 36(f), the Court noted that a competitive advantage would accrue to a federal bank which provided the service of receiving money for deposit at a place away from its main office when such a service was prohibited to state banks.⁵⁷ The Court was satisfied that when a customer delivered money to either the armored car or the receptacle, the bank, for purposes of section 36(f), had received a deposit.⁵⁸ Therefore, under federal law, these services fit the description of branches, and as such were prohibited because they constituted an attempt to secure branching privileges which Florida denied to its competing state banks.⁵⁹

The *Dickinson* decision is pertinent to a discussion of *St. Louis County* for three reasons. First, in *Dickinson*, the Court determined that the three functions listed in section 36(f) establish only the minimum content of the term "branch," and that the actual definition of that term may include other functions not specifically listed in the statute. Second, the *Dickinson* Court established that "competitive equality" may be considered in the federal definition of branch under section 36(f). Third, the Court rejected applying a state's definition of branch in arriving at a federal definition of that term under 36(f). Thus, in what appears to be an incongruity, while rejecting applying a state's definition of branch in arriving at a federal definition, the Court decided that in order to maintain "competitive equality," the federal definition of "branch" was influenced by the fact that if national banks could accept deposits they would have an advantage over state banks which could not. However, the *Dickinson* Court did not indicate how "competitive equality" could be assured *without* taking into consideration the state definition of branch. These then were the confused guidelines the *St. Louis County* court was left to follow.

B. "Competitive Equality" as Applied in *St. Louis County*

The *St. Louis County* majority discussed the concept of "competitive equality" but did not expressly base its decision on an application of that doctrine. Rather, the court chose to rely upon its interpretation of the meaning of the definition of "branch" contained in section 36(f). The court noted that the Clayton office of Mercantile Trust Company performed none of the listed functions of a branch—receiving deposits, paying checks or loaning money.⁶⁰ However, the *St. Louis County* majority broadened the

⁵⁵ *Id.* at 135.

⁵⁶ *Id.* at 134.

⁵⁷ *Id.* at 137.

⁵⁸ *Id.*

⁵⁹ *Id.* at 137-38.

⁶⁰ 548 F.2d at 717.

definition of "branch" beyond those three functions. In doing so, the court was very careful to point out, that it was relying on the McFadden Act, congressional intent and federal judicial construction but not on the definition given by Missouri law.⁶¹ It noted that section 36(f) defines a branch to include the three functions listed.⁶² In addition, the court noted that the Supreme Court in *Dickinson* stated that the word "include" suggests a "calculated indefiniteness with respect to the outer limits" of the term branch, and that services of a branch bank "may include more" than the three listed functions.⁶³ Accordingly, the *St. Louis County* court concluded that "accepting deposits, paying checks or lending money are not the only indicia of branch," since modern branch banking typically provides many other services.⁶⁴ Since the performance of trust services is a typical banking function, the court held that the trust office was a branch as contemplated by section 36(f).

The court found further support for its expanded definition of a branch office in a comment made by Representative McFadden that a branch included a place in which the bank "transact[ed] any business carried on at [its] main office."⁶⁵ The court noted that Mercantile Trust conducted a substantial amount of trust business at its main office.⁶⁷ Thus since the trust activity in Clayton closely paralleled the trust work conducted at Mercantile's main office, the court found that the Clayton office came within the definition of "branch" as set forth by Representative McFadden.⁶⁸

In dissent, Judge Henley observed that the McFadden Act was passed for the purpose of enabling national banks to compete, and that the Act was not meant to restrict their operations.⁶⁹ He also argued that Congress was well aware of trust departments in 1927 and if it had intended to include trust business in its definition of branch it would have done so.⁷⁰ Additionally, Judge Henley contended that a facility is not a branch merely because it performs some function or furnishes some service, other than accepting deposits, cashing checks, and making loans, which banks customarily provide.⁷¹

It is submitted that the position advanced by Judge Henley in dissent lacks support. The dissent's view of the McFadden Act as enabling legislation may have had validity if the majority's holding had been based solely upon the doctrine of "competitive equality." However, as noted earlier, the majority listed other reasons for determining that the office was a branch under section 36(f).⁷² With respect to congressional awareness of trust de-

⁶¹ *Id.* at 720.

⁶² *Id.* at 718.

⁶³ *Id.*, quoting *Dickinson*, 396 U.S. at 135.

⁶⁴ 548 F.2d at 719.

⁶⁵ *Id.* at 719-20.

⁶⁶ *Id.* at 718-19. See text at note 54 *supra*.

⁶⁷ *Id.* at 719-20. See note 10 *supra*.

⁶⁸ *Id.* at 720.

⁶⁹ *Id.* at 721 (Henley, J., dissenting).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See text at notes 60-68 *supra*.

partments in 1927, it should be noted that Representative McFadden was quite clear in his statement that an office conducting *any* business carried on at the main office was a branch.⁷³ The dissent ignored this statement as well as the volume and scope of business conducted in Clayton that was also performed at the main office.⁷⁴

Finally, the dissent's point that a facility is not a branch merely because it performs some function or furnishes some service other than the three services enumerated in 36(f) appears to be an attempt to counter the *Dickinson* Court's view that the definition of branch is not limited to those three functions. The dissent's observation may be well taken in the context of a facility that performs activities not directly related to banking, such as advertising for a charitable group. However, if the dissent does not believe that offering trust services rises above "merely" providing customary functions, it is difficult to conceive of what, if any, activities other than those within the four corners of 36(f), would be sufficient to constitute branch banking.

In view of the majority's analysis of the language of the McFadden Act, congressional intent, and federal judicial construction and the preceding discussion of the dissenting opinion, it appears that the *St. Louis County* court correctly decided that Mercantile's office was a branch. The imbalance in "competitive equality" that would have resulted was too great to allow Mercantile to continue the operation of the Clayton trust office. The court went a step beyond the language and previous interpretation of section 36(f), but the maintenance of "competitive equality" dictated the result.

The court's reasoning, however, did not explain the proper role of state law in reaching a federal definition of "branch." The court was quite explicit in not relying on state law, which is consistent with *Dickinson*,⁷⁵ but at some point this court may need to look to state law in analyzing "competitive equality" under section 36(f). For example, there could be conflicting interpretations of section 36(f) within the Eighth Circuit should a case similar to *St. Louis County* be brought in a state that prohibits branch banking, but does not define trust offices as branches, thus allowing the kind of trust office that Mercantile had opened. The court would have to decide whether competitive inequality would exist if national banks were not allowed to use such a facility. If competitive equality were threatened, the court would be required to find that the trust office was *not* a branch under section 36(f) in that particular state in order to allow the national bank to compete without being in violation of section 36(c). Yet, within Missouri, which is also in the Eighth Circuit, this kind of office is a branch. Would this mean, then, that unlike roses, a branch is not a branch?

A similar inconsistency could result if, hypothetically, Missouri changed its statute to eliminate any restrictions on branching, or if the state ruled that trust offices are not branches for purposes of state law. The effect would be that Missouri law would not consider trust offices as prohibited branches. Hence Missouri banks would not be prohibited from opening such trust offices. Yet since Mercantile's trust office was defined as

⁷³ See text at note 54 *supra*.

⁷⁴ See text and note 10 *supra*.

⁷⁵ 548 F.2d at 720.

CASENOTES

a branch by the federal court, and since Missouri still prevented branching, Mercantile would be prohibited by section 36(c) from operating its "branch." Thus Missouri banks would be conducting business in a manner prohibited to national banks, and competitive equality would be threatened.

If competitive equality is to be achieved, it would appear ill-advised not to consider what limitations or privileges are applicable to state banks if national banks are to compete with them. Indeed, in fostering competitive equality, courts *have* looked to state law in analyzing section 36(f). The Eighth Circuit was quite explicit in relying on a state definition of branch in *Nebraskans for Independent Banking v. Omaha Nat'l Bank*.⁷⁶ In ruling that a challenged drive-in and walk-in facility was a branch and not an extension of the main bank,⁷⁷ the appeals court stated that the district court was in error for disregarding the

indispensable role state law must play in applying the federal definition of "branch" in order to maintain competitive equality. By force of the language of § 36(c) itself, the fact that a state bank would not be permitted to operate the challenged facility in addition to its other existing facilities, must take precedence as a decision criterion over the many administratively and judicially conceived factors discussed above.⁷⁸

A concurring opinion and a vigorous dissent in which Judge Henley joined, rejected this reliance upon state law to determine the definition of a branch under federal law.⁷⁹

Another case which suggests looking to state law is *Independent Bankers Ass'n of America v. Smith*.⁸⁰ The issue in that case was whether customer-bank communication terminals (CBCT's)⁸¹ were branches, and the court found that in fact they were.⁸² A footnote in the opinion is particularly relevant to a discussion of *St. Louis County* and the role of state law in the federal definition of branch. The court described a hypothetical situation in which a state would prohibit branching but classify CBCT's as non-branches.⁸³ This would allow state banks to install CBCT's where they were denied to national banks because CBCT's were defined as branches according to federal law. The court rejected a narrow construction of section 36(c) in such a situation for two reasons. The first was the belief that the Comptroller can consider a state's administrative ruling or opinion "in-

⁷⁶ 530 F.2d 755 (8th Cir.), *vacated and remanded*, 426 U.S. 310 (1976).

⁷⁷ 530 F.2d at 763.

⁷⁸ *Id.*

⁷⁹ *Id.* at 764-67. This may explain the reluctance of the *St. Louis County* court not to place such reliance on state law, but Judge Henley in his dissent in *St. Louis County* believed the court again had relied improperly on the state's definition of branch. See text at notes 69-71 *supra*.

⁸⁰ 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976).

⁸¹ The device is activated by a customer card. Access to the machine usually is achieved by inserting the card and keying in a personalized identification number that is unique to that customer. The devices may be installed in bank lobbies, shopping centers, factories, supermarkets or any other place a bank wishes to provide a service to its customers. Depending upon the capabilities of the machine, it may be tied directly into a computer system or be operated in an "off-line" mode. In the off-line mode, the transactions are accumulated on a magnetic tape or disk for subsequent entry into the computer system.

⁸² 534 F.2d at 951-52.

⁸³ *Id.* at 948-49 n.104.

terpreting the state's branching laws so long as that opinion does not violate the anti-branching standard imposed by the statute law of the state."⁸⁴ The second reason was that a narrow reading of section 36(c) would engender the precise form of competitive inequality the McFadden Act was designed to prevent.⁸⁵ The court did not want to frustrate congressional intent by allowing states to manipulate statutes and rulings to gain an advantage over national banks.⁸⁶ Accordingly, in preventing the frustration of congressional intent, the court would not hesitate to rely on state law in deciding what constitutes a branch under a federal definition.

Clearly therefore, it would not have been unprecedented for the *St. Louis County* court to look to state law in maintaining competitive equality. However, there must also be a recognition of the inconsistent results that may occur in achieving this equality. The dilemma of the possible inconsistencies is a result of the language of the McFadden Act and the Supreme Court's interpretation of the act, particularly in the *Dickinson* case, in which the Court was insistent that state law would not define the federal definition of the term "branch" in section 36(f). It has been eight years since *Dickinson* was decided and it may be time for the Court to give a new interpretation to "competitive equality." It has been fifty years since the McFadden Act was written, and it may also be time for Congress to address the problem in light of current developments. If an alternative to the present branching laws and the courts' interpretation of these laws is not forthcoming, an inconsistency could arise as in the hypothetical situation of a change in Missouri law, where a court may rule one day that some combination of bricks and mortar is a branch and the next day rule that it is not. Theoretically the same court that decided *St. Louis County* could face such a dilemma.

II. FIDUCIARY POWERS OF MERCANTILE TRUST UNDER 12 U.S.C. §92(a)

The Clayton office that was opened by Mercantile was different from other facilities that have been declared branches because it performed only trust services. Thus its establishment was challenged not only under the banking statutes governing branches, but also under the statute governing fiduciary powers. This statute had its beginning in a provision of the Federal Reserve Act of 1913 which granted the Board of Governors of the Federal Reserve System the authority to supervise national banks applying for fiduciary powers.⁸⁷ Previously, national banks had no authority to act in a fiduciary capacity. In 1962, a new section of the act, now codified as 12 U.S.C. § 92(a), transferred the supervisory authority from the Board of Governors to the Comptroller of the Currency.⁸⁸ The Comptroller now has

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* For a general discussion of this CBCT classification problem and the relation of the McFadden Act definition of "branch" to state laws, see Note, *Customer Bank Communication Terminals Under the McFadden Act*, 47 U. COLO. L. REV. 765 (1976). For a criticism of the inconsistencies that could arise in maintaining "competitive equality," see Note, *Customer-Bank Communication Terminals and the McFadden Act Definition of a "Branch Bank,"* 42 U. CHI. L. REV. 362, 381-84 (1975).

⁸⁷ Act of 23 Dec. 1913, ch. 6 § 11(R), 38 Stat. 251, 262.

⁸⁸ Act of 28 Sept. 1962, P.L. 87-722, 76 Stat. 668, codified in 12 U.S.C. 92(a) (1970). See note 15 *supra* for the text of the statute.

the authority under section 92(a) to grant fiduciary powers to national banks "when not in contravention of State or local law."⁸⁹ This condition imposed upon the activities of national banks has been interpreted to mean that in enacting section 92(a), "Congress intended to create the same kind of 'competitive equality' with regard to trust services" that it intended to create in branch banking.⁹⁰

The majority in the *St. Louis County* case subscribed to this view that competitive equality was incorporated into section 92(a).⁹¹ Since Missouri banks were not allowed more than one location for exercising fiduciary powers, the court reasoned that "to allow Mercantile to accomplish what a state bank could not would frustrate the purpose of section 92(a)."⁹² It thus concluded that Mercantile's Clayton trust office was in contravention of state law within the meaning of section 92(a).⁹³

Judge Henley's dissent reasoned that the majority's reading of 92(a) suffered from the same defect of expansion used in interpreting section 36(f).⁹⁴ Judge Henley pointed out that 92(a) says nothing about prohibiting where fiduciary services might be offered.⁹⁵ He believed that sections 36 and 92(a) were not passed for the purpose of restricting national banks, but rather to enable national banks to compete with state banks.⁹⁶ In his opinion, the solution to the Clayton trust office situation was state enabling legislation to allow Missouri banks to compete with Mercantile Trust.⁹⁷

The majority opinion stands on even firmer footing in finding Mercantile's trust office was in "contravention of State or local law" under section 92(a) than it was in finding that the office was a branch under section 36(f). In its interpretation of section 36(f), the majority had to read into the statute an activity—trust services—not specifically listed in the definition of a branch. It did so by an expansion of the word "include" in section 36(f). In contrast, since Missouri banks could not operate more than one place of business for their exercise of fiduciary powers,⁹⁸ the Clayton trust office was squarely "in contravention of State or local law" under section 92(a).

⁸⁹ Section 92(b) provides that if state banking institutions have such powers, then the exercise of these powers by national banks is not in contravention of State or local law.

⁹⁰ *American Trust Co. v. South Carolina State Bd. of Bank Control*, 381 F. Supp. 313, 323 (D.S.C. 1974); *accord*, *Blaney v. Florida Nat'l Bank*, 357 F.2d 27, 30 (5th Cir. 1966). See S. REP. NO. 2039, 87th Cong., 2d Sess. reprinted in [1962] U.S. CODE CONG. & AD. NEWS, 2735, 2736, where the report in commenting on section 92(a) affirms the principles underlying the dual banking system. In *New Hampshire Bankers Ass'n v. Nelson*, 336 F. Supp. 1330 (D.N.H.) *aff'd*, 460 F.2d 307, 308 (1st Cir.), *cert. denied*, 409 U.S. 1001 (1972), suit was brought challenging a New Hampshire statute prohibiting trust companies, similar organizations or national banks from advertising that they were authorized to act as executors. 336 F. Supp. at 1332. The district court decided that there is no inherent right of banks to advertise, and since the statute did not discriminate in its law on advertising, it did not place national or state banks at a competitive disadvantage for fiduciary business under section 92(a). 336 F. Supp. at 1334-35.

⁹¹ 548 F.2d at 720.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 721 (Henley, J., dissenting).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 722.

⁹⁸ See note 7 *supra*.

Because the trust office was prohibited by section 92(a), the court could have avoided the problem of defining a "branch" under section 36(f). The only determination the court had to make under section 92(a) was that the same fiduciary capacity—conducting trust business in more than one location—was denied to state banks.⁹⁹ Although state law defined such an office as a branch,¹⁰⁰ the court did not need to rely on that fact to find that an office conducting trust business away from the main office was "in contravention of State" law.¹⁰¹ Such a finding could result regardless of whether federal law defined such an office as a branch. The court appears to recognize this point in its analysis of the 92(a) violation. Nowhere in the court's discussion of the trust office in relation to 92(a) does it describe the office as a branch.¹⁰² It only finds that since a state bank cannot operate the same kind of office, Mercantile's office is in contravention of state law and hence prohibited by 92(a).¹⁰³ In finding this violation of 92(a) it places no reliance at all upon its previous determination that the office was a branch. This non-reliance is quite appropriate because the statute does not require a determination that the office is a branch to find the 92(a) violation.

Thus, for a disposition of the case, the extension of section 36(f) was unnecessary. The court could have avoided the possible future inconsistent results that have been described by basing its holding on a finding that section 92(a) had been violated, and therefore that the trust office was not authorized.

CONCLUSION

The Eighth Circuit quite appropriately decided that the office performing trust services in *St. Louis County* was in violation of federal law. However, in finding that the office was a "branch" the court may have forced itself into a position where on similar facts in another case it would be forced to make an inconsistent decision. This inconsistency could arise because of the impact of state law upon the federal definition of "branch." For that reason this note suggests that the court did not need to find that the Clayton trust office was a branch and hence prohibited by section 36(c). To decide the case it was not necessary to find a branch in order for there to be a violation of 92(a). Therefore it is submitted that the extended interpretation of section 36(f), with all of its potential for judicial headaches, was unnecessary.

THOMAS J. URBELIS

⁹⁹ See 12 U.S.C. § 92(a) at note 15 *supra*.

¹⁰⁰ See note 7 *supra*.

¹⁰¹ 12 U.S.C. § 92(a). See note 15 *supra*.

¹⁰² See 548 F.2d at 720.

¹⁰³ *Id.*