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ELECTRONIC FUND TRANSFERS, BRANCH BANKS, AND POTENTIAL ABUSE OF PRIVACY

I. Introduction

Because increasing numbers of checks are being written annually,¹ banks are looking to computers as a means of alleviating their paperwork problems. One use of computers in this context has been the development of electronic fund transfer EFT systems, which, banks hope, will save them from drowning in a sea of paperwork.² EFT systems allow customers to make deposits and withdraw money from their accounts, pay bills, obtain loans to a pre-arranged credit limit, and to transfer funds between their savings accounts and checking accounts.

EFT systems are usually operated in connection with a bank at facilities such as a supermarket, shopping center or some other location not likely to have a bank office, but where people may find themselves in need of additional funds, or where they will already be transacting business. To activate the terminal, the user inserts a plastic bank card, which has identifying information encoded on it, into the computer terminal.³

1. Oklahoma *ex. rel.* State Banking Bd. v. Bank of Oklahoma, 409 F. Supp. 71, 85 (N.D. Okla. 1975).

2. N.Y. Times, May 31, 1977, at 41, col. 1.

3. Some of the more frequently used terms to describe EFT systems are point-of-sale terminals (POS), place of business terminals (POB), and customer-bank communications terminals (CBCT). EFT system terminals will be referred to as CBCTs herein.

EFTs have been referred to in a variety of ways. However, they are commonly understood to be remote computer terminals which are relatively small, ranging in size from a small portable television set with a keyboard that resembles a typewriter to a device that resembles a desk-sized adding machine. The terminals may be located within a store, or they may be completely outside of stores or other buildings and they may be operated by the employees of the store in which they are located or by the bank customer. The reason for establishing EFT systems is that they provide bank customers with convenient access to a number of traditional banking services at locations that are often more convenient than bank offices. They also provide customer access to many banking services at times that the banks themselves are not open.

The terminals may be either on-line (hooked directly into the bank's computer) or off-line (not directly connected to the computer). If the computer is off-line, the customer will immediately be able to type out his or her personal identification number. If it is on-line, the computer will first verify that the card is valid and currently in effect and will then tell the user to proceed to input the personal identification number. Next, in both systems, the user selects the transactions desired. In an off-line system the terminal will proceed to honor the user's request for a valid transaction. If the transaction is a withdrawal, the terminal will

EFT systems have a number of advantages for financial institutions. Because they can make banking far more convenient for customers,⁴ they are likely to attract new customers, including those of competitors that do not utilize these systems. They also eliminate part of the cost of processing checks.⁵ Additionally, some bankers view EFT systems as a means of reducing voluminous paperwork;⁶ over 27 billion checks are expected to be processed this year.⁷ One banker estimated that it might reasonably be possible to save ten cents on the processing of each check via EFT systems.⁸ This would be a savings of 2.7 billion dollars. Future savings might well be even higher, since historically, the rate of growth of checks processed has been seven per cent per year.⁹

Some banks see EFT systems as a way of cutting the cost of their operations, by eliminating brick and mortar buildings,¹⁰ and possibly reducing the number of employees.¹¹ The use of EFT systems would also help eliminate lost checks.¹² One New York bank, Citibank, loses 7,000 checks per day.¹³

EFT systems also have some disadvantages. Customer acceptance is by no means universal. Some banks have found the systems to be very costly to maintain and with too few customers using them to warrant their continued operation.¹⁴ Additionally, this marvel of modern technology has created problems with the banking and anti-trust laws, as well as with the right to privacy. Furthermore, some

typically disgorge the requisite amount of pre-packaged currency (usually terminals contain packets of twenty-five dollars and any number of packets up to the maximum allowed by that particular EFT system can be provided to the user) and will then prepare a receipt in duplicate and will give one copy to the user and keep the other for the bank's records. In an on-line system, the terminal will first verify that the customer's account contains the necessary funds at the time of the transaction before proceeding as the off-line system does. In all EFT systems, the transactions must be verified and processed at the bank's offices before the bank will consider them complete. The terminals are serviced daily.

4. N. Y. Times, May 31, 1977, at 41, cols. 1-2.

5. *Id.*

6. *Id.* at col. 1.

7. *Id.*

8. *Id.*

9. Oklahoma *ex. rel.* State Banking Bd. v. Bank of Oklahoma, 409 F. Supp. 71, 85 (N.D. Okla. 1975).

10. N. Y. Times, May 31, 1977, at 41, col. 1.

11. *See id.*

12. Franklin, *Regulation of EFT Revolution*, 37 U. Pitt. L. Rev. 693, 697 n.21 (1976).

13. *Id.*

14. N. Y. Times, May 31, 1977, at 41, col. 1.

small banks are afraid of being put out of business by the giants of the banking industry if EFT systems are allowed; even regional banks are not happy at the prospect of competition from the industry giants via EFT systems. However, in view of government interest as well as the interest being expressed by a number of the giants in the banking industry, EFT systems seem to be here to stay.¹⁵

This Comment will examine some of the legal problems which have resulted from attempts by national banks to use EFT systems in states which do not allow state banks to engage in branch banking. Initially it will focus on whether EFT systems are branch banks under applicable federal law.

II. EFT Terminals: Are They Branch Banks?

A variety of court decisions,¹⁶ the Comptroller of the Currency,¹⁷ the Federal Home Loan Bank Board¹⁸ and the National Credit Union Administration¹⁹ (NCUA) have dealt with EFT systems. All but the NCUA have addressed the question of whether an EFT terminal is a branch of the bank which operates it. This question is a particularly important one with respect to national banks (which are regulated by the Comptroller of the Currency), because of possible conflict between state and federal banking policy.

Historically, the United States has had a dual system of banking, *i.e.* federal and state banks. The former are chartered and regulated by the United States pursuant to the Constitution of the United States and laws enacted by Congress; the latter are regulated by the state which charters them, and are subject to its laws. Some states legislatively permit their banks to establish branches either on a limited²⁰ or unlimited basis,²¹ while the public policy of other states favors a "unitary" banking system that absolutely prohibits the establishment of any branches whatsoever.²²

15. See, *e.g.*, IOWA CODE ANN. § 524.821 (West Cum. Pamphlet 1978).

16. See text accompanying notes 41-128 *infra*.

17. 12 C.F.R. § 7.7491 (1974), *suspended* 40 Fed. Reg. 49077, Oct. 21, 1975, *rescinded* 41 Fed. Reg. 36198, Aug. 27, 1976.

18. 12 C.F.R. § 545.4-2 (1974), 12 C.F.R. § 545.14-5, 39 Fed. Reg. 2399, June 28, 1974, *corrected*, 39 Fed. Reg. 26286, July 18, 1974.

19. 12 C.F.R. § 721.3 (1974).

20. Comment, *Customer-Bank Communication Terminals and the McFadden Act Definition of a "Branch Bank"*, 42 U. Chi. L. Rev. 362, 364 (1975).

21. See generally, Prives, *Electronic Fund Transfer Systems and State Laws*, 93 Banking L.J. 527 (1976).

22. Regulations promulgated by the Comptroller of the Currency, the Federal Home Loan

In 1924, the United States Supreme Court held that federal banks could not establish branches because the Federal Banking Act of 1864 contained no express statutory authorization.²³ State banking systems were allowing their banks to branch and, as a result, federal banks were hurt competitively to such an extent that the dual banking system was nearly destroyed.²⁴ In 1927, Representative McFadden introduced a bill which permitted federally chartered banks (national banks), with the approval of the Comptroller of the Currency, to establish branches in the same city in which they had their main offices if state banks could do so.²⁵ Congress passed the bill and then amended it in 1933 to provide that federally chartered banks could establish branches anywhere in the state in which they were located if state banks were so authorized.²⁶ Thus, state law, in effect, controls federal banks with respect to the establishment of branches. However, the Court has said that the federal definition

Bank Board and the National Credit Union Administration served as catalysts for states opposed to branch banks on policy grounds and for banks to challenge the regulations in a variety of court actions. Unfortunately, individual agencies have no way of limiting the impact of their decisions to the institutions they supervise because competition in the financial industry is keen. If, for example, the Federal Home Loan Bank Board lets federally chartered savings and loan institutions use EFT systems, national banks and credit unions not allowed to use EFT systems are at a competitive disadvantage. To remedy this, the agencies that control them will probably also allow these institutions to use EFT systems. In fact, at least some of the regulations allowing the use of EFT systems probably occurred for exactly this reason.

23. *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656-659 (1924).

24. Comment, *Electronic Funds Transfer And Branch Banking—The Application of Old Law to New Technology*, 35 Md. L.R. 88, 90-93 (1975) [hereinafter *EFT and Branch Banking*]. *First Nat'l Bank v. Walker*, 385 U.S. 252, 257 (1966).

25. *EFT and Branch Banking*, *supra* note 24, at 92.

26. *Id.* at 92-93. Section 36 provides in 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).

States vary widely in their treatment of branch banks. Some allow unlimited branching, others allow no branching, some allow limited branching and one allows unlimited branching within the state and foreign countries. Comment, *Customer-Bank Communication Terminals and the McFadden Act Definition of a "Branch Bank"*, 42 U. Chi. L. Rev. 362, 364 (1975).

rather than state law applies to define "branch," for states would have too much power if state law were allowed to govern the definition.²⁷

Most problems with EFT systems have occurred because of the definition of "branch" set out in section 36(f) of the McFadden Act. It provides that the term branch includes branch banks, offices, agencies of any "place of business"²⁸ located in the United States or its territories and the District of Columbia "(a)t which deposits are received, or checks paid, or money lent." The Supreme Court examined the legislative history of the McFadden Act in *First National Bank v. Walker Bank & Trust Co.*²⁹ and concluded that Congress' purpose was to provide for "competitive equality" between state and federal banks.³⁰ Accordingly, in 1969, the Court held in *First National Bank v. Dickinson*,³¹ that ". . . (N)ot merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers" must be considered when determining whether a facility is a "branch bank."³²

In the *Dickinson* case, the Court found that an armored car service and a stationary facility to which customers could take money for transmittal to the bank's main office for deposit there were branch banks. The bank's contractual arrangement with its customers stipulated that the debtor-creditor relationship would not arise until the funds were in the bank's main office and the crediting of the customer's accounts completed; but the Court said the intent of parties to a private contractual agreement was not binding for purposes of interpreting a federal law.

Almost all of the courts which have applied the McFadden Act test have found that at least one of the transactions commonly permitted by EFT systems met the *Dickinson* interpretation of the "branch bank" test. While most courts agree that deposits are made at EFT terminals,³³ there is wide disagreement over whether money

27. *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 133 (1969), *rehearing denied*, 396 U.S. 1047 (1970).

28. 12 U.S.C. § 36(c) (1970).

29. 385 U.S. 252 (1966), *rehearing denied*, 385 U.S. 1032 (1967).

30. *Id.* at 261.

31. 396 U.S. 122 (1969).

32. *Id.* at 136-37.

33. *E.g.*, *Colorado ex. rel. State Banking Bd. v. First Nat'l Bank*, 394 F. Supp. 979 (D. Colo. 1975).

is withdrawn or checks cashed.³⁴ Several courts have held that these functions are performed,³⁵ and at least one court refused to decide the issue.³⁶

In recent years, legislation dealing with EFTs has proliferated, with 20 states enacting a variety of EFTs legislation in one year.³⁷ Some statutes provide that EFTs are not branch banks.³⁸ The New York, New Jersey and Oregon acts,³⁹ say that they are branches, while other legislation seems to imply that banking transactions are conducted only at a bank and not at remote terminals.⁴⁰

34. *Illinois ex. rel. Lignoui v. Continental Illinois Nat'l Bank & Trust Co.*, 409 F. Supp. 1167 (N.D. Ill. 1975), *Independent Banker's Ass'n v. Smith*, 402 F. Supp. 207 (D.D.C. 1975), *Oklahoma ex. rel. State Banking Bd. v. Bank of Oklahoma*, 409 F. Supp. 71 (N.D. Okla. 1975).

35. *Colorado ex. rel. State Banking Bd. v. First Nat'l Bank*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *Independent Banker's Association v. Smith*, 402 F. Supp. 207 (D.D.C. 1975).

36. *Missouri ex. rel. Kostman v. First Nat'l Bank*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976).

37. Prives, *Electronic Fund Transfer Systems and State Laws*, 93 *Banking L.J.* 527 (1976) (footnote omitted) [hereinafter *State Laws*].

38. *Id.* at 570.

39. *Id.* at 570 n.76.

40. *Id.* at 570. Some states require different banks to share the same EFT equipment, *id.* at 556, others permit such sharing, *id.*, a few require some institutions to share and permit others to do so. *Id.* Still others are silent on this point. *Id.* at 553.

For an excellent discussion of some of the problems which sharing provisions of state EFTs laws may cause, see *id.* at 553-64. For a discussion of possible antitrust problems which the use of EFT systems may create, see Ubell, *Electronic Fund Transfer and Antitrust Laws*, 93 *Banking L.J.* 43 (1976); Vernard, *Some Antitrust Issues Raised by Large Electronic Fund Transfer Systems*, 25 *Cath. U.L. Rev.* 749 (1976); Murray, *EFTs and Antitrust—Some Reflections On The Possibilities*, 37 *U. Pitt. L. Rev.* 673 (1976); Note, *The Effect of the Use of Customer Bank Communications Terminals on Competition Among Financial Institutions*, 45 *U. Cinn. L. Rev.* 591 (1976). For a more general discussion of the application of antitrust laws to banking services, see Comment, *Applying Federal Antitrust Law to Banking Services—Non-Interest Bearing Accounts*, 25 *Me. L.R.* 315 (1973).

Additionally, a few states voice concern with privacy, while most say nothing about it. *State Laws*, *supra* note 37, at 572. Some define EFT systems narrowly, *id.* at 543-544, while still other states offer no definition. *Id.* at 542-44. In short, there is no uniformity among the states on this subject. For a general discussion of the privacy provisions of EFT laws in those states which have such provisions, see *id.* at 572-74.

It should also be noted that although case law to date has dealt with the type of EFT system described above, at least one commentator has said that a number of EFT systems might be the subject of legislation. They are:

- (1) Automated teller machines;
- (2) Points-of-Sale terminals (handling transactions in retail stores);
- (3) Service-counter terminals (handling deposits and withdrawals in retail stores);
- (4) Telephone banking services in the home;
- (5) Check and credit verification (sponsored by financial institutions, bank card systems, credit cards or retailers);

A. Court EFT Decisions

*State of Colorado ex. rel. State Banking Board v. First National Bank*⁴¹ was one of the first cases to consider the EFT-branch bank question. Pursuant to authority granted by the Comptroller of the Currency the defendant established an EFT system which had a customer bank communications terminal at a shopping center about two and eight-tenths miles from the bank. The terminal, a self-contained unit, was not staffed by any bank personnel. The customer could obtain pre-packaged funds in amounts of \$25.00 or \$50.00 which constituted a withdrawal from the customer's account, or could obtain funds against a previously established line of credit. The customer could also make deposits and transfer funds between checking and savings accounts.⁴²

Colorado prohibited branch banking, but the court noted that it was common for customers of state and federal banks to make deposits by mail, using envelopes supplied by the banks. Bank customers often transferred funds between accounts by means of wire or telephone communications, and Colorado commercial banks also extended a line of credit to commercial customers.

The court, relying on the *Walker* case, found that Congress intended to provide for "competitive equality" between state and federal banks when it passed the McFadden Act. Furthermore, the court applied the *Dickinson* test to determine whether the remote terminal was a branch bank. Judge Matsch saw no functional difference between the terminal and the stationary deposit facility in *Dickinson*. Therefore, he concluded that insofar as deposits were accepted by the terminal, it was a branch bank.⁴³

However, Judge Matsch further found that checks were not being

(6) Automated clearing houses;

(7) 'Future systems' with uncertain characteristics under sponsorship by financial and nonfinancial institutions.

Id. at 583.

Many of these areas are already subject to EFT laws. For a discussion of some of the problems created by such legislation, see *id.* at 544-50. However, discussion of state EFT statutes is outside the scope of this Comment and will not be discussed further.

41. 394 F. Supp. 979 (D. Colo. 1975).

42. Two individuals collected the transaction forms, checks and currency from the terminal each day and otherwise serviced the terminal. All of the material was taken to the bank's main office for verification and processing into computer readable characters and sent to the computer center for appropriate action. *Id.* at 982.

43. *Id.* at 984.

cashed nor money lent by the terminal. He said that instructing the bank by pressing keys on the terminal did not meet the definition of "check" provided by Uniform Commercial Code, section 4-3-104(2)⁴⁴ or by *Webster's Dictionary*.⁴⁵ Therefore, Judge Matsch found that a transaction in which a customer obtains funds from his checking account does not constitute the cashing of a check.⁴⁶

The court also refused to find that money was being lent at the terminal when customers received funds against a pre-arranged line of credit. The court saw no functional difference between such a transaction and the use of a credit card to obtain goods or services from retailers.⁴⁷ The court also found that the transfer of funds between accounts was not branch banking.⁴⁸

Consequently, it held that the deposit function of the terminal was illegal since it constituted "branch banking;" but the other transactions were permissible, since they were authorized by the Comptroller of the Currency and did not constitute branch banking.⁴⁹

The United States Court of Appeals for the Tenth Circuit affirmed the decision with respect to the deposit function. However, it said that the withdrawal of funds and the transfer of funds between accounts met the requirements of the McFadden Act and constituted branch banking.⁵⁰ Thus, none of those functions could be performed through an EFT terminal without violating the state banking law. The court found that the district court reached its decision because of the "manner in which (the) bank's CBCT (customer bank communications terminal) permitted the withdrawal of pre-packaged packets of money . . . and also permitted the transfer of funds Such reasoning . . . unduly emphasizes form at the expense of substance and fails to follow the admonition of the Su-

44. *Id.* at 984-85. UCC § 3-104(2) reads in part: "A writing which complies with the requirements of this section is (a) a 'draft' ('bill of exchange') if it is an order; (b) a 'check' if it is a draft on a bank and payable on demand;"

45. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 381 (unabr. ed. 1964).

46. 394 F. Supp. at 984-85.

47. *Id.* at 985. There is a major controlling difference between CBCTs and the use of credit cards to obtain goods and services. The former is established or operated by a bank; the latter is not. This distinction is crucial to the application of the McFadden Act.

48. *Id.* at 984.

49. *Id.* at 985.

50. 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

preme Court . . . that '§36(f) must not be given a restrictive meaning that would frustrate the congressional intent this Court found to be plain in *Walker Bank*''⁵¹ The congressional intent referred to was that national and state banks be in a position of competitive equality.

The court said it was not necessary to find that the withdrawal and transfer of funds fit the "traditional molds of 'checks paid' or 'money lent' as used in 36(f)"⁵² because, "that section declared that the term 'branch' shall *include* any branch place of business where deposits are received or checks paid, or money lent."⁵³ The court of appeals also found that the *Dickinson* decision teaches that section 36(f) is indefinite with respect to the outer limits of that definition; the statute specifies general minimum requirements for finding a facility to be a branch bank but does not provide guidance on what *may* be a branch bank if the statutory standards are not met. Nevertheless, it said that *any* place where deposits are received, checks paid or money lent is a branch bank. Thus, the withdrawal of funds and transfer of funds from one account to another would be considered banking transactions prohibited by the Colorado anti-branching statute.

It is clear that the trial court erred when it found that checks were not being cashed nor money lent at the remote terminal. The trial court failed to apply the "owned or operated" prong of the section 36(f) test. Had it done so, the difference between credit card transactions and remote terminal functions would have been apparent. The machines into which credit cards are placed to record transactions are not owned or operated by a bank, but a bank was the owner of the remote terminals in the instant case. Thus, the trial court's failure to apply both prongs of the section 36(f) test resulted in its erroneous analysis of the functions the terminal was performing. The court of appeals' analysis of the facts and applicable case law is sounder. Truly, it places the substance of the law over the form of particular transactions.

*Independent Bankers' Association of America v. Smith*⁵⁴ resulted in the withdrawal of the regulation authorizing national banks to

51. *Id.* at 499 (emphasis in original).

52. *Id.*

53. *Id.* (emphasis in original).

54. 402 F. Supp. 207 (D.D.C. 1975).

use EFTs. Plaintiff sought judicial review of an interpretative decision of the Comptroller of the Currency which opined that off-premises customer bank communications terminals (CBCTs) were not "branch banks" within the meaning of the McFadden Act, and authorized their use by national banks even where state banks could not establish branches. The trial court disagreed with the Comptroller of the Currency. It found that EFTs are branch banks. The court of appeals affirmed in an exhaustive opinion. It examined the validity of the Comptroller's decision, that EFTs were not branch banks and discussed the legislative history of the McFadden Act. The court next examined the concepts of federalism and competitive equality, as well as the federal definition of branch bank and the manner in which that definition has been interpreted by courts.⁵⁵ The court of appeals decision is particularly noteworthy for its affirmation of the district court's finding that *all* CBCTs perform at least one of the three functions which constitute "branch banking" under the McFadden Act,⁵⁶ and must comply with all relevant federal law on the establishment of branch banks even in those states which permit branching.⁵⁷

A national bank may not establish a CBCT in an anti-branching state which views CBCTs as branches.⁵⁸ However, the court went on to state that if an anti-branching state was to determine administratively that a CBCT is not a branch under state law and permitted state banks to establish them, federal banks could also do so despite the clear language of section 36(f) which requires affirmative statutory authority for national banks to establish branches in a given state.⁵⁹ The court said the Comptroller can "consider and follow . . . administrative opinion or ruling interpreting the state's branching laws so long as that opinion does not violate the anti-branching standard imposed by statute law of the state."⁶⁰

The court further indicated that a narrow reading of section 36(c) could destroy the competitive equality Congress intended to foster.

55. 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). The opinion provides an excellent overview of the functions of EFTs terminals and of their relationship to the McFadden Act.

56. *Id.* at 934.

57. *Id.* at 948.

58. *See id.*

59. *Id.* at 948-49 n.104.

60. *Id.*

It reasoned that such a narrow reading would enable state banks to establish CBCTs as a result of an administrative decision, while national banks would not be able to do so absent affirmative statutory authority.⁶¹ The court concluded that, for this reason, section 36(c) must be read broadly in a way that provides for continuance of competitive equality between state and national banks with respect to branching.⁶²

Whether the Supreme Court will be willing to accept this well reasoned dicta and sanction such a radical departure from existing law is questionable. The Court's fairly narrow reading of the McFadden Act can be seen in the *Logan* and *Dickinson* cases, but the Court has given great weight to the intent of Congress and the doctrine of competitive equality in the past and might well do so again. Since the McFadden Act was adopted to preserve a dual banking system, it would be particularly ironic if it was interpreted so strictly as to destroy the very system whose life it previously saved. In view of Congress' intent that federal and state banks compete with each other on equal terms, the Supreme Court should adopt the reasoning of the court of appeals.

The importance which states place on their banking policy and on the doctrine of competitive equality is illustrated by *Missouri ex. rel. W. R. Kostman v. First National Bank of St. Louis*.⁶³ In that case, the State Commissioner of Finance sued the respondent bank for violation of the state's banking laws. Missouri law permits a bank to operate two offices in the same city in which the main office is located, if it has the approval of the Commissioner of Finance. Respondent was operating the three offices permitted. It then placed two EFT terminals in operation in a different county from that in which its offices were located. The general public had access to one of these terminals.⁶⁴

The federal district court, relying on section 36(f) of the McFad-

61. *Id.*

62. *Id.*

63. 405 F. Supp. 733 (E.D. Mo. 1975).

64. The EFTs allowed customers to select from among the following transactions: obtain pre-packaged cash by debiting the customer's savings or checking account or charging the amount against the customer's Master Charge account at the bank, make deposits to savings and checking accounts, transfer funds from one account to another and make payments on obligations to the bank by cash or by debiting the customer's savings or checking account. The terminals were serviced daily by a bank employee.

den Act, section 362.707 of the Missouri Statutes and the *Dickinson* and *Walker* decisions, found that the terminal was a branch bank in violation of Missouri law. The court did not indicate whether only one or all of the section 36(f) tests were met. The eighth circuit affirmed *per curiam*.⁶⁵ It concluded that deposits were made but indicated that it had not reached the question of whether checks were paid or money lent because its finding with respect to deposits was sufficient for a finding that the terminals were "branch banks."⁶⁶

If national banks are again permitted to use EFTs, that decision is likely to engender future litigation to determine whether terminals which do not accept deposits but do perform the other transactions mentioned are "branch banks." Even though the Comptroller of the Currency suspended his decision authorizing national banks to establish EFT systems,⁶⁷ federally chartered savings and loan associations⁶⁸ and credit unions⁶⁹ are still authorized to establish them. Such terminals might be challenged as illegal banks under state law. This is most likely to occur in those states which do not allow state banks, savings and loan institutions or credit unions to establish branches.

One of the reasons this may be a problem is that Congress has not provided for "competitive equality" between federally chartered thrift institutions and their state counterparts. Neither has Congress provided for "competitive equality between thrift institutions and national banks. The United States District Court for the Northern District of Oklahoma considered this problem in *Oklahoma ex rel. State Banking Board v. Bank of Oklahoma*.⁷⁰ It reasoned that state thrift institutions which were allowed to establish EFT sys-

65. 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976).

66. *Id.* at 539 n.1.

67. See text accompanying note 54 *supra*.

68. The Federal Home Loan Bank Board has established its own branching regulations with which national savings and loan associations must comply. These regulations require compliance with certain procedures and also prohibit branching in states where anti-branching policy is so strong that no state bank is allowed to establish branches. 12 C.F.R. § 556.5(b)(b)(1). Congress left the definition of branch to the Federal Home Loan Bank Board with respect to federal savings and loan associations and it says that EFTs terminals are not branches. *Oklahoma ex rel. State Banking Board v. Bank of Oklahoma*, 409 F. Supp. 71, 92-93 (N.D. Okla. 1975).

69. See text accompanying note 19 *supra*.

70. 409 F. Supp. 71 (N.D. Okla. 1975).

tems would have an unfair advantage over state banks and federal thrift institutions which were not permitted to use EFT systems.⁷¹

The Oklahoma banking commissioner authorized state financial institutions to use EFT systems and brought suit to prevent the respondent federal bank from using such systems. The district court held that EFT systems are not branches under 22 U.S.C. § 36(f). The two respondent federal banks were operating EFT systems which could transfer customer funds from one account to another and which allowed customers to make deposits to, and withdrawals from their accounts, take advantage of pre-arranged lines of credit and pay bills.

The court reached several conclusions of law which seem directly opposed to the teachings of the *Dickinson* case. However, the court indicated that the facts in the instant case could be distinguished from those in *Dickinson*, without further elaboration. Furthermore, the court found that the *Dickinson* decision is limited to its facts.

Chief Judge Barrow found as a matter of law that 22 U.S.C. § 24(7) permits national banks to exercise those incidental powers, express or implied, which are necessary to carry on the banking business.⁷³ He concluded that operation of remote terminals is necessary and incidental to carry on a banking business.⁷⁴ The court further held that the legislative history of the McFadden Act reveals that “. . . Congressional debate discloses that branches as ‘then

71. *Id.* at 92-93.

72. The Oklahoma State Bank Commissioner regulated state commercial banks and all state-chartered financial institutions including savings and loan associations, credit unions and trust companies. However, he did not treat all such institutions equally. The Commissioner allowed all state financial institutions except banks to establish EFT systems. Additionally, at least one state bank notified him in writing, of its intention to establish an EFT system. The Commissioner approved the remote terminal since he considered that state law permitted its operation. However, the Commissioner was aware that at least one national bank had been using an off-line automated teller machine for over two and one-half years. This machine performed the same functions as the respondents' EFT systems. While the Commissioner had the authority to initiate legal action to try to prevent this use, he took no action.

One of the respondents' defenses which was not ruled on by the court was that a determination that EFT systems were branch banks would violate the 14th amendment to the U.S. Constitution and the due process clause of the Oklahoma State Constitution.

73. However, in *Independent Bankers of Oregon v. Camp*, 357 F. Supp. 1357 (D. Ore. 1973), the court held that specific state statutory authorization is required for the establishment of any branch bank, including EFTs, by national banks. Where state law is silent, no such authorization exists.

74. 409 F. Supp. at 90.

conceived' by Congress were separate and complete banking establishments staffed by people where general banking business was conducted."⁷⁵ The court concluded from the testimony of several expert banking witnesses that no deposit is received until after the items tendered have been verified or counted and credited to the account of the depositor. It said that plastic bank cards and identification numbers are not checks, do not meet the statutory definition found in the UCC and are not the written instruments contemplated by the McFadden Act.⁷⁶ Additionally, checks, like deposits, are not considered to be paid as opposed to cashed, until they are presented to the drawee bank. They must then be verified as to genuineness and amount and the account balance must be sufficient. The amount is then debited and the check photographed, cancelled and its use in commerce ended.⁷⁷ Another reason for the court's finding that the terminal was not a branch bank is that disbursing cash does not automatically create a loan. Instead personal judgment of a bank officer is necessary to the making of a loan. The customer and the bank must agree on the terms before the bank can disburse funds to the customer. The court indicated that the bank's obligation to provide the funds and the borrower's commitment to repay them become effective when the terms of the loan are negotiated and the instruments evidencing the agreement are executed. A loan is not made at a location where only funds are provided.⁷⁸ The court added that this is true of all extensions of credit.⁷⁹ Therefore, the terminal was not making loans to customers merely by disbursing prepackaged funds to them up to their credit limit.

In reaching these conclusions, the court ignored the admonition of the *Dickinson* Court that the intent of private contractual agreements is not binding on federal courts interpreting federal law. Instead, the overall effect of the transactions must be considered in applying the McFadden Act definition of branching.⁸⁰ The district court did say, however, that the Supreme Court's determination in *Dickinson* is limited to the facts in that case, and can be distin-

75. *Id.*

76. *Id.* at 91.

77. *Id.*

78. *Id.*

79. *Id.*

80. *First National Bank v. Dickinson*, 396 U.S. 122, 133 (1966), *rehearing denied*, 396 U.S. 1047 (1970).

guished on the facts from those before the court.⁸¹ The court also found as a matter of fact that a remote terminal is closely analogous to a telephone, telegraph or mailbox through which bank customers may communicate their instructions for certain routine transactions.

While this telephone-remote terminal analogy is certainly a logical one, it ignores one key difference between telephones and terminals. Customers instructing their banks by telephone are using their own instruments, or at least the instruments are not owned by the bank; remote terminals are owned or leased by banks which provide them for the convenience of their customers. A bank is not establishing or operating its customers' telephones, but it is establishing or operating remote terminals. This difference is crucial under the McFadden Act.⁸² A facility not owned or operated by a bank cannot be a branch bank. However, the same facility, if owned or operated by a bank, may meet the test for being considered a branch. Thus, the holding in this case seems to be in error since the court did not consider this difference between telephone and terminal banking.

An underlying concern of Judge Barrow's decision may have been one of fairness and the preservation of competitive equality between all state financial institutions and their federal counterparts even though Congress has not specifically mandated equality among all financial institutions. In a footnote, the court said: "The Court feels that under . . . the evidence in this litigation, if other financial institutions in this State are allowed . . . to engage in the use of CBCTs but they are prohibited to the defendant banks, it would create, no doubt, unfair treatment, inequality, and undue hardship on the banks The doctrine of competitive equality requires that a national bank not be denied ' . . . privileges which the State is allowing other institutions to exercise'" ⁸³

The Oklahoma decision was concerned with the fair treatment of federal banks and the inequities which would result if state financial institutions could establish EFT systems and federal banks could not. A Nebraska case involved the reverse situation⁸⁴—an attempt

81. 409 F. Supp. at 92.

82. 12 USC 36(c).

83. 409 F. Supp. at 92-93.

84. *Nebraska ex rel. Meyer v. American Community Stores Corp.*, 193 Neb. 634, 228 N.W.2d 299 (1975).

to prevent a federal savings and loan association from using an EFT system when state banks could not. Since federal savings and loan associations are not subject to the competitive equality provisions of the McFadden Act, the state could not directly challenge the savings and loan association's EFT system. Therefore, the state attorney general brought a *quo warranto* proceeding⁸⁵ to revoke the charter of the corporation that had an EFT system terminal in two of its supermarkets. The attorney-general asserted that the terminal was really a bank being operated in violation of state banking laws.⁸⁶ Although the challenge was unsuccessful in Nebraska, the result might well be different in another state.⁸⁷

The court held that Hinky Dinky was not engaging in illegal banking activities.⁸⁸ It reasoned that the Transmatic Money Service (TMS) was expressly authorized by the Federal Home Loan Bank Board (FHLBB) which has jurisdiction over all federal savings and loan associations and that Hinky Dinky was merely acting as an intermediary between the customers and First Federal.⁸⁹ The court pointed out that the banker-depositor relationship can only be created by contract, express or implied.⁹⁰ The debtor-creditor relationship essential to a bank deposit or withdrawal never exists between the customer and Hinky Dinky.⁹¹ The computer terminal merely

85. *Id.*, 228 N.W.2d at 300.

86. *Id.* at 635, 228 N.W.2d at 300.

87. In the Nebraska case, the respondent, a Texas corporation, operated 35 supermarkets called "Hinky Dinky" stores in Nebraska. Two of the stores had computer terminals which were installed by the First Federal Savings and Loan Association pursuant to authority granted by the Federal Home Loan Bank Board. The terminals enabled customers to make withdrawals from, or deposits to their First Federal accounts. The service, known as transmatic money service (TMS) was put into operation on an experimental basis from January 14, 1974 to March 1, 1974 and was then temporarily suspended. It was later resumed. During the experimental period, deposits of \$333,085.80 were made via TMS in the two Hinky Dinky stores. There was a total of 3,169 transactions for an average of \$117.92 per transaction during the period.

State chartered savings and loan associations were permitted to maintain agents in areas in which they had no branch or home office. The agents were permitted to accept and transmit deposits or withdrawal requests to their main office or to make on the spot withdrawals. They could also solicit business and conduct other activities for the home office. At trial, the State Assistant Director of Banking testified that there was no law in Nebraska which covered the activities of such agents nor was there anything that would prohibit any person from acting as such an agent. Thus, Hinky Dinky stores could have acted as agents for a state savings and loan association.

88. *Id.* at 640, 228 N.W.2d at 303.

89. *Id.* at 639, 228 N.W.2d at 303.

90. *Id.* at 638, 228 N.W.2d at 302.

91. *Id.* at 639, 228 N.W.2d at 302.

transmits information to the central computer in First Federal which electronically effects the transactions and perfects the records on the premises of First Federal.⁹² Therefore, the store is merely acting as a financial and operational intermediary, not as a bank.⁹³

The court said that since Hinky Dinky does not accept or retain deposits nor promise to repay them, it is not engaging in banking activity or in the business of a savings and loan association.⁹⁴ The court's conclusion is correct, although the result is not terribly fair to state financial institutions. Hinky Dinky's relationship is analogous to that between a store that accepts credit cards and the issuing company. It is an independent contractor which is providing a service for its customers' convenience in both cases. It should not be found to have engaged in a wholly new business solely because of this.

In *Bloomfield Federal Savings and Loan Association v. American Community Stores Corp.*,⁹⁵ the plaintiff charged the defendant corporation with violating the antitrust laws and the branching regulations established by the FHLBB because of its use of computer terminals in its Hinky Dinky stores. (This case involved the same EFT system discussed in the Nebraska state court case.) Here, the plaintiff alleged that the FHLBB had adopted the regulation allowing EFT systems without authority pursuant to the Home Owners' Loan Act of 1933, and said that each terminal was a branch office established in violation of the Board's procedural requirements. The plaintiff further argued that Hinky Dinky made unsecured loans in violation of section 5(c) of the Home Owners' Loan Act of 1933 and the rules adopted thereunder.

The court found that the Home Owner's Loan Act grants FHLBB exclusive authority to regulate federal savings and loan associations.⁹⁶ This authority and substantial case law authorized the Board's promulgation of its EFT system regulation.⁹⁷ A critical factor in analyzing EFT systems is that no debtor-creditor relationship exists between the store and its customers in relation to the with-

92. *Id.*

93. *Id.*, 228 N.W.2d at 302-303.

94. *Id.*, 228 N.W.2d at 303.

95. 396 F. Supp. 384 (D. Neb. 1975).

96. *Id.* at 386.

97. *Id.* at 387-88.

drawal or deposit of funds.⁹⁸ Therefore, the terminal is only a conduit of information.⁹⁹ In this respect the court's reasoning is essentially the same as that of the Nebraska decision. This court also reasoned that an EFT system which does not allow the making of loans, opening of new accounts or acceptance of deposits is not a branch bank and therefore, does not violate Board branching regulations.¹⁰⁰ Further, the court lacked jurisdiction to grant summary judgment on plaintiff's claim that unsecured loans were being made.¹⁰¹ While there were temporary deficits in Hinky Dinky's First Federal account on six days, they were for three short periods from one evening to the next morning.¹⁰² New procedures which would eliminate the possibility of such an occurrence in the future were put into effect.¹⁰³ For that reason the plaintiff's did not have standing to raise the issue nor could the court have decided it even if they did because the litigant's rights would no longer be affected as a result of the new procedures.¹⁰⁴

The court's assumption that an EFT system must make loans, open new accounts or accept deposits to be considered a branch bank is correct. Clearly, section 36(f) is written in the disjunctive and any *one* of the functions it describes is sufficient for a finding that branch banking is occurring. However, the court's finding that deposits were not made is erroneous, although the court's conclusion in the case is sound, for the same reasons as the Nebraska state court case.

A case with still a different view of the functions of EFT systems is *Illinois ex rel. Lignoui v. Continental Illinois National Bank and Trust Company of Chicago*.¹⁰⁵ There, the court concluded that CBCTs receive deposits and lend money but do not cash checks. Judge Hubert Will, relied on the *Dickinson* opinion and its holding that the effect of transactions on competitive equality rather than the contractual agreement of individuals governs in determining whether deposits are received. He found that CBCTs do receive deposits.¹⁰⁶ However, payments on credit card accounts and install-

98. *Id.* at 387.

99. *Id.*

100. *Id.* at 389.

101. *Id.* at 391.

102. *Id.* at 390.

103. *Id.*

104. *Id.* at 390-91.

105. 409 F. Supp. 1167 (N.D. Ill. 1975).

106. *Id.* at 1177.

ment loans are not deposits. The court concluded that they are payments on existing loan obligations, rather than deposits into an account which the customer may later withdraw.¹⁰⁷

The court rejected respondents' arguments that the cash advances which CBCTs provide are not "money lent" because the bank exercises no discretion when payments are disbursed. Respondents claimed that the loan is made at the time a line of credit is established.¹⁰⁸ Judge Will wrote:

The contracts underlying the issuance of credit cards with respect to cash advances are, in effect, agreements to make small loans to the customer at some future presentation of a valid card. That agreement does not transfer any funds and, therefore, is not a loan as urged by defendants. Nor is interest charged with the opening or establishing of a line of credit. The funds are transferred and interest commences when the CBCT disburses the requested number of \$25 packets up to \$100.00. That is when and where the loan is made.¹⁰⁹

The Illinois court further held that CBCTs do not cash checks.¹¹⁰ This was based on an analysis of section 3-104(2) of the UCC and the court's finding that "[N]egotiability, the transferability of the instrument (check) from the payee or holder to a third party, is the essential characteristic of a check."¹¹¹ The court reasoned that inserting a card into a CBCT is not the equivalent of cashing a check because there is no written instrument and no third party designation is involved, although an analogy can be drawn between the CBCT transaction and a bearer instrument presented for payment by the maker.¹¹² It added, however, that this limited similarity to checks does not transform the withdrawal of cash from a checking or savings account, or by use of a Master Charge card, into the cashing of checks under section 36(f).¹¹³

The court of appeals affirmed most of the trial court's decision. However, it disagreed with the holding that the withdrawal of cash and payments on installment loans do not constitute forms of

107. *Id.*

108. *Id.* at 1178.

109. *Id.*

110. *Id.* at 1177-78.

111. *Id.* at 1177.

112. *Id.*

113. *Id.* at 1177-78.

branch banking.¹¹⁴ These holdings were reversed. The court added its own comments on these functions.¹¹⁵ It said the customer's card serves the same purpose as the check.¹¹⁶ "It is an order to the bank."¹¹⁷ It added that any properly executed order by a customer to the bank has to be considered to be a routine banking transaction when used as here.¹¹⁸ Furthermore, it said that section 3-104(3) of the UCC expands the definition of check to include non-negotiable instruments.¹¹⁹ Finally, the court found CBCT transactions to be made pursuant to a written agreement between the bank and its customer which clearly makes the withdrawal a routine banking function.¹²⁰

The reasoning of the court of appeals is correct. In today's world of electronics and computers, the substance of a transaction—not whether it is made by traditional means or via new technology—should govern. The trial court's view with respect to the withdrawal of cash and payment on installment loans failed to delve beneath the surface of modern technology to discover its substance.

III. EFT Systems and Privacy

In recent years, increased concern over the individual's right to privacy in this area has been expressed. The United States Supreme Court found that the Constitution guarantees a right of privacy in cases dealing with abortion¹²¹ and the availability of contraceptives for married couples¹²² but there has been no agreement on the specific basis of that right. Assuming a right to privacy does exist, it means nothing unless it is enforced. With the coming of age of computers, the personal privacy of Americans is in far greater jeopardy than at any time in the past.

114. *Illinois ex. rel. Lignoui v. Continental Illinois Nat'l Bank & Trust Co.*, 536 F.2d 176 (7th Cir.), cert. denied, 429 U.S. 871 (1976).

115. 536 F.2d at 178.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* U.C.C. § 3-104(3) reads: "As used in other Articles of this Act, and as the context may require, the terms 'draft', 'check', 'certificate of deposit' and 'note' may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable." *Id.*

120. 536 F.2d at 178.

121. *Roe v. Wade*, 410 U.S. 113 (1973).

122. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The use of EFT systems presents further threats to privacy. The Privacy Protection Study Commission (Commission) was created to look at the area of personal privacy and to recommend means of protecting the individual's right to it. One of the areas the Commission examined was EFT systems. It also studied automated clearing houses which constitute one aspect of such systems.

The Commission found that EFT systems are generally not designed in a way that causes major threats to personal privacy. This is primarily because the systems are still in their infancy.¹²³ It is very likely that future systems or updated current ones will be capable of creating massive privacy problems for users.¹²⁴ The Commission further found that as EFT systems expand, they will very likely include more personal information about individuals than is necessary for the maintenance of accounts, records will be more centralized and, more easily retrievable than at present and financial records will include information that is not usually considered to be payment data.¹²⁵ In fact, as access to such systems increases, it may be necessary to use fingerprints and similar information to identify users in order to guard against unauthorized disclosures.¹²⁶ Not only may EFT records include more information than is necessary for fund transfers, they may actually become generalized information transfer systems.¹²⁷ Pressure for such a development currently exists.¹²⁸

A. Government Access to Personal Information

Government agencies are frequent users of bank records.¹²⁹ Because of this, EFT systems may make it possible for the government to quickly retrieve massive amounts of information about individuals at will—including information on the vast majority of people who have broken no laws. Even at present, banks are not the only users of bank records. Such records are often used for law enforcement purposes.¹³⁰ In fact, bank records are routinely disclosed to

123. THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION: PERSONAL PRIVACY IN AN INFORMATION SYSTEM 116 (1977) [hereinafter PRIVACY REPORT].

124. *Id.*

125. *Id.*

126. *Id.* at 118.

127. *Id.* at 116.

128. *Id.*

129. *Id.* at 117-18.

130. *Id.*

various government agencies conducting investigations—or fishing expeditions.¹³¹ Certainly, a potential use for EFT systems is electronic eavesdropping.¹³² Information flowing through an EFT network can be monitored electronically and only certain specified items or all of the data can be captured.¹³³ This could lead to a fairly rapid way of locating individuals.¹³⁴ Furthermore, such monitoring would not require illegitimate entry into the system; it could be done by anyone with access to the computer equipment that directs and sorts the flow of information.¹³⁵ At present, the response time of EFT systems is hours or days so the temptation to use them is not too great. But they could become much more attractive sources of personal data if the EFT systems become transaction oriented since this would create a much more dynamic system.¹³⁶

Additionally, point of sale terminals must be monitored and monitoring the transactions could become another way of tracking an individual's movements.¹³⁷ Moreover, once the government acquires information about an individual, it is likely to retain it.

The potential for government use and abuse of EFT systems is great. What is even more troubling is that most people are unaware of the existence of such a problem. Additionally, some people who are familiar with it may feel that an existing federal law, commonly known as the Privacy Act,¹³⁸ protects them. It is true that the Privacy Act prohibits federal agencies from collecting and maintaining more personal information about individuals than they need. It also places restrictions on their ability to disseminate that information without the written consent of the individual about whom it is maintained. However, the Act applies only if the information is kept

131. *Id.* at 116 & n.27.

132. *Id.* at 120.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 122.

Although the Commission report only discussed this aspect of the privacy problem with reference to requests to the Federal Reserve System for information it has or will have as a result of the automated clearing house it is operating, nevertheless, agencies such as the Internal Revenue Service request and receive records from banks. In fact, one of the reasons for the Bank Secrecy Act was to insure that federal agencies would have access to the information they believe they need in order to function effectively. *Id.* at 118 & n.29.

137. *Id.* at 122.

138. 5 U.S.C. § 552(a) (1970).

in a "system of records" that is retrievable by "individual identifier."¹³⁹

It does not provide nearly as much protection of the right of privacy as one might assume. This is because the Privacy Act requires federal agencies to define their own systems of records.¹⁴⁰ Furthermore, an agency must also specify the routine uses for which that information will be disclosed.¹⁴¹ When a use of information is defined as routine, the agency does not need the individual's consent to disclose it for any routine use,¹⁴² although it must keep a written record of the disclosure. The record includes the name of the requestor, address, information disclosed, the purpose for which it was requested and the date of disclosure.¹⁴³ The individual about whom the information was disclosed generally has access to this accounting record.¹⁴⁴

139. *Id.* § 552(b). "System of records" is defined in section 552(a)(5).

140. *Id.* § 552(e)(4).

141. *Id.* § 552(b)(2).

142. *Id.* § 552(b)(3).

143. *Id.* § 552(c).

144. If any agency learns, after it has provided information to another party, that the data it sent was incorrect or if the individual involved used statutory procedures to file a notice of disagreement with the information, the agency must send the corrected information or a copy of the notice of disagreement to anyone to whom it recently released the information.

While the Privacy Act provides some measure of protection for personal privacy, it does not adequately protect individuals from the invasion of privacy that is possible with EFT and other computer systems nor does it provide protection from disclosure by non-government parties which are not subject to it.

The Privacy Act prohibits federal agencies from gathering and maintaining personal information about individuals if they do not need it.

Automated clearing house (ACH) services are similar to the EFT systems used by individuals, except that they service institutions. *PRIVACY REPORT*, *supra* note 123, at 115. ACHs affect debits and credits of a recurring nature between institutions. *Id.* The funds transferred may be insurance premiums, social security benefits, wages, or any other type of recurring payment. *Id.* ACHs differ from point-of-sale terminals mainly by the type of transactions they process, institutional controls over the system and the processing details. *Id.* This difference will probably continue for the foreseeable future. *Id.*

The Federal Reserve System presently operates all but two of the ACHs in use throughout the country. *Id.* at 116. Although telecommunications networks were not essential to early ACH systems, they are now used to link ACHs across the country together in order to make interregional transfers easier. *Id.* ACHs run by the Federal Reserve System may well represent the greatest threat to personal privacy of any part of an EFT system. The Commission said:

Most significant from the personal privacy viewpoint, the Federal Reserve System, which acts as a fiscal agent of financial institutions and the Treasury Department in some respects, is not constrained by either its government or its commercial clients, much less by any individual bank client, from disclosing information about a bank

At present, most individuals are probably in the records of only a limited number of federal agencies. The information such agencies have may be limited only to their sphere of operation.¹⁴⁵ Nevertheless, many more agencies may obtain access to information in EFT systems if the Federal Reserve System is allowed to provide automated clearinghouse services for banks.¹⁴⁶

B. Extensive Data Communications Networks

EFT services are also likely to need extensive data communication networks.¹⁴⁷ This will result in various information being retained for billing and accounting purposes within different portions of the data communications network.¹⁴⁸ This further increases available sources of personal information about individuals and the threat that an individual's right to privacy will be violated. To combat these potential problems before they occur, the Commission made the following recommendations:

That individually identifiable account information generated in the provision of EFT services be retained only in the account records of the financial institutions and other parties to a transaction, except that it may be retained by the EFT service provider to the extent, and for the *limited period of time*,

customer's account to other government agencies.

Id.

What is particularly disturbing about government operation of ACHs is that the surveillance potential of EFT systems discussed above is relatively minor in comparison to the threat posed by the Federal Reserve System's operation of ACHs. The Commission said of this:

Current problems with government access to bank records are relatively minor compared with the potential threat to privacy posed by government operation of EFT facilities. As such services become more sophisticated and documentation and surveillance capacity increases, government operation of EFT systems will become, in the Commission's view, an unparalleled threat to personal privacy.

Id.

Because of this very real threat to personal privacy, the Commission recommended: "That no governmental entity be allowed to own, operate, or otherwise manage any part of an electronic payments mechanism that involves transactions among private parties." *Id.* at 123. Adoption of this recommendation would help to lessen the possibility that there will be a conflict of interest on the part of the Federal Reserve System with it becoming less responsive to the public. *Id.* If this recommendation is not acted on, it is possible that there may not be any choice in the future. The economic cost of providing a non-governmental ACH system may become too great to permit that. *Id.* Another factor to be considered is the possibility that the EFT systems run by banks (or at least the variety known as point-of-sale terminals) may merge with the ACHs, thus posing an even greater threat to personal privacy. *Id.*

145. *Id.* at 120.

146. *Id.* at 120-21. For a discussion of automated clearinghouse services, see note 144 *supra*.

147. *Id.* at 121.

148. *Id.* at 122.

that such information is essential to fulfill the operations requirements of the service provider.¹⁴⁹

The reason for this recommendation is to limit access to personal information to the parties involved so that they can control who receives personal information about them.¹⁵⁰ The recommendation also helps to guard against misuse of personal information by the service provider.

The recommendation does not include a suggested enforcement mechanism. Without it, implementation may prove ineffective. If Congress adopts this suggestion, it should provide for the imposition of substantial fines against violaters of it.

C. Inaccurate Information

Another problem likely to occur is the retention and dissemination of inaccurate information. Anyone who has ever been the victim of an error in a charge account, a telephone or electric bill or of some other computer generated error knows that it is usually a lot easier to get the erroneous information *into* than *out of* the system. This is true despite the protection that the Fair Credit Billing Act affords credit card users.¹⁵¹ At present, EFT users have no such protection, but as EFT systems become more common and expand, it will probably be needed.¹⁵² To alleviate this potential problem, the Commission recommended: "That procedures be established so that an individual can promptly correct inaccuracies in transactions or account records generated by an EFT service."¹⁵³

There is one recommendation the Commission made with respect to bank reports to check guarantee services that should be adopted with respect to EFT systems as well. The Commission suggested that when the bank discovers it has incorrectly reported information, it should be required to notify the check cashing service of the correct information in a reasonable period of time so that the receiving party's records can be corrected.¹⁵⁴ Considering the speed with which computer systems can provide information, an EFT provider should also be required to notify any person or organization to whom

149. *Id.*

150. *Id.*

151. *Id.* at 127.

152. *Id.* at 112.

153. *Id.*

154. *Id.* at 128.

it has released the erroneous information of the correct information promptly. When a dispute occurs between the EFT provider and the customer, the customer should have an opportunity to provide EFT users with an explanation of the disagreement. This could be accomplished by allowing the customer to file a written explanation with the service provider, which would then be forwarded to the information receiver, if information is lawfully disclosed before the disagreement is resolved. This will enable the receiver to better evaluate the information provided.

Congress might also wish to consider legislation granting individuals the right to sue the provider of EFT services for release of personal information without the individual's authorization. The prospect of paying substantial damages for abuse of personal privacy should act as a strong deterrent against the unauthorized release of personal information. Additionally, criminal sanctions might be imposed for the willful or repeated negligent release of personal information. If civil and criminal penalties are not imposed, some other effective way must be found to protect the individual's right to personal privacy if "1984" is not to arrive several years in advance of its scheduled date.

IV. Conclusion

If the use of EFT systems is further encouraged by changes in the banking law of the United States, the problem of abuse of an individual's right to privacy will increase dramatically. Few states have attempted to deal with the privacy problems inherent in EFT systems which they have authorized their own state financial institutions to use, nor has the federal government acted effectively in this area.

The potential that EFT systems and especially Automatic Clearing Houses have for virtually destroying the individual's privacy is very disturbing. Obviously, it is not possible to prevent the use of modern technology, nor is it desirable to do so. However, care should be used when utilizing electronic technology. Only if the concern for the rights of the individual is as strong as the desire to benefit from technology can we be reasonably certain that the price the individual pays for increased technological ability is not too high. The only effective way to reflect concern for the personal privacy of individuals is to control strictly the uses to which data in computer systems can be put. Such controls will enable banks and other businesses to

benefit from modern technology without jeopardizing the individual's right to privacy. Therefore, it is essential that Congress act quickly to implement the recommendations of the Commission.

Under present law, it is clear that EFT systems cannot be used in states which prohibit "branching." Yet, for businesses, including banks, to function effectively, they must be able to take advantage of modern technology. Refusing to allow this could hurt American businesses competitively in relation to foreign businesses. However, allowing federal banks to use EFT systems even if state banks could not would go a long way towards destroying the carefully nurtured system of "competitive equality."

In the final analysis, whether the definition of branch banking is rewritten to allow the use of EFT systems is a matter of policy for Congress to decide. It should allow the use of EFT systems, but should also immediately place safeguards on the use of the data in those systems. Effective action to protect the privacy of individuals is essential.

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