

Summer 1997

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Recommended Citation

Kevin M. Lesperance, *A Unique Preemption Problem: The Insurance and Banking Industries Engage in War*, 31 Val. U. L. Rev. 1141 (1997).

Available at: <https://scholar.valpo.edu/vulr/vol31/iss3/8>

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A UNIQUE PREEMPTION PROBLEM: THE INSURANCE AND BANKING INDUSTRIES ENGAGE IN WAR

*"Some things just don't go together. Cats and dogs. Oil and water. Insurance agents and bankers."*¹

I. INTRODUCTION

Since 1967, the insurance industry has struggled to defend its business markets from multiple attacks by the banking industry.² In recent years, this ongoing battle has intensified.³ The banking industry, fueled by a recent Supreme Court victory in the annuities market,⁴ quickly turned its sights to

1. Mark A. Hofmann, *Alliance: Independent Bankers and Insurance Agents Join Forces to Prevent Ventures Between Banks and Insurers*, BUS. INS., Nov. 6, 1995, at 32B.

2. Georgia Ass'n of Indep. Ins. Agents, Inc. v. Saxon, 268 F. Supp. 236 (N.D. Ga. 1967). In 1967, the Georgia Association of Independent Insurance Agents brought an action against a national bank that was selling insurance out of its Atlanta, Georgia office. *Id.* at 237. The agents received a declaratory judgment and an injunction against the bank. *Id.* The court reasoned that section 92 of the National Bank Act prohibited the banks' actions. *Id.* at 238. The United States Court of Appeals for the Fifth Circuit affirmed the decision in favor of the insurance agents. Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1014 (5th Cir. 1968).

The explanation for the war between insurance agents and bankers is simple: bankers want to sell insurance, and insurance agents do not want them to. Hofmann, *supra* note 1, at 32B. For a thorough discussion of the principle reasons that banks are expanding into new marketplaces, see JAMES J. WHITE, BANKING LAW 34-37 (1976).

3. See Richard M. Whiting, *Key Issues Unresolved as Banks, Insurance Firms Keep Fighting Over Turf*, BANKING POL'Y REP., May 15, 1995, at 1 (noting that the commercial war between the insurance and banking industries has steadily increased in intensity over the past 25 years); William G. McCullough, *The Continuing Evolution of Banks' Insurance Powers*, 69 FLA. L. REV. 70, 70 (1995) (arguing that the future will see substantial changes with respect to the ability of banks to engage in the sale of insurance products).

4. NationsBank of N.C. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995). In *NationsBank*, the Supreme Court held that annuities are "financial investment instruments" rather than "insurance" for the purposes of the National Bank Act. *Id.* at 814. Thus, national banks could sell annuities without the limitations imposed by section 92 of the National Bank Act. *Id.* at 816. See *infra* notes 54-71 and accompanying text for a discussion of section 92 of the National Bank Act.

The *NationsBank* decision is important because it represents the "first instance" where powers not specifically enumerated in the National Bank Act were implied into that Act. McCullough, *supra* note 3, at 72; Jason M. Koral, *Bank Holding Companies and "The Business of Insurance": Interpretations of McCarran-Ferguson in Owensboro National Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), and *Barnett Bank v. Gallagher*, 43 F.3d 631 (11th Cir. 1995), 19 HARV. J.L. & PUB. POL'Y 217, 217 (1995).

selling general insurance without geographic limitation through a small-town loophole found at 12 U.S.C. § 92 (section 92).⁵

In the initial stages of the battle, the insurance industry relied on section 92 to exclude national banks from establishing insurance agencies in towns with more than 5000 people.⁶ However, in 1986, the federal agency responsible for supervising the National Bank Act, the Office of the Comptroller of the Currency (OCC or Comptroller),⁷ interpreted section 92 to allow national banks operating under section 92 to sell insurance to customers outside of their small towns.⁸ Further, the circuit courts upheld the OCC's expansive interpretation.⁹ As a result, the insurance industry abandoned its reliance on section 92.¹⁰ Instead, the insurance industry sought to prevent national banks from exercising any of their section 92 insurance powers.¹¹ The methods of prevention used by the insurance industry were state anti-affiliation statutes which precluded bank

5. 12 U.S.C. § 92 (1994). Section 92, a provision of the National Bank Act of 1864, specifically empowers nationally chartered banks properly located in small towns with less than 5000 people to engage in the sale of insurance. *Id.* See also Whiting, *supra* note 3, at 1; David W. Roderer & William B.F. Steinman, *The Authority for Banks to Sell Annuities and Insurance Related Products*, 48 CONSUMER FIN. L.Q. REP. 395, 395 (1994) (noting that the name "small town loophole" refers to section 92's grant of power only to national banks located in small towns).

6. See, e.g., *Saxon*, 399 F.2d at 1010. In *Saxon*, a national bank began selling insurance out of its Atlanta, Georgia office. *Id.* at 1012. The court held that section 92 prohibited the sale of insurance in towns with more than 5000 people. *Id.* at 1014. See *infra* notes 76-91 and accompanying text (discussing the *Saxon* decision).

7. The OCC was created in the National Bank Act of 1864. 12 U.S.C. § 3 (1994). One of the Comptroller's many duties is to regulate and supervise the national banks. WHITE, *supra* note 2, at 66. The OCC is inherently close to the national banks because they owe their very existence to the OCC. *Id.* Besides granting charters for the national banks, the OCC regulates the national banks through its power to interpret the National Bank Act. *Id.* at 66-76.

8. See OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). See *infra* note 96 for the pertinent portions of the OCC's letter.

9. *Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *NBD Bank v. Bennett*, 677 F.3d 629 (7th Cir. 1995). In the *Ludwig* decision, the D.C. Circuit paved the way for nationally chartered banks to sell insurance, through their branches located in small towns with a population of 5000 or less, without geographic limitation. Philip C. Meyer, *Bank Insurance Powers Are Under Renewed Attack in Courts and Congress*, BANKING POL'Y REP., Apr. 17, 1995, at 7. Likewise, the Seventh Circuit's agreement with the *Ludwig* decision in *NBD* reinforced the OCC's expansive interpretation of section 92. See *infra* notes 92-123 and accompanying text for a further discussion.

10. In light of the *Ludwig* decision, it was apparent that the insurance industry would need to take some form of action. Whiting, *supra* note 3, at 2.

11. See, e.g., *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir. 1995); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994); *First Advantage Ins. v. Green*, 652 So. 2d 562 (La. Ct. App. 1995).

subsidiaries or bank holding companies from conducting insurance activities in their respective states.¹²

A direct conflict existed between section 92 and the state anti-affiliation laws.¹³ This problem, however, was different than ordinary Supremacy Clause¹⁴ problems because Congress expressly gave the right to regulate the insurance industry to the several states through the McCarran-Ferguson Act of 1945.¹⁵ The McCarran-Ferguson Act creates reverse-preemption whereby state insurance laws preempt acts of Congress unless Congress speaks directly to the

12. Generally, state anti-affiliation statutes prohibit the affiliation of banks and insurance agencies. Whiting, *supra* note 3, at 2. Anti-affiliation statutes work by prohibiting banks from obtaining a license to engage in insurance agency activities. Koral, *supra* note 4, at 218.

Sixteen states have enacted some form of an anti-affiliation statute. See ALASKA STAT. § 06.05.272 (Michie 1996); ARK. CODE ANN. § 23-64-203(b) (Michie 1994 & Supp. 1995); COLO. REV. STAT. ANN. § 10-2-601(2) (West 1992 & Supp. 1996); CONN. GEN. STAT. ANN. § 38a-775 (West 1992 & Supp. 1996); FLA. STAT. ANN. § 626.988 (West 1996 & Supp. 1997); GA. CODE ANN. § 33-3-23 (1992); ILL. COMP. STAT. ANN. 215/5-499.1 (West 1993 & Supp. 1996); LA. REV. STAT. ANN. § 121-B(2) (West 1986 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 175, § 174E (West 1987 & Supp. 1997); MICH. COMP. LAWS ANN. § 500.1242 (West 1993); N.M. STAT. ANN. § 59A-12-10 (Michie 1995 Repl.); N.Y. INS. LAW § 2501 (McKinney 1985); OHIO REV. CODE ANN. § 3911.01 (Banks-Baldwin 1995); 40 PA. CONS. STAT. ANN. § 281(b) (West Supp. 1996); R.I. GEN. LAWS. § 27-3-46 (Supp. 1996); VT. STAT. ANN. tit. 8, § 4811(a) (1993). For a general discussion of anti-affiliation statutes, see Karol K. Sparks, *Towards Functional Regulation: Untangling Bank and Insurance Law*, 912 PRAC. LAW INST. 595, 598 n.26 (1995).

13. Koral, *supra* note 4, at 218 (noting that the conflict between section 92 and the anti-affiliation statutes has recently been played out in the circuit courts); McCullough, *supra* note 3, at 73 (adding further that the two circuits that addressed this conflict, the Sixth and Eleventh Circuits, have arrived at opposite conclusions under nearly identical facts); Philip C. Meyer, *Insurance Amendments Cloud Outlook for Major Banking Measures*, BANKING POL'Y REP., July 17, 1995, at 8.

14. The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Normally, "the Supremacy Clause mandates that federal law overrides, i.e., preempts, any state regulation where there is an actual conflict between the two sets of legislation." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 292 (2d. ed. 1983). Note, this traditional approach to preemption applies whether Congress articulates the specific intention to preempt or not. *Id.*

15. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1994). The McCarran-Ferguson Act was passed in response to the Supreme Court's ruling in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In that case, the Court held for the first time that the business of insurance was part of interstate commerce and therefore subject to federal regulation. *Id.* at 562. The McCarran-Ferguson Act indicated Congress' intent to leave the regulation of the insurance industry to the several states. 15 U.S.C. § 1012(b) (1994). Thus, the McCarran-Ferguson Act created a reverse preemption whereby state insurance laws could preempt federal laws as long as two factors were satisfied. Sparks, *supra* note 12, at 597.

regulation of insurance.¹⁶ The insurance industry contended that anti-affiliation statutes fell under the unique protection from ordinary preemption provided for in the McCarran-Ferguson Act.¹⁷ In direct contrast, however, the banking industry contended that section 92 should preempt the anti-affiliation statutes because section 92 speaks directly to the regulation of insurance, thereby representing a clear intention by Congress to control this issue on the federal level.¹⁸ In practice, the resolution of this conflict has proven to be difficult and the circuit courts have split over which law should prevail.¹⁹

Both the Sixth and Eleventh Circuits recently reviewed conflicts between section 92 and two state anti-affiliation statutes.²⁰ Those courts arrived at opposite conclusions under nearly identical facts.²¹ The Sixth Circuit supported the banking industry's contention that section 92 should preempt Kentucky's anti-affiliation statute.²² Conversely, the Eleventh Circuit supported the insurance industry's contention.²³ The United States Court of Appeals for the

16. Sparks, *supra* note 12. *Id.* at 598. The McCarran-Ferguson Act reverses the normal order of federal supremacy law. *Id.* The McCarran-Ferguson Act will not, however, provide a means of reverse preemption where Congress has specifically spoken to the area of insurance. 15 U.S.C. § 1012(b). For a full discussion of the constitutional requirements for reverse preemption under the McCarran-Ferguson Act, see *infra* notes 128-44 and accompanying text.

17. A facet of Florida's insurance industry has submitted an Amicus Brief to the Supreme Court in the *Barnett* case. Brief for Respondent Florida Association of Life Underwriters, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1995) (No. 94-1837). In the insurance agents' brief, they contend that Florida's anti-affiliation statute should preempt section 92 because Florida's law regulates insurance whereas section 92 regulates banks. *Id.*

18. Various banking interests have submitted Amicus Briefs to the Supreme Court on behalf of the *Barnett Bank of Marion County* in the defense of section 92. See, e.g., Brief of Amicus Curiae Florida Bankers Association in Support of Petitioner, *Barnett* (No. 94-1837); Brief of American Deposit Corporation in Support of Petitioner, *Barnett* (No. 94-1837); Brief of the New York Clearing House Association in Support of Petitioner, *Barnett* (No. 94-1837); Brief of the United States and the Comptroller of the Currency in Support of Petitioner, *Barnett* (No. 94-1837); Brief of the American Bankers Association in Support of Petitioner, *Barnett* (No. 94-1837); Brief of Consumer Bankers Association et al., *Barnett* (No. 94-1837).

19. One scholar predicted, before the Supreme Court's decision in *Barnett*, that a decision in favor of the banking industry would allow nationally chartered banks to open up agencies all over the country. Hofmann, *supra* note 1, at 32B. However, a defeat for the insurance industry would likely turn its primary statute for federal authority, the McCarran-Ferguson Act, into Swiss cheese. *Id.* at 32B. In contrast, a victory for the insurance industry would declare state law under the McCarran-Ferguson Act as pre-eminent. *Id.*

20. McCullough, *supra* note 3, at 72; *State Attacks on National Bank Insurance Powers Reach U.S. Supreme Court*, BANKING POL'Y REP., June 5, 1995, at 2.

21. McCullough, *supra* note 3, at 72 (noting the strong similarities in facts between the two circuit cases).

22. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994). The court based its decision on the first prong of the McCarran-Ferguson test. *Id.* at 390-92. For a discussion of that test, developed from section 1012(b) of the McCarran-Ferguson Act, see *infra* notes 128-44 and accompanying text.

23. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 633 (11th Cir. 1995).

Eleventh Circuit held that Florida's anti-affiliation statute regulated the business of insurance and, therefore, preempted section 92 under the limited exception provided in the McCarran-Ferguson Act.²⁴ As a result, the Eleventh Circuit's decision allowed Florida to prevent national banks in Florida from exercising any of their section 92 insurance powers.²⁵

On September 27, 1995, the United States Supreme Court granted certiorari to the petitioners of the Eleventh Circuit's decision in *Barnett Bank of Marion County v. Nelson*.²⁶ However, the current language of section 92 and the McCarran-Ferguson Act prohibited the Court from deciding this conflict in accordance with Congress' original intentions for those statutes.²⁷ For example, on March 26, 1996, the Court decided the *Barnett* case in favor of section 92, thus making the banking industry free to sell insurance on a statewide basis under the OCC's current interpretation of section 92.²⁸ That result is contrary to Congress' purposes for enacting both section 92 and the McCarran-Ferguson Act.²⁹ Similarly, however, the purpose for section 92 would have been thwarted if the Court had decided that state anti-affiliation statutes like Florida's preempt section 92.³⁰ Under that result, states could prohibit national banks located in small towns from exercising any of their Congressionally authorized section 92 insurance powers.³¹ Thus, the judicial branch is not the proper body to change or modify a statute "[because] when time and technology open up a loophole, it is up to Congress to decide whether it should be plugged, and how."³²

24. *Barnett*, 43 F.3d at 638. See *infra* notes 218-37 and accompanying text for a discussion of the *Barnett* case.

25. Koral, *supra* note 4, at 219.

26. *Barnett Bank of Marion County v. Gallagher, cert. granted sub nom, Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1995).

27. The ambiguous language of section 92 has allowed the OCC to interpret it broadly. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). See *infra* notes 252-80 and accompanying text (demonstrating that the ambiguous language of section 92 prohibits the Supreme Court from deciding this conflict in accordance with Congress' original intentions for enacting section 92 and the McCarran-Ferguson Act).

28. *Barnett*, 116 S. Ct. at 1103.

29. See *infra* notes 238-80 and accompanying text.

30. See *infra* notes 281-83 and accompanying text.

31. See *infra* notes 274-83 and accompanying text.

32. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993). "If the judge were to guess at the interpretation, and arbitrarily fix the result, no doubt it would be true that he [or she] would be assuming the functions of a legislator." G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 12 (1888). However, the Constitution vests the power to make laws in the legislature. J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 68 (1891). Further, the power to legislate is not one which may be delegated. *Id.*

This Note examines the conflict between section 92 of the National Bank Act and the state anti-affiliation statutes authorized under the McCarran-Ferguson Act.³³ Additionally, this Note suggests that the Supreme Court was unable to solve this conflict in accordance with Congress' original intentions due to the current language of section 92 and the McCarran-Ferguson Act.³⁴ Therefore, this Note proposes an amendment to section 92 that will provide a compromise between the contentions of both the banking and insurance industries.³⁵ This amendment will narrow the scope of the national banks' powers to sell insurance to the level present in 1945, when Congress enacted the McCarran-Ferguson Act.³⁶

Section II of this Note reviews the historical and legislative background of section 92 and the McCarran-Ferguson Act.³⁷ The historical role of the OCC's interpretations of section 92 of the National Bank Act on this unique problem is also reviewed in Section II.³⁸ Section III critically analyzes the recent attempts by the Sixth Circuit, the Eleventh Circuit, and the Supreme Court of the United States to resolve this conflict.³⁹ Further, Section III concludes that the Supreme Court's recent decision overruling the Eleventh Circuit did not resolve this conflict in accordance with Congress' original intentions due to the present language of the statutes involved.⁴⁰ Finally, Section IV solves the conflict between section 92 and the state anti-affiliation statutes authorized under the McCarran-Ferguson Act by providing a model congressional amendment to section 92.⁴¹ This amendment will be based upon the historical and legislative background of section 92 and the McCarran-Ferguson Act.⁴²

II. BACKGROUND

The battle between the insurance and banking industries over the right of national banks to sell insurance under section 92 created a conflict between

33. See *infra* section III (analyzing this conflict in the context of two opposing circuit court decisions and a Supreme Court ruling).

34. See *infra* section III.C (arguing that the Supreme Court was unable to resolve this conflict in accordance with Congress' original intentions for enacting section 92 and the McCarran-Ferguson Act).

35. See *infra* section IV.

36. See *infra* section IV.

37. See *infra* notes 54-71, 128-44 and accompanying text.

38. See *infra* notes 72-127 and accompanying text.

39. See *infra* notes 145-285 and accompanying text.

40. See *infra* notes 276-85 and accompanying text.

41. See *infra* notes 286-308 and accompanying text.

42. See *infra* section II.

several states and the federal government.⁴³ The states were attempting to prohibit banks from acting as insurance agents by passing anti-affiliation statutes.⁴⁴ In contrast, the federal government argued that states cannot prohibit national banks from selling insurance because section 92 of the National Bank Act expressly allows national banks to act as insurance agents in small towns.⁴⁵ Thus, a clear conflict existed as to which law should apply.

The Sixth and Eleventh Circuits have each attempted to resolve this conflict concerning which law should apply.⁴⁶ However, both courts were troubled with the current language of section 92 and the state anti-affiliation statutes authorized under the McCarran-Ferguson Act.⁴⁷ As a result, the courts arrived at opposite decisions under nearly identical facts.⁴⁸ It became apparent from these cases that much confusion exists concerning the applications of section 92 and the McCarran-Ferguson Act.⁴⁹ Further, both circuit court decisions contradicted the historical and legislative backgrounds behind the enactment of section 92 and the McCarran-Ferguson Act.⁵⁰

Like the circuit courts, the Supreme Court was unable to solve the conflict between section 92 and the McCarran-Ferguson Act in accordance with

43. See *State Attacks on National Bank Insurance Powers Reach U.S. Supreme Court*, BANKING POL'Y REP., June 5, 1995, at 2 [hereinafter *State Attacks*] (noting that "[a] key unresolved legal question is whether states can block national banks [authorized under federal laws] from exercising their small-town insurance agency powers by denying them licenses to sell insurance"). David W. Roderer, *Supreme Court Alert to Complexity, Stakes in Insurance Sales Case*, AM. BANKER, Jan. 23, 1996, at 10 (noting that this conflict between banks and insurance agents, as demonstrated in the *Barnett* case, will provide "an opportunity for the Justices to delineate the respective roles of federal and state regulators").

44. See, e.g., *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 632 (11th Cir. 1995); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 389 (6th Cir. 1994).

45. See, e.g., Brief for the United States and the Comptroller of the Currency, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1995) (No. 94-1837). Specifically, the federal government argued that section 92 preempts any state law to the contrary since Congress has spoken directly to the regulation of banking in enacting section 92. *Id.* at 6.

46. *Barnett*, 43 F.3d at 633 (noting that the issue before the court was to decide whether Florida's anti-affiliation statute was preempted by section 92); *Owensboro*, 44 F.3d 389 (addressing the issue of whether Kentucky's anti-affiliation statute was preempted by section 92).

47. The *Owensboro* and *Barnett* decisions both addressed the issue of whether section 92 could preempt anti-affiliation statutes authorized under the McCarran-Ferguson Act. McCullough, *supra* note 3, at 72. However, those courts arrived at opposite decisions. *Id.*

48. *Barnett*, 43 F.3d at 637; *Owensboro*, 44 F.3d at 393.

49. See Koral, *supra* note 4, at 219; McCullough, *supra* note 3, at 70 (noting that the decision of the Eleventh Circuit demonstrates the state of flux in this area of the law); *State Attacks*, *supra* note 43, at 2 (arguing that the circuit court attempts at a resolution have left key questions unresolved).

50. See *infra* sections III.A, III.B.

Congress' original intentions.⁵¹ Over time, the OCC's interpretations of section 92 have expanded its small town limitation beyond small towns.⁵² The changes necessary to narrow the scope of section 92 can only be made by Congress.⁵³ Thus, a legal conflict still exists after the Supreme Court's decision in *Barnett* because the judicial legislation created in that decision was an unsatisfactory solution. A review of the historical and legislative intent behind section 92 and the McCarran-Ferguson Act will clarify the Supreme Court's shortcomings and lay the foundation for why the model amendments proposed in this Note should be adopted by Congress.

A. Section 92

The controversy surrounding the national banks' powers to sell insurance to their customers begins with section 92 of the National Bank Act.⁵⁴ Prior to the enactment of section 92, the clear rule was that banks possessed no right to sell insurance.⁵⁵ In 1916, however, Congress made a limited exception to the general rule against banks selling insurance by enacting section 92.⁵⁶ The

51. See *infra* section III.C (discussing the Supreme Court's failure to resolve this conflict in accordance with Congress' original intentions).

52. See *infra* note 96 and accompanying text for the pertinent portions of the OCC's letter explaining its expansive interpretation of section 92.

53. See *supra* note 32 and accompanying text (outlining the premise that the legislature, not the courts, is responsible for changing a statute that has fallen into disagreement with its original intentions).

54. Over the past few years, the OCC has expanded the national banks' insurance powers under section 92. Koral, *supra* note 4, at 217. "The controversy surrounding the ability of national banks to sell insurance and related products to their customers and the general public focuses primarily on . . . 12 U.S.C. Section 92, commonly referred to . . . as the 'small town loophole.'" Rod er & Steinman, *supra* note 5, at 395-96.

55. *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968) (taking note that "prior to the 1916 enactment of Section 92 it seems to have been universally understood that no national bank possessed any power to act as insurance agents").

56. 12 U.S.C. § 92 (1992). The current text of section 92 provides:

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

legislative history behind section 92 demonstrates that it was enacted for the limited purpose of aiding struggling national banks located in small towns.⁵⁷

The origin of section 92 can be traced back to a single letter written to Congress in 1916 by then Comptroller of the Currency, John Skelton Williams.⁵⁸ In his letter, Williams addressed Congress' concern over the continued financial security of the nationally chartered banks located in small towns.⁵⁹ This concern was based on the inability of national banks to compete effectively with their state chartered counterparts.⁶⁰ In 1916, both national and state banks in small towns received only small deposits.⁶¹ The low deposits forced nationally chartered banks to charge high interest rates.⁶² However, the state banks could often maintain lower interest rates by supplementing their incomes through alternative means allowed under state laws.⁶³ The lower interest rates charged by state banks enabled them to create greater revenues than their nationally chartered counterparts.⁶⁴

Williams' letter suggested that allowing national banks to act as insurance agents in their small towns would offset the problems that high interest rates were causing.⁶⁵ In his letter, Williams noted that small local insurance markets

Id. (emphasis in original).

57. The legislative history behind the enactment of section 92 reveals a letter by the OCC to Senator Robert L. Owen. 53 CONG. REC. 11,001 (1916). In that letter, the OCC suggested that Congress enact a limited exception to the general rule that national banks cannot sell insurance. *Id.* The OCC reasoned that the national banks located in small towns were at a distinct disadvantage to their state chartered counterparts. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The Comptroller wrote:

[T]here are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers.

Id.

62. *Id.* The Comptroller regrettably admitted that these low deposits were resulting in high interest rates. *Id.*

63. 53 CONG. REC. 11,001 (1916). The Comptroller wrote,

I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks . . . which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Id.

64. *Id.*

65. *Id.*

would not generate enough business to distract the banks from their primary loan and depository functions.⁶⁶ In fact, Williams' letter stated that limiting the national banks' insurance powers authorized under section 92 was in the public's best interest.⁶⁷

On September 7, 1916, Congress enacted the law that Williams had recommended in his letter.⁶⁸ That law ultimately appeared as section 92 of Title 12 of the United States Code.⁶⁹ The primary congressional purpose of section 92 was to provide another source of income for the struggling national banks that were located in small towns.⁷⁰ This purpose is evidenced by Williams' letter, which is a permanent part of the Congressional Record of 1916.⁷¹

B. *The Role of the OCC in the Insurance-Banking War*

A historical review of the OCC's interpretations of section 92 of the National Bank Act demonstrates the need for an amendment to that Act.⁷² The OCC's interpretations have consistently attempted to expand section 92's scope beyond Congress' original intentions.⁷³ In recent years, these interpretations have received a large degree of judicial deference by the courts.⁷⁴ Thus, Congress needs to amend the language of section 92 to narrow its scope in

66. *Id.* Comptroller Williams wrote that "[t]his additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.*

67. *Id.* The Comptroller wrote, "[i]t seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities."

68. 12 U.S.C. § 92 (1994).

69. *Id.*

70. The purpose of section 92 was provided in Comptroller Williams' letter to Congress. 53 CONG. REC. 11,001 (1916).

71. *Id.*

72. Congress intended for the scope of section 92 to aid only those national banks located and doing business in small towns. *Id.* In contrast, the OCC has expanded section 92 over the past few years. Koral, *supra* note 4, at 217. These expansions were accomplished because section 92 neglects to discuss where national banks' customers must be located. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 959 (D.C. Cir. 1993).

73. For example, the OCC recently determined that national banks could operate under section 92 and sell insurance to customers outside of those small towns. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

74. See, e.g., Ludwig, 997 F.2d at 962 (upholding the OCC's interpretation expanding section 92 to customers of all cities as reasonable); NationsBank of North Carolina v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (upholding the OCC's interpretation of the National Bank Act allowing annuities to be sold by national banks as an incidental function of banking). For a discussion of judicial deference, see *infra* notes 101-03 and accompanying text.

accordance with Congress' original intentions.⁷⁵

1. Section 92 as a Restraint on the National Banks

In 1962, then Comptroller of the Currency, James Saxon, created a National Advisory Committee on Banking Regulatory Policies and Practices.⁷⁶ Comptroller Saxon instructed the Committee to investigate possible changes in the laws affecting national banks.⁷⁷ The Committee, composed entirely of people affiliated with the banking industry, recommended that national banks be allowed to sell insurance.⁷⁸

Under the Committee's recommendation, Comptroller Saxon created an Administrative Ruling which stated that "National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions."⁷⁹ In 1964, the Citizens and Southern National Bank of Georgia (Citizens) applied for and received the OCC's permission to sell insurance.⁸⁰ In 1965, Citizens began selling insurance from its offices located in Atlanta, Georgia.⁸¹ To protect their business market from this invasion, the Georgia Association of Independent Insurance Agents filed suit against Comptroller Saxon and Citizens.⁸² The district court in *Georgia Ass'n of Independent*

75. Congress' original intent for enacting section 92 was to aid national banks located and doing business in small towns. 53 CONG. REC. 11,001 (1916). In contrast, the OCC has expanded section 92 to allow for the sale of insurance by banks to customers on a statewide basis. *Ludwig*, 997 F.2d at 959 (relying on 12 C.F.R. § 5.34). Thus, since time has created a loophole in section 92's clearly established purpose, Congress needs to amend that section. *Id.*

76. *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1012 (5th Cir. 1968).

77. *Id.*

78. *Id.* This Committee was formed one year after Comptroller James J. Saxon's appointment to the Office of Comptroller. *Id.* In his prior position as the Secretary of an Advisory Committee to Congress, Saxon had attempted to propose legislation similar to that recommended by his newly created committee in 1967. *Id.* Congress, however, rejected Saxon's proposal from his prior position. *Id.* In *Saxon*, Comptroller Saxon tried to go around Congress by creating an Administrative Ruling. *Id.*

79. *Saxon*, 399 F.2d at 1012 (quoting the Comptroller's 1963 ruling, number 7110). The court noted that instead of asking Congress to create legislation in accordance with the Committee's recommendation, Comptroller Saxon took it upon himself to create an Administrative Ruling. *Id.* The court further noted that the Comptroller's ruling was not limited in scope to cities of 5000 inhabitants or less as required by section 92. *Id.* Rather, the ruling allowed any national bank, regardless of its location, to enter the insurance industry and sell insurance. *Id.*

80. *Id.* The OCC's permission allowed Citizens to sell broad forms of automobile, home, casualty and liability insurance out of its Atlanta, Georgia office. *Id.* The court noted that Citizens' program was also extended to its offices in Athens, Augusta, Macon, Savannah and Valdosta, Georgia. *Id.*

81. *Id.*

82. *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1012 (5th Cir. 1968).

*Insurance Agents v. Saxon*⁸³ agreed with the insurance agents and held that section 92 is the full extent of insurance agency power possessed by national banks.⁸⁴

The United States Court of Appeals for the Fifth Circuit affirmed the district court's holding that section 92 limits national banks to act as insurance agents only in cities with a population less than 5000.⁸⁵ The court noted that prior to the enactment of section 92 in 1916, it was universally understood that no national banks possessed the power to act as insurance agents.⁸⁶ Thus, the court concluded that Congress intended for section 92 to be a limited exception to the general rule that national banks could not sell insurance.⁸⁷ The court's reasoning was based on the well established principle of statutory construction mandating that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."⁸⁸

The Fifth Circuit's decision in *Saxon* was based upon the congressional intentions behind the enactment of section 92.⁸⁹ In *Saxon*, the OCC had attempted to give insurance powers to the national banks that Congress had purposefully omitted from the text of section 92.⁹⁰ Thus, the OCC's interpretation of section 92 in *Saxon* was unreasonable.⁹¹

83. 268 F. Supp. 236 (N.D. Ga. 1967), *aff'd*, 399 F.2d 1010 (5th Cir. 1968).

84. *Saxon*, 268 F. Supp. at 238-39. In finding that section 92 limited the locations from which national banks could operate, the court noted that section 92 does not specifically prohibit banks from acting as insurance agents in areas with populations larger than 5000 people. *Id.* at 238. However, the court found that Congress had prohibited banks from acting as insurance agents in large cities through implication by explicitly allowing an exception for national banks located in small towns of less than 5000. *Id.*

85. *Saxon*, 399 F.2d at 1012. The court of appeals agreed with the district court stating that "[s]ince Congress dealt specifically with the insurance agency power in Section 92, . . . the existence of any other power to act as an insurance agent [is nonexistent]." *Id.* at 1014.

86. *Id.* at 1013.

87. *Id.*

88. *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968) (quoting the Eighth Circuit in *Service Life Ins. Co. v. United States*, 293 F.2d 72 (8th Cir. 1961)).

89. *Id.* at 1013 (citing the OCC's 1916 letter to Congress, stating that "[i]t is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law"). The court reasoned that Comptroller Saxon had extended his bounds by issuing an Administrative Ruling in an area over which he had no legal authority. *Id.*

90. *Id.*

91. *Id.* at 1015. The court reasoned that there could be no reasonable doubt as to the meaning of section 92. *Id.*

2. Section 92 as an Aid to The National Banks

Despite its defeat in *Saxon*, the OCC continued to interpret banking legislation expansively.⁹² For example, in 1983, a leading OCC attorney responded to an inquiry from the Commerce Department by asserting that section 92 does not limit the geographic locations of customers buying insurance from national banks operating under section 92.⁹³ In 1984, the United States National Bank of Oregon (NBO) wrote the OCC requesting to sell insurance in accordance with the OCC's earlier letter to the Commerce Department.⁹⁴ The OCC instructed NBO to wait until the OCC could review the policy implications of allowing nationally chartered banks to sell insurance without geographic limitations.⁹⁵

In 1986, the OCC formally interpreted section 92 to allow national banks operating under section 92 to sell insurance without geographic limitations.⁹⁶ Consequently, the OCC permitted NBO to sell insurance to its customers in towns with populations more than 5000 people out of a branch located in Banks, Oregon, which had a population of less than 5000 people.⁹⁷ Insurance industry agents immediately filed suit against the Comptroller of the Currency in the case of the *National Ass'n of Life Underwriters v. Clarke*.⁹⁸ In *Clarke*, the United States District Court for the District of Columbia Circuit followed the Supreme Court's test for determining the validity of an agency's statutory interpretation

92. See, e.g., OCC Inter. Ltr. 623 [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,505 (Sept. 24, 1993) (determining that national banks could sell annuity products under the National Bank Act's incidental powers provision); OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986) (determining that national banks could sell insurance under section 92 without geographic limitations).

93. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 959 (D.C. Cir. 1993). The OCC's letter was written by a senior OCC attorney, Debra A. Chong, of the OCC's San Francisco office. *Id.* In her letter, Ms. Chong asserted that a small town bank could sell insurance "without geographic restriction to the community [in which] it is located." *Id.* (quoting Debra A. Chong).

94. *Id.*

95. *Id.*

96. *Id.* In the OCC's letter to NBO, it stated that "[b]ased on our analysis of the relevant legal precedent, we have concluded that Ms. Chong correctly determined that a national bank or its branch which is located in a place of 5000 or under population may sell insurance to existing and potential customers located anywhere." OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). In support of this position, the OCC wrote that "[S]ection 92 does not directly address geographic limitations" *Id.*

97. *Ludwig*, 997 F.2d at 959.

98. 736 F. Supp. 1162 (D.C. Cir. 1990), *rev'd sub nom.*, *Independent Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *rev'd and remanded for review of original judgment sub nom.*, *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993), *original judgment aff'd sub nom.*, *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

developed in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*⁹⁹ In *Chevron*, the Court determined that the Environmental Protection Agency's interpretation of the Clean Air Act was reasonable.¹⁰⁰

The test developed in *Chevron* for determining the reasonableness of a federal administrative agency's interpretation utilizes a two-pronged inquiry.¹⁰¹ Under the first prong, if Congress has expressed a clear intent on the precise issue in question, then the court must give effect to that unambiguously expressed intent of Congress.¹⁰² However, if the statute is silent or ambiguous on the particular issue, then the court must only ask whether the agency's interpretation was reasonable.¹⁰³

After reviewing the language of section 92, the *Clarke* court concluded that Congress had not spoken directly to the precise issue of whether national banks operating under section 92 could sell insurance to customers located outside of

99. 467 U.S. 837 (1984).

100. *Id.* at 866. In *Chevron*, the Supreme Court reviewed a set of Environmental Protection Agency (EPA) rules that interpreted terms in the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1994 & Supp. I. 1995). *Id.* at 841. At the District of Columbia Circuit, the EPA's interpretation was replaced with that of the court. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 728 (D.C. Cir. 1982). The Supreme Court reversed that decision, finding that the EPA's regulations were a reasonable interpretation of the Clean Air Act since Congress had expressed no specific intent with respect to that precise issue. *Chevron*, 467 U.S. at 866. In its opinion, the Supreme Court chastised the District of Columbia Circuit for failing to defer to the EPA. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

The *Chevron* decision is important because it overruled the prevailing rule that courts could replace an agency's interpretation with one of their own. Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference?*, 40 ADMIN. L. REV. 121, 122 (1988); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 6 (1990). Further, subsequent cases have expanded the *Chevron* doctrine of judicial deference. Jonathon Bloomberg, Note, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion*, 73 CORNELL L. REV. 113, 129 (1988); Bernard Schwartz, *Administrative Law Cases During 1991*, 44 ADMIN. L. REV. 629, 635 (1992) (noting that subsequent cases have extended the judicial deference given to include agency rulemaking).

101. *Chevron*, 467 U.S. at 842-44. Generally, the *Chevron* test provides that where a statute is silent or ambiguous on a specific issue, the courts must defer to the interpretation given by the administrator of the agency with the authority to enforce the statute. *Id.* at 843. Deference by the court is required unless the interpretation is arbitrary, capricious, or manifestly contrary to the intent of the statute. *Id.* For a complete discussion of the two-part *Chevron* analysis, see Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829, 829 (1990).

102. *Chevron*, 467 U.S. at 842-43.

103. *Id.* at 843.

those small towns.¹⁰⁴ Specifically, the language of section 92 does not address customers.¹⁰⁵ Based upon this silence, the *Clarke* court then asked whether the OCC's interpretation was reasonable.¹⁰⁶ The insurance agents argued that the OCC's interpretation was not reasonable in light of section 92's legislative intent. Despite the insurance agents' argument, however, the court exercised great judicial discretion and found in favor of the Comptroller of the Currency.¹⁰⁷ The court reasoned that the OCC provided a cogent explanation as to why it interpreted section 92 to provide no geographic limitations on the customers of small town national banks.¹⁰⁸

The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court.¹⁰⁹ The court reasoned that the OCC's interpretation of section 92 was reasonable because section 92 was ambiguous in regard to the locations of present and future customers.¹¹⁰ Thus, the OCC was permitted to expand the scope of section 92 to include insurance sales to customers located in towns larger than 5000 people.¹¹¹ Further, the District of Columbia Circuit's expansion of section 92 in *Clarke* has been followed by the Seventh Circuit.¹¹² These cases are representative of a recent trend since the Supreme Court's decision in *Chevron* toward broad judicial deference by the courts to the interpretations of various federal agencies, including the Comptroller's office.¹¹³

In 1995, the Supreme Court added support to the OCC's power in the case of *NationsBank of North Carolina v. Variable Annuity Life Insurance Co.*¹¹⁴ In the unanimous *NationsBank* opinion, the Court upheld the OCC's

104. *National Ass'n of Life Underwriters v. Clarke*, 736 F. Supp. 1162, 1168 (D.C. Cir. 1990). The court, reading the language of section 92, concluded that the statute says little concerning how the banks' powers to sell insurance are to be exercised. *Id.* The court added that section 92's silence coupled with its express rulemaking authority in the OCC "suggests that Congress explicitly 'left a gap for the [Comptroller] to fill.'" *Id.* (quoting *Chevron*, 467 U.S. at 843).

105. 12 U.S.C. § 92 (1994).

106. *Clarke*, 736 F. Supp. at 1170. The court restated the second step of the *Chevron* rule as follows: "we must defer to any reasonable interpretation by the Comptroller on [this] issue." *Id.*

107. *Id.* The court rejected the agents' contention that the OCC's interpretation was unreasonable in light of the legislative intent of section 92. *Id.*

108. *Id.* at 1173 (quoting *King Broadcasting Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir. 1988)).

109. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

110. *Id.* at 960. The court noted that "Congress knew how to impose geographic restrictions when it wanted to." *Id.* (quoting the district court's earlier opinion in *Clarke*).

111. *Id.* at 962.

112. *NBD Bank v. Bennett*, 67 F.3d 629 (7th Cir. 1995).

113. For a thorough discussion of the recent trends following the *Chevron* decision, see generally Bloomberg, *supra* note 100.

114. 115 S. Ct. 810 (1995).

interpretation of the National Bank Act to allow national banks to sell annuities.¹¹⁵ The shocking speed and force of the *NationsBank* decision sent a message concerning the OCC's power to expansively interpret the National Bank Act.¹¹⁶

In *NationsBank*, the OCC permitted national banks to sell variable annuities.¹¹⁷ Prior to *NationsBank*, variable annuities were sold only by the insurance industry.¹¹⁸ The *NationsBank* Court agreed with the OCC's interpretation that these annuities should be categorized as investments and not insurance, despite the fact that this is not expressly stated in the National Bank Act.¹¹⁹ As a result of the *NationsBank* categorization, annuities were not confined to the limits of section 92 like insurance products.¹²⁰

When read together, the *Clarke* and *NationsBank* decisions represent a trend toward judicial deference to the OCC's interpretations of the National Bank Act.¹²¹ This deference has allowed the OCC to extend the scope of section 92 beyond the original intentions of that Act.¹²² For that reason, Congress should

115. *Id.* at 817. In *NationsBank*, the Court addressed the precise issue of whether the Comptroller's decision allowing banks to sell annuities was in accordance with the National Bank Act. *Id.* at 812. The Comptroller based his opinion on the reasoning that annuities are investment products. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

116. Brian W. Smith et al., *Annuities Ruling Boosts Business Opportunities, But Uncertainty Lingers*, BANKING POL'Y REP., Apr. 17, 1995, at 1 (noting that the *NationsBank* decision surprised banking industry observers due to its speed and force). The Court decided the case merely six weeks after the oral arguments were heard. Roderer & Steinman, *supra* note 5, at 396. The decision demonstrated the Court's forcefulness in that the decision was unanimous. *Id.*

117. *NationsBank*, 115 S. Ct. at 812. In determining that federal law permits such annuity sales as a service to bank customers, the Comptroller concluded that annuities are investment products rather than insurance products. *Id.* Therefore, annuities were not covered under the restrictions of section 92 of the National Bank Act. *Id.*

118. *Id.*

119. *Id.* at 814. Justice Ginsburg authored the opinion and wrote that the Comptroller is "charged by the Congress with superintendence of national banks." *Id.* at 812. Consequently, the *NationsBank* opinion upheld the Comptroller's interpretation of annuities as a reasonable interpretation of the National Bank Act and therefore, worthy of deference by the courts. *Id.* at 814.

120. *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 814 (1995).

121. See, e.g., Roderer & Steinman, *supra* note 5, at 396 (reasoning that the *NationsBank* decision afforded sweeping deference to the Comptroller's power to interpret the National Bank Act); Smith et al., *supra* note 116, at 1 (noting that the deference displayed by the *NationsBank* Court should create new business opportunities for banking organizations). See *supra* note 100 and accompanying text for a discussion of how the *Chevron* doctrine is continuing to expand the scope of judicial deference.

122. The OCC has interpreted section 92 to permit statewide insurance sales by banks properly located and doing business in cities with less than 5000 people. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). In contrast, the legislative history behind the enactment of section 92 suggests that it was enacted only to aid small

amend section 92 to restore its scope to coincide with Congress' original intentions.¹²³

In the conflict between section 92 and state anti-affiliation statutes authorized under the McCarran-Ferguson Act, the OCC argued that section 92 should prevail.¹²⁴ To support this decision, the OCC interpreted section 92 as allowing insurance sales even though the net result went beyond the actual language of that text.¹²⁵ This interpretation of section 92 preempts the anti-affiliation statutes, and as a result, the insurance industry's ability to regulate the business of insurance has greatly diminished.¹²⁶ That result contradicts the legislative intent behind the enactment of the McCarran-Ferguson Act.¹²⁷

C. *The McCarran-Ferguson Act*

Traditionally, the duty of regulating the insurance industry in the United States has been left to the individual states.¹²⁸ The Supreme Court's initial

town banks that were located in towns of less than 5000. 53 CONG. REC. 11,001 (1916). The OCC's recent interpretation does not appear to coincide with Congress' original intentions for section 92.

123. When a statute's language begins to create confusion and loopholes, then it is Congress' role to fix the statute's language. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993).

124. Brief of Amicus Curiae United States and the Comptroller of the Currency in Support of Petitioner, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1995) (No. 94-1837). The OCC argues that "Florida's prohibition on insurance agency activities by bank affiliates conflicts with 12 U.S.C. 92's authorization of such activities by certain national banks." *Id.* at 5. "The court of appeals erred in concluding that the McCarran-Ferguson Act . . . saves the state law from preemption." *Id.*

125. See *supra* note 96 for the OCC's interpretation of the National Bank Act which gives rise to this result.

126. A victory for the banking industry will turn the McCarran-Ferguson Act and the several states' abilities to regulate insurance into Swiss cheese. Mark A. Hofmann, *Hoping for Favorable Outcome But Foresee Alternative Scenarios*, BUS. INS., Feb. 5, 1996, at 32J.

127. The McCarran-Ferguson Act was created by Congress to return the power to regulate and tax the insurance industry to the several states. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). If the national banks are allowed to sell insurance on a statewide basis beyond the reach of the McCarran-Ferguson Act, then the Act's purpose will be diminished. For a full discussion of the McCarran-Ferguson Act and its purposes, see *infra* notes 128-44 and accompanying text.

128. See, e.g., Charles R. McGuire, *Regulation of the Insurance Industry After Hartford Fire Ins. v. California: The McCarran-Ferguson Act and Antitrust Policies*, 25 LOY. U. CHI. L.J. 303, 304 (1994); John L. Ingersoll et al., *Federal Regulation of Insurance: The Industry's Response to H.R. 4900 and H.R. 1290*, 23 A.B.A. BRIEF 10, 10 (1994).

interpretation of the Commerce Clause¹²⁹ precluded the federal government from regulating the insurance industry until 1944 when the Court decided the case of *United States v. South-Eastern Underwriters Ass'n*.¹³⁰ In that case, the Court held that the business of insurance was "commerce" within the meaning of the Commerce Clause.¹³¹ As a result, the insurance industry could be regulated by the federal government.¹³²

However, in 1945, one year following the Court's ruling in *South-Eastern Underwriters*,¹³³ Congress passed the McCarran-Ferguson Act.¹³⁴ This Act

129. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183-85 (1868) (holding that insurance contracts are "local transactions . . . governed by the local law"). The *Paul* Court explained its refusal to characterize insurance contracts as commerce by stating:

These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States.

Id. at 183.

For other cases supporting the *Paul* decision, see, e.g., *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 510 (1913) (holding that the business of insurance involves neither state nor interstate commerce); *Hooper v. California*, 155 U.S. 648, 655 (1895) (holding that "[t]he business of insurance is not commerce").

130. 322 U.S. 533, 553 (1944) (noting that "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause").

In *South-Eastern Underwriters*, the Court noted that in every case in which it had held that "the business of insurance is not commerce," it had been faced with the issue of the validity of a state statute regulating the insurance industry. *Id.* at 544. In fact, the Court had never before addressed the validity of an attempt by Congress to regulate the insurance industry. *Id.* Accordingly, the Court noted that its prior characteristics of insurance as outside the scope of "commerce" had occurred in cases where the Court was evaluating state rather than federal regulations, and observed that such characterizations were "inconsistent with many decisions of [the] Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause." *Id.* at 545.

131. *Id.* at 553.

132. *Id.*

133. *Id.*

134. 15 U.S.C. §§ 1011-1015 (1994). The current version of the McCarran-Ferguson Act provides in pertinent part:

§1011. Declarations of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

§ 1012. Regulation by State Law

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such

expressly overruled the *South-Eastern Underwriters* decision and declared that the "continued regulation and taxation by the several States of the business of insurance is in the public interest."¹³⁵ The adoption of the McCarran-Ferguson Act was based in large part on the recommendation of the National Association of Insurance Commissioners (NAIC).¹³⁶ According to the NAIC, the original purpose of the McCarran-Ferguson Act was to preserve the state operated regulatory system of the insurance industry.¹³⁷ The Supreme Court has acknowledged the purpose put forth by the NAIC as the valid intent of Congress for passing the McCarran-Ferguson Act.¹³⁸

Specifically, the congressional intent behind the McCarran-Ferguson Act clearly aspires to create a limited exception to the basic constitutional policy of economic federalism. To accomplish its purpose, the McCarran-Ferguson Act established a two-prong test that must be met before a state insurance statute receives immunity from federal preemption.¹³⁹ First, the state statute must "regulate the business of insurance" to fit within the scope of the

business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance

135. *Id.*

136. *See, e.g.,* McGuire, *supra* note 128, at 311 (noting that Congress passed the McCarran-Ferguson Act due in large part to the aggressive lobbying of NAIC). Since NAIC's inception, it has played an increasingly important role in the formulation of insurance regulations and policies. David G. Stebing, *Insurance Regulation in Alaska: Healthy Exercise of a State Prerogative*, 10 ALASKA L. REV. 279, 288 (1993). The NAIC is comprised of the chief insurance regulatory officials of the several states. *Id.* at 288 n.41. Throughout its history, the NAIC has provided valuable national leadership in regulating the insurance industry. *How Insurance Laws Are Made: The NAIC and State Adoption of NAIC Model Laws: Hearings on the Nat'l Ass'n of Ins. Comm'rs Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 102d Cong. 2 (1991) (statement of Sen. Howard M. Metzenbaum).

137. "[The] legislative history of the McCarran-Ferguson Act indicates that the Act was intended to preserve state insurance laws and regulations." Brief of Amicus Curiae National Association of Insurance Commissioners in Support of Respondents at 4, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1996) (No. 94-1837) (relying on 1945 NAIC PROC. 156, at 159 and the case *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 208 (1979)).

138. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). One year after the enactment of the McCarran-Ferguson Act, the Supreme Court in *Prudential* described the Act's purpose as:

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done . . . by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Id. at 429-30.

139. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 634 (11th Cir. 1995); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 390 (6th Cir. 1994).

McCarran-Ferguson Act.¹⁴⁰ Second, even if the state statute satisfies the first requirement, the federal statute will control, and consequently preempt the state statute, if the federal statute “specifically relates to the business of insurance.”¹⁴¹

The Sixth and Eleventh Circuits both applied the two-part McCarran-Ferguson test to evaluate conflicts between section 92 and two similar state anti-affiliation statutes.¹⁴² Under similar facts, however, the two circuits arrived at opposite conclusions.¹⁴³ Likewise, the Supreme Court also utilized the McCarran-Ferguson test in the case of *Barnett*.¹⁴⁴ Thus, a critical analysis of those cases is necessary to illustrate that only a congressional amendment will solve this conflict in accordance with Congress’ original intentions for enacting section 92 and the McCarran-Ferguson Act.

III. A CRITICAL ANALYSIS OF JUDICIAL ATTEMPTS TO SOLVE THE CURRENT CONFLICT BETWEEN SECTION 92 AND THE MCCARRAN-FERGUSON ACT

Both the Sixth and Eleventh Circuits have struggled with the conflict between section 92 and state anti-affiliation statutes.¹⁴⁵ The two circuits applied slightly different analyses for the first prong of the McCarran-Ferguson test concerning the definition of insurance and consequently arrived at opposite conclusions.¹⁴⁶ The Sixth and Eleventh Circuits focused primarily on the semantics of section 92 and the McCarran-Ferguson Act rather than Congress’

140. 15 U.S.C. § 1012(b) (1994).

141. *Id.*

142. *Barnett*, 43 F.3d at 634 (evaluating the preemption problem between Florida’s anti-affiliation statute and section 92 using the McCarran-Ferguson test); *Owensboro*, 44 F.3d at 391 (using the two-pronged McCarran-Ferguson test to evaluate a conflict between Kentucky’s anti-affiliation statute and section 92).

143. *Barnett*, 43 F.3d at 637 (holding that Florida’s anti-affiliation statute preempted section 92 under the McCarran-Ferguson test); *Owensboro*, 44 F.3d at 389 (holding that the federal law, section 92, preempts Kentucky’s state anti-affiliation statute).

144. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1112 (1996).

145. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir. 1995) (addressing whether Florida’s anti-affiliation statute could preempt section 92 through the doctrine of reverse preemption); *Owensboro Nat’l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) (addressing a conflict between Kentucky’s anti-affiliation statute and section 92).

146. The *Owensboro* court relied on two Supreme Court cases to analyze the first prong of the McCarran-Ferguson test. *Owensboro*, 44 F.3d at 391-93 (relying on *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), and *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993)). In contrast, the *Barnett* court relied solely upon the *Fabe* decision in its analysis of the first prong of the McCarran-Ferguson test. *Barnett*, 43 F.3d at 634-36. Further, the *Barnett* and *Owensboro* decisions arrived at opposite conclusions. *State Attacks*, *supra* note 43, at 2; McCullough, *supra* note 3, at 72; Meyer, *supra* note 9, at 8.

original intentions for enacting those statutes.¹⁴⁷ The detailed analysis of those decisions provided in the following sections will demonstrate the fundamental need for a congressional amendment that will clarify section 92's language.

A. *The Sixth Circuit's Attempted Resolution of the Conflict*

In 1994, the United States Court of Appeals for the Sixth Circuit held in the case of *Owensboro National Bank v. Stephens*¹⁴⁸ that section 92 preempted Kentucky's anti-affiliation statute (section 287).¹⁴⁹ For nationally chartered banks, the preemption of section 287 by section 92 meant that the state laws of Kentucky could not stop them from exercising their section 92 insurance powers.¹⁵⁰ Further, under the expansive OCC interpretations of section 92 upheld by the District of Columbia Circuit in *Clarke*, nationally chartered banks could use their section 92 insurance powers to sell insurance on a statewide basis.¹⁵¹ Thus, whether Kentucky's anti-affiliation statute could stop national banks from exercising their section 92 insurance powers had the potential to affect Kentucky's entire insurance market.¹⁵²

147. See *Owensboro*, 44 F.3d at 388 (focusing its analysis on the first prong of the McCarran-Ferguson test by incorporating a combination of definitions); *Barnett*, 43 F.3d at 636-37 (addressing only the procedural history behind section 92).

148. *Owensboro*, 44 F.3d at 389.

149. KY. REV. STAT. ANN. § 287.030(4) (Banks-Baldwin 1996). Section 287 provides: No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of real property mortgagee in mortgage property, other than title insurance.

Id.

150. See Toby Roth, *Perfect Time for a New Banking Era*, WALL ST. J., Jan. 16, 1996, at A14 (noting that a victory for the insurance industry in the *Barnett* battle would allow states to block national banks from selling insurance nationwide). See also Jaret Seiberg, *Comptroller, States Aiming for Accord on Insurance Sales Series*, AM. BANKER, Jan. 11, 1996, at 1 (noting that the Justices in the *Barnett* case were asked to decide whether the McCarran-Ferguson Act gives the states authority to completely exclude national banks from the insurance industry through anti-affiliation statutes).

151. *National Ass'n of Life Underwriters v. Clarke*, 736 F. Supp. 1162 (D.C. Cir. 1990), *rev'd sub nom.*, *Independent Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *rev'd and remanded for review of original judgment sub nom.*, *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993), *original judgment aff'd sub nom.*, *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). See *supra* note 96 and accompanying text for the pertinent portions of the OCC letter authorizing national bank insurance sales on a statewide basis.

152. The OCC has given national banks the go-ahead on selling insurance out of their small town offices on a statewide basis. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). This interpretation has been upheld in the circuit courts. *Ludwig*, 997 F.2d at 957; *NBD Bank v. Bennett*, 67 F.3d 629 (7th Cir. 1995).

The *Owensboro* court addressed the precise issue of whether Kentucky's anti-affiliation statute, section 287, could preempt section 92.¹⁵³ The court's analysis relied on the two-pronged test developed from the language of the McCarran-Ferguson Act.¹⁵⁴ Under that test, the first consideration was whether section 287 was enacted for the purpose of regulating the business of insurance.¹⁵⁵ The court broke that inquiry down further into two elements: the business of insurance and the purpose of enactment.¹⁵⁶

The *Owensboro* court first addressed the "business of insurance" element by using the working definition developed by the Supreme Court in *Union Labor Life Insurance Co. v. Pireno*.¹⁵⁷ In *Pireno*, an antitrust action was brought against a health insurance association for utilizing rates pre-set by an insurance commission.¹⁵⁸ The *Pireno* Court held that the health insurer was not exempt from liability under the McCarran-Ferguson Act because the insurer's actions did not constitute the "business of insurance."¹⁵⁹ The Court reasoned that

153. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 389 (6th Cir. 1994). The court first dismissed the insurance industry's contention that ordinary preemption could not apply in this case because the laws do not actually conflict. *Id.* at 390-91. Next, the court addressed whether the McCarran-Ferguson Act could save Kentucky's anti-affiliation statute from preemption. *Id.* at 391.

154. *Id.* The court stated that "[Section 287] is not preempted by § 92 if (1) Section 287 was 'enacted . . . for the purpose of regulating the business of insurance,' and (2) § 92 does not 'specifically relate[] to the business of insurance.'" *Id.* (quoting the language of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)).

155. *Id.*

156. *Owensboro*, 44 F.3d at 391. The first prong of the McCarran-Ferguson analysis asks whether the state insurance law was enacted for the purpose of regulating the "business of insurance." 15 U.S.C. § 1012(b) (1994). The *Owensboro* court addressed this prong in two steps. *Owensboro*, 44 F.3d at 391. First, the court analyzed whether Kentucky's anti-affiliation statute should be categorized within the business of insurance. *Id.* at 391-92. Second, the court addressed whether Kentucky's statute was enacted with the necessary purpose element to pass the McCarran-Ferguson test. *Id.* at 392.

157. 458 U.S. 119, 127-29 (1982).

158. *Id.* at 123. The basis of the action brought against the health insurance company was that the practice of using rates set by an insurance commission stifled competition. *Id.* Thus, the claim was based upon federal antitrust law. *Id.* at 124.

159. *Id.* at 134. The Court developed three criteria for determining when an activity or practice is in the business of insurance. *Id.* at 129. Those criteria were "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and insured; and third, whether the practice is limited to entities within the insurance industry." *Id.*

These criteria for defining the business of insurance in an antitrust context are much more narrow than the other contexts in which the McCarran-Ferguson Act requires an activity or statute to be in the business of insurance. T. Richard Kennedy, *The McCarran Act: A Limited "Business of Insurance" Antitrust Exemption Made Even Narrower—Three Recent Decisions*, 18 FORUM 528, 529 (1983); Eric Peter Gillet, *The Business of Insurance: Exemption, Exemption, Who Has the Antitrust Exemption*, 17 PAC. L.J. 261, 272 (1985). Note, the *Owensboro* case did not occur in the antitrust context. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 394 (6th Cir. 1994) (Batchelder, J., dissenting).

Congress' intention for enacting the antitrust section of the McCarran-Ferguson Act was to create a narrow exception to the federal antitrust laws.¹⁶⁰ Thus, the *Pireno* Court's definition of the "business of insurance" used by the *Owensboro* court was very narrow in scope.¹⁶¹

The *Owensboro* court next addressed the "purpose" element of the McCarran-Ferguson test using the Supreme Court's decision in *United States Department of Treasury v. Fabe*.¹⁶² The *Fabe* Court stated that laws are enacted for the "purpose" of regulating the business of insurance when they possess the intention or aim of adjusting, managing, or controlling the business of insurance.¹⁶³ The *Owensboro* court used the *Fabe* criteria in conjunction with the *Pireno* Court's definition of the "business of insurance" to form a hybrid test for applying the first prong of the McCarran-Ferguson test.¹⁶⁴ The *Owensboro* Court's hybrid issue asked whether Section 287 "possess[ed] the aim of regulating activities that [met] the *Pireno* criteria."¹⁶⁵ The court held that Kentucky's anti-affiliation statute did not possess the required aim and, therefore, was not protected by the McCarran-Ferguson Act.¹⁶⁶ The court noted that section 287 merely excluded the participation of banks in the insurance industry.¹⁶⁷ The court reasoned that excluding participation in an activity is different than regulating the manner in which the activity is conducted.¹⁶⁸ Thus, Kentucky's anti-affiliation statute was not a regulation of the "business of insurance."¹⁶⁹

Since the *Owensboro* court concluded that section 287 was enacted to regulate the banking industry and not the business of insurance, it failed the first prong of the McCarran-Ferguson test.¹⁷⁰ Thus, section 92 preempted section 287.¹⁷¹ As a result, Kentucky was unable to stop national banks from

160. *Pireno*, 458 U.S. at 129. The antitrust laws referred to in *Pireno* are part of the Sherman Act, 15 U.S.C. §§ 1-7 (1994).

161. See Kennedy, *supra* note 159, at 529. Prior to *Pireno*, many scholars predicted that the phrase "business of insurance" would be read broadly by the Court. *Id.* at 528-29.

162. 508 U.S. 491 (1993).

163. *Id.* at 505.

164. *Id.*

165. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994).

166. *Id.*

167. *Id.* Thus, Kentucky's anti-affiliation statute failed to meet *Pireno*'s narrow definition of the business of insurance. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994).

exercising their section 92 insurance powers.¹⁷² These powers included the ability to sell insurance to customers without geographic limitation.¹⁷³

The decision reached by the *Owensboro* majority is flawed for two reasons. First, the court's result contradicted Congress' intentions for both section 92 and the McCarran-Ferguson Act as represented by their legislative backgrounds.¹⁷⁴ Second, as the *Owensboro* dissent pointed out, the court erred in using the *Pireno* criteria to determine whether the practices and activities of section 287 pertained to the "business of insurance."¹⁷⁵ The following Sections will examine these flaws in detail.

1. The *Owensboro* Decision Ignored the Historical and Legislative Backgrounds of Both Section 92 and the McCarran-Ferguson Act

Although the court acknowledged the essential role of section 92 and the McCarran-Ferguson Act in the resolution of this conflict, the court's final decision contradicted the historical and legislative backgrounds of both Acts.¹⁷⁶ The court's opinion concentrated on the semantics concerning which test was the most appropriate to use in resolving this conflict.¹⁷⁷ As a result, the *Owensboro* decision contradicted the congressional purpose of section 92 and the McCarran-Ferguson Act.¹⁷⁸

The original purpose behind section 92 dates back to 1916 when the Comptroller of the Currency informed Congress of the problems that nationally chartered banks were having in small towns.¹⁷⁹ Due to the low local deposits received by small-town banks, they were forced to charge overly high interest

172. See Roth, *supra* note 150, at A14 ("If banks win, national banks would be allowed to sell insurance from coast to coast."); Seiberg, *supra* note 150, at 1 (noting that a defeat for the insurance industry would mean the inevitable sale of insurance by banks).

173. The OCC currently allows national banks to sell insurance out of their small town offices without concern over the geographic locations of their customers. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

174. See *infra* notes 176-198 and accompanying text for a comparison of the *Owensboro* decision's result with the original intentions for the enactment of section 92 and the McCarran-Ferguson Act.

175. *Owensboro*, 44 F.3d at 393 (Batchelder, J., dissenting). The dissent noted that *Pireno* was developed for use with antitrust fact patterns. *Id.* at 394-95. The *Owensboro* case did not present antitrust facts. *Id.*

176. See *infra* notes 185-99 and accompanying text.

177. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 391-92 (6th Cir. 1994). The court's analysis of the McCarran-Ferguson test involved a detailed discussion distinguishing the definition of the business of insurance used in *Pireno* versus the definition used in *Fabe*. *Id.*

178. See *infra* notes 185-212 and accompanying text.

179. 53 CONG. REC. 11,001 (1916). For a full discussion of the historical and legislative background of section 92, see *supra* notes 54-71 and accompanying text.

rates.¹⁸⁰ The Comptroller suggested that allowing the small-town banks to supplement their incomes with insurance sales would offset the problems caused by the low deposits.¹⁸¹ The Comptroller also noted the persuasive public policy reasons for limiting the national banks' abilities to sell insurance to "small communities."¹⁸² Congress enacted the law recommended by the Comptroller as part of the Act of September 7, 1916.¹⁸³ That law is commonly referred to as section 92 of the National Bank Act.¹⁸⁴

The *Owensboro* court's final decision was flawed because it contradicted Congress' purpose for enacting section 92.¹⁸⁵ Congress enacted section 92 to aid the struggling small-town national banks.¹⁸⁶ In contrast, the result obtained in *Owensboro* allows large national banks to sell insurance through their branches located in small towns to customers in any location.¹⁸⁷ This result of statewide insurance sales thwarts the public policy reasons initially stated for limiting banks' abilities to sell insurance under the section 92 exception.¹⁸⁸

180. 53 CONG. REC. 11,001 (1916).

181. *Id.*

182. *Id.*

183. Ch. 461, 39 Stat. 750, 753 (1916).

184. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1110 (1996).

185. The legislative history behind the enactment of section 92 demonstrates that it was enacted for the specific purpose of aiding small town national banks. 53 CONG. REC. 11,001 (1916). In contrast, the *Owensboro* decision allowed national banks located in Kentucky to operate out of their small towns on a statewide basis due to the OCC's expansive interpretation of section 92. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). Thus, the result reached by the *Owensboro* court does not appear to coincide with Congress' original purpose for enacting section 92.

186. 53 CONG. REC. 11,001 (1916).

187. The result in *Owensboro* allowed national banks in Kentucky to use their section 92 insurance powers despite state laws to the contrary. See generally Roth, *supra* note 150, at A14; Seiberg, *supra* note 150, at 1. Further, the OCC has interpreted section 92 to allow national banks operating under section 92 to sell insurance outside of their small towns without geographic limitations. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

188. The general rule is that national banks are not authorized under the National Bank Act to sell insurance. *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968). Section 92 was enacted as an exception to that general rule. 53 CONG. REC. 11,001 (1916). The public policy concerns behind the enactment of section 92 illustrated a fear that some national banks would soon fail simply because they were located in small towns. *Id.* Nowhere in the Comptroller's 1916 letter to Congress does it mention allowing national banks to sell on a statewide basis. *Id.* "In contrast, the Comptroller wrote that '[i]t seems pretty desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities.'" *Id.* In contrast, the *Owensboro* decision allows national banks to exercise insurance sales outside of the small communities discussed in the Comptroller's 1916 letter to Congress. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994). Thus, the *Owensboro* decision contradicts the public policy concerns behind the enactment of section 92.

In addition to the *Owensboro* court's lack of deference to Congress' intentions for section 92, the court failed to acknowledge the purposes behind the McCarran-Ferguson Act.¹⁸⁹ That Act was a quick and direct response by Congress to the Supreme Court's decision in *South-Eastern Underwriters*.¹⁹⁰ Historically, the several states have been the sole regulators of the insurance industry.¹⁹¹ In direct contrast to that clear history, however, the Court held in *South-Eastern Underwriters* that insurance was commerce within the control of Congress through the Commerce Clause.¹⁹² Consequently, one year after the *South-Eastern Underwriters* decision, Congress expressly returned the power to regulate the insurance industry to the several states by enacting the McCarran-Ferguson Act.¹⁹³ The Act specifically states that "continued regulation and taxation by the several states of the business of insurance is in the public's best interest."¹⁹⁴

In contrast to Congress' intention to have insurance regulated by the several states, the *Owensboro* court struck down Kentucky's anti-affiliation statute, section 287, proscribing banks from selling insurance.¹⁹⁵ The *Owensboro* decision thwarted the public interests behind the enactment of the McCarran-Ferguson Act by taking away Kentucky's right to regulate its insurance industry.¹⁹⁶ The intrusion onto Kentucky's right to regulate the business of

189. See *infra* notes 190-99 and accompanying text.

190. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946) (stating that the McCarran-Ferguson Act was enacted to reinstate the power to regulate and tax insurance in the several states).

191. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183-85 (1868) (holding that insurance contracts are "local transactions . . . governed by the local law").

192. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (holding that insurance contracts were subject to the Commerce Clause).

193. 15 U.S.C. §§ 1011-1015 (1994).

194. *Id.* § 1011.

195. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 393 (6th Cir. 1994). The *Owensboro* court held that section 92 preempted Kentucky's anti-affiliation statute, section 287. *Id.* As a result, Kentucky was unable to stop national banks from obtaining insurance licenses and selling insurance. See Roth, *supra* note 150, at A14; Seiberg, *supra* note 150, at 1.

196. Congress' purpose for enacting the McCarran-Ferguson Act was to return the power to regulate insurance to the several states. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946). Congress stated in the McCarran-Ferguson Act that its purpose for returning the power to regulate insurance to the several states was based upon the "public's best interest." 15 U.S.C. § 1011 (1994). In contrast to Congress' stated purpose for enacting the McCarran-Ferguson Act, the *Owensboro* court took much of the power to regulate the insurance industry away from the several states. See Roth, *supra* note 150, at A14; Seiberg, *supra* note 150, at 1 (noting that a resolution in favor of the banking industry, like the *Owensboro* decision, would allow national banks to sell insurance despite state legislation to the contrary).

insurance is further magnified by the statewide basis upon which the decision allows national banks to sell insurance.¹⁹⁷

The result obtained in *Owensboro* cannot be considered an adequate solution to the conflict between section 92 and the state anti-affiliation statutes. The result directly contradicts the essential premises behind both section 92 and the McCarran-Ferguson Act.¹⁹⁸ One possible explanation for this error is that the *Owensboro* court used the wrong test.¹⁹⁹

2. The *Owensboro* Court's Use of the *Pireno* Criteria was Incorrect

As the *Owensboro* dissent noted, the majority's use of the *Pireno* criteria to define the phrase "business of insurance" was incorrect.²⁰⁰ That phrase appears in two separate clauses of section 2(b) of the McCarran-Ferguson Act.²⁰¹ The issue in *Pireno* concerned the second clause of section 2(b), which deals with antitrust exemptions for insurance companies operating in the business of insurance.²⁰² In contrast, both the *Owensboro* and *Fabe* courts addressed the reverse-preemption issue, which deals with the first clause of section 2(b) of the McCarran-Ferguson Act.²⁰³ In *Fabe*, the Supreme Court distinguished its definition of the business of insurance from its earlier definition in *Pireno* based on the two separate clauses in the McCarran-Ferguson Act.²⁰⁴

197. The OCC has supported the interpretation of section 92 allowing national banks to sell insurance on a statewide basis. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). As a result, Kentucky's Insurance Commissioner will have to work with the OCC on issues that used to be exclusively within the states' authority. Seiberg, *supra* note 150, at 1. See also Hofmann, *supra* note 126, at 32J (noting that a Supreme Court decision following the *Owensboro* decision would lead to a dual state and federal system of regulation concerning the business of insurance).

198. See *supra* notes 185-97 and accompanying text.

199. *Owensboro*, 44 F.3d at 394 (Batchelder, J., dissenting). Batchelder suggested that the majority's use of the *Pireno* Court's definition of the "business of insurance" was incorrect. *Id.*

200. *Id.*

201. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 394 (6th Cir. 1994) (Batchelder, J., dissenting) (relying on the Supreme Court's subsequent decision in *Fabe* to distinguish the two separate definitions of the "business of insurance").

202. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). Justice Brennan wrote, "[t]he only issue before us is whether [the insurance company's] peer review practices are exempt from antitrust scrutiny as part of the business of insurance." *Id.*

203. *Owensboro*, 44 F.3d at 389; *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 493 (1993).

204. *Fabe*, 508 U.S. at 504. The Court distinguished the first and second clauses of section 2(b) of the McCarran-Ferguson Act. *Id.* The court wrote that

[t]he language of § 2(b) is unambiguous: the first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with

The slight distinction between the *Pireno* and *Fabe* definitions is important because the two tests have yielded different results under similar circumstances.²⁰⁵

The *Owensboro* court held that section 92 preempted Kentucky's section 287.²⁰⁶ The court reasoned that section 287 failed to satisfy the requirements for reverse preemption under the McCarran-Ferguson Act.²⁰⁷ More specifically, the *Owensboro* court ruled that section 287, which prohibits the sale of insurance by national banks, did not fit within the *Pireno* Court's definition of the "business of insurance."²⁰⁸

However, the *Pireno* Court narrowly defined the "business of insurance" for antitrust cases, not reverse preemption cases.²⁰⁹ In contrast, the *Owensboro* court should have applied the *Fabe* Court's definition which addressed the same issue as the *Owensboro* court.²¹⁰ Further, the *Fabe* Court's definition of the "business of insurance" only required that state laws regulate the relationships between policyholders and insurance companies to pass the first prong of the McCarran-Ferguson test.²¹¹ It is likely that section 287 would have passed the first prong of the McCarran-Ferguson test under the *Fabe* definition, as that law limited from whom policyholders could purchase their insurance products.²¹²

the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute.

Id.

205. The *Owensboro* and *Barnett* decisions arrived at opposite conclusions under nearly identical facts. Meyer, *supra* note 9, at 8; McCullough, *supra* note 3, at 72; *State Attacks*, *supra* note 43, at 2. The *Owensboro* court used a hybrid test incorporating both the *Pireno* and *Fabe* decisions. *Owensboro*, 44 F.3d at 391-92. In contrast, the *Barnett* court relied solely upon the *Fabe* Court's test. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 635-36 (11th Cir. 1995).

206. *Owensboro*, 44 F.3d at 389.

207. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994) (arguing that Kentucky's section 287 did not possess the necessary aim to be considered as regulating the "business of insurance" under the McCarran-Ferguson test).

208. *Owensboro*, 44 F.3d at 392 (Batchelder, J., dissenting). The *Owensboro* court held that section 287 merely excluded people from participating in insurance, which it did not consider a regulation of the "business of insurance" under the *Pireno* Court's definition. *Id.*

209. See Kennedy, *supra* note 159, at 529; Gillet, *supra* note 159, at 272.

210. *Owensboro*, 44 F.3d at 389; United States Dept. of Treasury v. *Fabe*, 508 U.S. 491, 493 (1993).

211. *Fabe*, 508 U.S. at 504.

212. *Owensboro*, 44 F.3d at 396 (Batchelder, J., dissenting). The court noted that the proper standard for determining whether Kentucky section 287 passed the first prong of the McCarran-Ferguson analysis was whether the "statute is centrally concerned with policyholders." *Id.* Under that test, section 287 should have passed the first prong. *Id.*

The *Owensboro* error may have been caused by the court's reliance on the district court's use of the *Pireno* test.²¹³ The district court's decision was made before the *Fabe* decision.²¹⁴ The *Owensboro* dissent suggested that the *Fabe* test would be the only test required today.²¹⁵ The dissent's view was adopted in a subsequent case by the Eleventh Circuit on the same issue of reverse-preemption.²¹⁶ In fact, the Eleventh Circuit's decision under the *Fabe* test was the opposite of the *Owensboro* decision.²¹⁷ A more extensive look at the Eleventh Circuit's decision helps to clarify this distinction.

B. The Eleventh Circuit's Attempted Resolution of the Conflict

Shortly after the *Owensboro* decision, the Eleventh Circuit addressed the same conflict in the case of *Barnett Bank of Marion County v. Gallagher*.²¹⁸ In *Barnett*, the United States Court of Appeals for the Eleventh Circuit held that Florida's anti-affiliation statute (Florida Section 626.988)²¹⁹ preempted section 92.²²⁰ After applying the McCarran-Ferguson test, the court found that Florida Section 626.988 "regulate[d] the business of insurance," and that section 92 does not "specifically relate[] to the business of insurance."²²¹ This result is the exact opposite of the result reached in *Owensboro*.²²² As a result, the Supreme Court granted certiorari to the petitioners of the *Barnett* decision.²²³

The *Barnett* court began its analysis with the first prong of the McCarran-Ferguson test by asking whether Florida Section 626.988 was enacted for the purpose of regulating the business of insurance.²²⁴ The court applied

213. *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 398 (6th Cir. 1994).

214. *Id.*

215. *Id.* at 396.

216. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir. 1995). The *Barnett* court also addressed the issue of reverse-preemption. *Id.* at 634.

217. See Meyer, *supra* note 9, at 8; McCullough, *supra* note 3, at 72.

218. 43 F.3d 631 (11th Cir. 1995). The *Barnett* court handed down its decision on January 30, 1995. The *Owensboro* court handed down its decision on December 29, 1994. *Owensboro*, 44 F.3d at 388.

219. FLA. STAT. ANN. § 626.988(2) (West 1996 & Supp. 1997) provides:

No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

220. *Barnett*, 43 F.3d at 632.

221. *Id.* at 636-37.

222. See Meyer, *supra* note 9, at 8; McCullough, *supra* note 3, at 72.

223. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir.), *cert. granted*, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1995).

224. *Barnett*, 43 F.3d at 634.

the *Fabe* test described in the *Owensboro* dissent.²²⁵ Relying on *Fabe*, the court asked whether Florida Section 626.988 was enacted to protect policyholders by regulating their relationships with the insurers.²²⁶ The Eleventh Circuit concluded that Florida Section 626.988 did regulate the business of insurance.²²⁷ The court reasoned that the purpose behind Florida's statute was to protect policyholders by preventing the possibility of "overreaching by [the] financial institutions if [they were] permitted to sell insurance."²²⁸ The court noted that banks would be in a prime position to force insureds to take bad loans or inappropriate insurance policies.²²⁹

The *Barnett* court next addressed the second prong of the McCarran-Ferguson test: whether section 92 relates to the business of insurance.²³⁰ The court held that section 92 did not relate to the business of insurance.²³¹ The court reasoned that section 92's concern is banking, not insurance.²³² The court further reasoned that section 92 was enacted in 1916 when it was generally believed that Congress could not "regulate" the business of insurance.²³³ Thus, the court concluded that Florida Section 626.988 preempted section 92 under the McCarran-Ferguson Act's reverse preemption.²³⁴

The insurance industry's victory in the Eleventh Circuit was short-lived, however, and on March 26, 1996, the Supreme Court overruled the Eleventh Circuit's decision.²³⁵ This result allows national banks in all fifty states to sell insurance out of small towns without geographic limitation.²³⁶ Thus, a need

225. *Id.* at 635. The court noted that the *Fabe* court was concerned with the policyholder and their relationships to their insurance companies. *Id.*

226. *Id.*

227. *Id.* at 636.

228. *Id.* at 635. The court determined that a statute enacted to keep overreaching banks out of the insurance industry was enacted to protect policyholders. *Id.* Thus, Florida section 626.988 passed the first prong of the McCarran-Ferguson analysis. *Id.*

229. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 635 (11th Cir. 1995).

230. *Id.* at 634, 636. The McCarran-Ferguson test mandates that a state statute enacted to regulate the business of insurance must be preempted by a conflicting federal law which "relates to the business of insurance." *Id.* at 634 (quoting 15 U.S.C. § 1012(b)).

231. *Id.* at 637.

232. *Id.*

233. *Id.* The court reasoned that *Barnett Bank's* use of section 92 was an attempt to control the insurance industry. *Id.* at 636-37. According to the court, the control of the insurance industry lies solely in the several states under the authority of the McCarran-Ferguson Act. *Id.*

234. *Id.* at 637.

235. *See Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103 (1996) (holding that section 92 of the National Bank Act preempts Florida's anti-affiliation statute).

236. *See supra* notes 92-100 and accompanying text (explaining that allowing national banks to sell insurance out of the small towns is in effect allowing national banks to sell insurance without geographic limitations).

exists for congressional action in the form of an amendment to section 92.²³⁷ A detailed analysis of the Supreme Court's decision in *Barnett* will clarify this need.

C. The Supreme Court's Failed Attempt at Resolution

Unlike the preceding circuit court decisions, the Supreme Court's decision which analyzed the conflict between section 92 and Florida Section 626.988 did not begin with the two-pronged McCarran-Ferguson test.²³⁸ Instead, the Court first addressed the question of whether Congress, in enacting section 92, intended to exercise its constitutionally delegated authority to set aside the laws of the several states.²³⁹ The Court reached the conclusion that, under ordinary Supremacy Clause jurisprudence, section 92 would clearly preempt Florida's anti-affiliation statute.²⁴⁰ In reaching its conclusion, the Court put aside the special concerns of the McCarran-Ferguson Act and focused solely on section 92.²⁴¹

The Court's analysis of the Supremacy Clause began with the question of whether section 92 and Florida Section 626.988 were in "irreconcilable conflict."²⁴² Although the two statutes did not impose directly conflicting duties, Florida Section 626.988 did prohibit national banks' permissible power to sell insurance under section 92.²⁴³ Thus, the Court held that Florida's law

237. The need for congressional action in the form of an amendment is premised on the legislative history of section 92 and the McCarran-Ferguson Act. For an in-depth discussion of the background of those statutes, see *supra* notes 54-71 and 128-44, and accompanying text.

238. *Barnett*, 116 S. Ct. at 1103. See also *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994); *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir. 1995).

239. *Barnett*, 116 S. Ct. at 1107.

240. *Id.* at 1111. The Court's primary question in determining whether section 92 preempted Florida's anti-affiliation statute was whether "Congress, in enacting . . . [section 92], intend[ed] to exercise its Constitutionally delegated authority to set aside the laws of a State." *Id.* at 1107. The Court noted that if Congress intended to set aside Florida's anti-affiliation statute, then the Supremacy Clause requires the Court to follow the federal rather than the state law. *Id.* (quoting *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987)). For a reprint of the entire Supremacy Clause, see *supra* note 14.

In attempting to ascertain Congress' intent, the Court noted that more often than not, explicit language of preemption does not appear in the federal statute. *Barnett*, 116 S. Ct. at 1108. Rather, the Court determined that it is permissible to interpret a clear, but implicit preemptive intent on the part of Congress in the federal statute's "structure and purpose." *Id.* (relying on the Court's earlier holding in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982)).

241. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1107 (1996).

242. *Id.* at 1108.

243. *Id.* The Court gave the following example of two directly conflicting duties: "if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'" *Id.*

"[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting section 92]."²⁴⁴

Next, the Court specifically addressed Congress' purpose for enacting section 92.²⁴⁵ The Court noted that the language of section 92 suggests a broad, rather than limited, grant of power to the national banks.²⁴⁶ Further, this expression of power is not one, in the Court's view, that "Congress would want States to forbid, or impair significantly . . ." ²⁴⁷ For support, the Court relied on its earlier decision in *Franklin National Bank v. New York*.²⁴⁸ In *Franklin*, the Court held that a New York law concerning advertising was in conflict with the National Bank Act and the Federal Reserve Act, and therefore invalid.²⁴⁹ The *Franklin* Court's rationale was that express powers of the National Bank Act and the Federal Reserve Act grant more than mere passive powers to national banks, thus requiring the preemption of state laws to the contrary.²⁵⁰ Following this rationale, the *Barnett* Court held that section 92 is an express grant of power and contains no indication that Congress intended to subject its power to the laws of the States.²⁵¹

In its discussion of section 92's purpose, the *Barnett* Court included, almost in its entirety, the letter written to Congress by the Comptroller of the Currency in 1916.²⁵² In that letter, the Comptroller stated that it would be "unwise and . . . undesirable" for banks in large cities to be afforded the insurance powers of section 92.²⁵³ However, the Court down-played the relevance of this letter, noting that the letter says nothing about state law limitations.²⁵⁴ Here, the Court failed to consider that the Comptroller's letter and the enactment of section 92 occurred twenty-nine years prior to the enactment of the McCarran-Ferguson Act.²⁵⁵ A careful reading of the letter suggests that the result obtained in *Barnett*, allowing national banks to sell insurance nationwide

244. *Id.*

245. *Id.*

246. *Id.*

247. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1108 (1996).

248. 347 U.S. 373 (1954).

249. *Id.* at 377.

250. *Id.*

251. *Barnett*, 116 S. Ct. at 1110.

252. *Id.* For portions of the Comptroller's letter, see *supra* notes 61-63.

253. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1108 (1996).

254. *Id.* The Court noted that "[t]he letter refers to limitations that federal regulation might impose, but it says nothing about limitations imposed by state regulation or state law." *Id.*

255. Section 92 of the National Bank Act was enacted by Congress in 1916. 12 U.S.C. § 92 (1994). In 1945, twenty-nine years after the enactment of section 92, Congress enacted the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015 (1994).

out of their small town offices, was never the purpose for enacting section 92.²⁵⁶

Likewise, the result obtained by the Supreme Court in *Barnett* contradicted the purpose behind Congress' enactment of the McCarran-Ferguson Act.²⁵⁷ The Court held in *Barnett* that the McCarran-Ferguson Act did not apply to the conflict between section 92 and Florida Section 626.988.²⁵⁸ The Court's reasoning addressed only the second prong of the McCarran-Ferguson Act and asked the question of whether section 92 relates to the business of insurance.²⁵⁹ Since the Court held that section 92 related to both banking and insurance, there was no need to address the first prong of the McCarran-Ferguson test.²⁶⁰

The Court's analysis of the McCarran-Ferguson test's second prong concentrated on the Act's language and purpose.²⁶¹ The relevant test asks the question whether the federal statute, here section 92, "specifically relates to the business of insurance."²⁶² The Court held that under "ordinary English,"

256. For a careful reading of the Comptroller's letter, see *supra* notes 54-71 and accompanying text. This discussion includes the following portion of the Comptroller's letter, stating that "[i]t seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities." 53 CONG. REC. 11,001 (1916). The Comptroller, in his letter, goes on to state, "I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers." *Id.*

257. The clear legislative purpose of Congress' enactment of the McCarran-Ferguson Act was to "broadly . . . give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. V. Benjamin*, 328 U.S. 408, 429 (1946).

258. *Barnett*, 116 S. Ct. at 1111 (stating that the McCarran-Ferguson Act's special preemption rule does not apply under the *Barnett* facts because section 92 specifically relates to the business of insurance).

259. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1111-12 (1996) (using the language and purpose of the McCarran-Ferguson Act to determine whether section 92 satisfies the "specifically relates to the 'business of insurance'" test; also known as the second prong of the McCarran-Ferguson test). 15 U.S.C. § 1012(b) (1994). The McCarran-Ferguson Act provides protection for federal preemption for those laws that are "enacted by any State for the purpose of regulating the business of insurance. . . ." *Id.*

260. This conclusion is based upon the McCarran-Ferguson Act's test. For an in depth analysis of the workings of that test, see *supra* notes 128-41 and accompanying text.

261. *Barnett*, 116 S. Ct. at 1111.

262. The relevant section of the McCarran-Ferguson Act reads that, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance.*" 15 U.S.C. § 1012(b) (1994) (emphasis added).

section 92 clearly relates to the business of insurance.²⁶³ The statute specifically grants permission to national banks to both solicit and sell various types of insurance.²⁶⁴

The Court rejected Florida's contention that a statute could only relate to one thing—in this case, banking.²⁶⁵ The Court noted that neither the language nor the purpose of the McCarran-Ferguson Act require a federal statute to relate only to insurance.²⁶⁶ The purpose of the McCarran-Ferguson Act is addressed as further support for the Court's holding that the Supremacy Clause and not the McCarran-Ferguson Act should control the conflict between section 92 and Florida Section 626.988.²⁶⁷ As the Court acknowledged, the purpose of the McCarran-Ferguson Act is two-fold.²⁶⁸ First, the Act was created to ensure that the power to regulate the insurance industry was maintained by the several states.²⁶⁹ Second, the Act was enacted to ensure that silence on the part of Congress would not be construed to impose burdens on states' regulation of the business of insurance.²⁷⁰ It was this silence concern that led the Court back to the language of section 92, which it found to be quite explicitly a grant of express power in the national banks to sell insurance in towns with less than 5000 people.²⁷¹ Thus, under the Court's interpretation of the McCarran-Ferguson Act's purpose, Congress' clear grant of insurance power in section 92 is governed by the Supremacy Clause, not the McCarran-Ferguson

263. *Barnett*, 116 S. Ct. at 1111.

264. *Id.*

265. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1113 (1996). The Court stated that "a statute may specifically relate to more than one thing. Just as an ordinance forbidding dogs in city parks specifically relates to dogs and parks, so a statute permitting banks to sell insurance can specifically relate to banks and to insurance." *Id.* The Court went on to note that the actual language of the McCarran-Ferguson Act requires a statute to specifically relate, not predominately relate, to insurance. *Id.*

266. *Id.*

267. *Id.* at 1112.

268. *Id.*

269. *Id.* In 1946, the Court made clear that this was Congress' primary reason for enacting the McCarran-Ferguson Act. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). This belief is also shared by the National Association of Insurance Commissioners. In their brief to the Supreme Court concerning the *Barnett* decision, the NAIC wrote that "[The] legislative history of the McCarran-Ferguson Act indicates that the Act was intended to preserve state insurance laws and regulations." Brief for Amicus Curiae National Association of Insurance Commissioners in Support of Respondents at 4, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 39 (1995) (No. 94-1837) (relying on 1945 NAIC PROC. 156, at 159 and the Court's decision in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 208 (1979)).

270. *Barnett*, 116 S. Ct. at 1112.

271. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103, 1112 (1996).

Act.²⁷² And, under ordinary Supremacy Cause jurisprudence, the state law must give way to the federal law.²⁷³

The aggregate result of the *Barnett* holding is that Florida and the other forty-nine states are now unable to control national banks selling insurance on a statewide basis out of their small town offices.²⁷⁴ This decision has thwarted the congressional intentions behind section 92 and the McCarran-Ferguson Act. Section 92 was enacted to aid small-town national banks.²⁷⁵ In contrast to that purpose, however, the Supreme Court's decision in *Barnett* allows national banks to exploit that federal statute.²⁷⁶ Thus, a congressional amendment is needed to allow section 92 to coincide with Congress' original intentions.²⁷⁷

Likewise, however, a congressional amendment would have been necessary if the Supreme Court had decided to affirm the Eleventh Circuit's decision. If that were the result, then states with anti-affiliation statutes could prohibit national banks from exercising any of their expressed section 92 powers.²⁷⁸ That result would eliminate the benefits to small town national banks in the sixteen states with anti-affiliation statutes.²⁷⁹ For example, a national bank operating in a small town would have been prohibited from complementing its income with insurance sales.²⁸⁰ Thus, Congress' original purpose for enacting

272. *Id.*

273. *Id.*

274. This was the prediction made before the Court's decision in the *Barnett* case. Roth, *supra* note 150, at A14. Roth wrote that "[i]f the banks win [in the *Barnett* case], national banks [will] be able to sell insurance from coast to coast." *Id.*

275. This conclusion is warranted by section 92's historical and legislative background. Section 92 was enacted in response to Congress' concern over the financial stability of the national banks located in small towns. 53 CONG. REC. 11,001 (1916). For the complete historical and legislative background of section 92, see *supra* notes 54-71 and accompanying text.

276. Like the *Owensboro* decision, if the Supreme Court holds that section 92 preempts Florida's anti-affiliation statute, then the states will not be able to prohibit national banks from operating under section 92. Roth, *supra* note 150, at A14 (noting that if the banking industry is successful in arguing that section 92 should preempt Florida Section 626.988, then banks will be free to sell insurance from coast to coast).

277. The contradiction between the application of section 92 and its congressional intentions have created a loophole in the law. Thus, "[w]hen time and technology open up a loophole, it is up to Congress to decide whether it should be plugged, and how." *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993). For the policy reasons explained in the OCC 1916 letter to Congress, see *supra* note 67 and accompanying text.

278. Roth, *supra* note 150, at A14 ("If [the Eleventh Circuit's decision in *Barnett* is affirmed], national banks [will] be blocked from selling insurance nationwide.")

279. Section 92 was enacted by Congress to aid small town national banks. 53 CONG. REC. 11,001 (1916). However, in states with anti-affiliation statutes, those small town banks would be blocked from obtaining the benefits that Congress intended when it enacted section 92. See generally Roth, *supra* note 150, at A14. For a complete listing of the states which currently have anti-affiliation statutes, see *supra* note 12.

280. Roth, *supra* note 150, at A14.

section 92 would be completely thwarted in those states that have enacted anti-affiliation statutes.

Additionally, if the Supreme Court had affirmed the Eleventh Circuit's decision in *Barnett*, national banks would be allowed to sell insurance on a statewide basis in the majority of states because they have not enacted anti-affiliation statutes.²⁸¹ In those states, the legislative purpose for section 92 would be violated in the same manner as it was in the Sixth Circuit's *Owensboro* decision.²⁸² Instead of aiding only small town national banks, a decision by the Supreme Court affirming the Eleventh Circuit's *Barnett* decision would aid all national banks on a statewide basis in the majority of states.²⁸³

Fortunately, the problems associated with the Supreme Court's decision in *Barnett* can be solved by an amendment to section 92.²⁸⁴ Specifically, Congress should narrow the scope of section 92 to coincide with its original intentions.²⁸⁵ The next Section of this Note provides the amendment to section 92 that will achieve Congress' original intentions.

IV. MODEL AMENDMENT TO SECTION 92

In essence, the conflict between section 92 and the several state anti-affiliation statutes is a power struggle between the banking and insurance industries.²⁸⁶ The banking industry seeks to exercise its section 92 insurance powers to sell insurance on a statewide basis.²⁸⁷ In contrast, the insurance industry argues that states should be allowed to prohibit the national banks from selling any form of insurance through anti-affiliation statutes authorized under

281. The *Barnett* decision held that states could pass anti-affiliation statutes prohibiting national banks from exercising their section 92 powers. *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 637 (11th Cir. 1995). Logically, states without anti-affiliation statutes would have no means to prohibit national banks from selling insurance under section 92.

282. See *supra* notes 177-97 and accompanying text (contrasting the *Owensboro* decision with the Congressional purposes for the enactment of section 92).

283. Under the OCC's interpretation of section 92 of the National Bank Act, national banks properly located and doing business under section 92 may sell insurance statewide. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *NBD Bank v. Bennett*, 67 F.3d 629 (7th Cir. 1995).

284. See *supra* note 32 and accompanying text.

285. See *supra* notes 274-83 and accompanying text.

286. The current conflict between section 92 and anti-affiliation statutes authorized under the McCarran-Ferguson Act is only the most recent of many battles between the banking and insurance industries. Whiting, *supra* note 3, at 1; Seiberg, *supra* note 150, at 1; Hofmann, *supra* note 1, at 32B.

287. See Brief of Petitioner, *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. 1103 (1996) (No. 94-1837). In its brief, *Barnett Bank* argued that it should be free to exercise all of its insurance powers authorized under section 92. *Id.* at 5.

the McCarran-Ferguson Act.²⁸⁸ These opposing positions appear to be mutually exclusive.²⁸⁹ Yet, when Congress enacted the McCarran-Ferguson Act, section 92 had been a part of the United States Code for twenty-nine years.²⁹⁰ The fact that Congress did not amend section 92 when it enacted the McCarran-Ferguson Act is evidence that Congress intended the two Acts to coexist.

This Note suggests that the conflict between section 92 and the state anti-affiliation statutes can be resolved with a single congressional amendment to section 92 of the National Bank Act. The key to this amendment's ability to agree with the original intentions of both section 92 and the McCarran-Ferguson Act is its element of compromise.²⁹¹ In contrast, the judicial attempts to resolve this conflict in the *Owensboro* and *Barnett* decisions were unable to reach a compromise due to the language of the statutes involved.²⁹² As a result, both of those decisions contradicted the congressional intentions for section 92 and the McCarran-Ferguson Act.²⁹³ Likewise, a decision by the Supreme Court was unable to overcome the language barrier of section 92.²⁹⁴ Thus, the following amendment is the only means of bringing a satisfactory resolution to this area of the law.

288. The insurance industry's argument was based on the theory that the McCarran-Ferguson Act allows state anti-affiliation statutes to preempt Section 92. Brief of Respondents, *Barnett* (No. 94-1837).

289. It appears that section 92's broad scope of authorization to the national banks encroaches upon the several states' abilities to regulate the business of insurance in accordance with the McCarran-Ferguson Act. Likewise, if states were permitted to prohibit all national banks from exercising their section 92 powers, then the public interests behind the enactment of section 92 have been thwarted.

290. The McCarran-Ferguson Act was enacted in 1945. 15 U.S.C. §§ 1011-1015 (1994). Additionally, Congress added section 92 to the National Bank Act in 1916. 12 U.S.C. § 92 (1994).

291. Since section 92 and the McCarran-Ferguson Act appear to be existing as mutually exclusive, both the banking and insurance industries must compromise. Under the amended version of section 92, the banking industry must compromise the ability to sell insurance beyond the limits of the small towns in which they are properly located. This will place the scope of section 92 in accordance with the historical and legislative background of that Act. See *supra* notes 54-71 and accompanying text (discussing the background of section 92).

Further, the insurance industry must compromise the right to prohibit national banks from exercising their section 92 powers. To accomplish this, paragraph three of the amended section 92 provides that section 92 relates to the business of insurance. The effect of this amendment gives the several states the power to regulate all aspects of the business of insurance except the narrow area covered by the amended version of section 92. See *infra* section IV.

292. The Supreme Court's choices were either a complete victory for the banking industry or a complete victory for the insurance industry and the several states. See *supra* notes 242-73 and accompanying text (comparing the Supreme Court's options with Congress' original intentions).

293. See *supra* notes 176-97, 281-83, and accompanying text.

294. See *supra* notes 278-83 and accompanying text.

A Model Amendment to Section 92

The pertinent portion of section 92 currently includes the following:

[1.] In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State²⁹⁵

In addition to the current text of section 92, the following paragraphs should be added:

2. The powers vested in national banking associations under the first paragraph of this Act shall be limited by the following: A national banking association properly located and operating under the first paragraph of this Act may Not, under any circumstances, act as the agent for any fire, life, or other insurance company when the Insured's residence or place of business is Not properly located in the same place of less than five thousand inhabitants as the national banking association.

3. Congress declares that this section of the National Bank Act relates to a limited area of the business of insurance. The continued regulation and taxation of all other aspects of the business of insurance shall remain within the power of the several states.

Comments: This amendment to section 92 of the National Bank Act is in response to the recent confusion surrounding the relationship between section 92 and state laws authorized under the McCarran-Ferguson Act.²⁹⁶ On one side of the conflict, the OCC has expanded section 92 to allow national banks to sell insurance on a statewide basis.²⁹⁷ On the other side, state legislatures have passed laws which prohibit national banks from exercising rights expressly given to them by Congress.²⁹⁸ This model amendment compromises between both

295. 12 U.S.C. § 92 (1994). For the complete text of section 92, see *supra* note 56.

296. See, e.g., *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631 (11th Cir. 1995), *rev'd*, 116 S. Ct. 1103 (1996); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), *cert. denied*, 116 S. Ct. 1350 (1996).

297. OCC Inter. Ltr. 366 [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

298. See *supra* note 12 for the 16 states which have enacted anti-affiliation statutes.

positions and returns the scope of section 92 to agree with Congress' original intentions.

It is well established that prior to the enactment at section 92, the national banks possessed no power to act as insurance agents.²⁹⁹ In 1916, Congress created a limited exception to that general rule by enacting section 92 of the National Bank Act.³⁰⁰ That Act was intended to aid the struggling national banks that were located in the many small towns across this country.³⁰¹ In recent years, section 92 has been expanded so that it is possible for large national banks with branch offices properly located in small towns to sell insurance to customers in their large cities.³⁰² This result is clearly contrary to Congress' original intentions for section 92.

The second paragraph of the amended version of section 92 resolves this problem by reducing the scope of the insurance market available to national banks under section 92. Under that paragraph, national banks operating under section 92 may sell insurance only to customers properly located within that small town. Thus, small-town national banks may supplement their incomes by selling insurance locally. Additionally, large national banks may also supplement the incomes of their branch offices located within small towns. No national banks, however, will be permitted to sell insurance in towns of more than 5000 people. Under this amendment, the scope of section 92 will once again coincide with Congress' purpose for creating an exception to the general rule that banks cannot sell insurance.³⁰³

In 1945, twenty-nine years after the enactment of section 92, Congress enacted the McCarran-Ferguson Act.³⁰⁴ In that Act, Congress gave the several states the ability to regulate and tax the insurance industry.³⁰⁵ Also included in that Act was the ability for state insurance laws to preempt federal laws which interfered with the states' ability to regulate and tax the business of

299. See *supra* notes 55-56 and accompanying text.

300. 12 U.S.C. § 92 (1994). See *supra* notes 54-71 and accompanying text for a discussion of the historical and legislative background behind the enactment of section 92.

301. See *supra* notes 179-88 and accompanying text.

302. OCC Inter. Ltr. 366 [1985-1985 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986). This interpretation of section 92 has been upheld in the circuit courts. *Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *NBD Bank v. Bennett*, 67 F.3d 629 (7th Cir. 1995).

303. This conclusion is warranted by section 92's legislative history. Section 92 was enacted to aid small town national banks. 53 CONG. REC. 11,001 (daily ed. July 14, 1916) (statement of Comptroller Williams). In accordance, the revised version of section 92 limits the national banks' abilities to sell insurance by reducing the scope of bank insurance sales power to small towns. See *supra* notes 54-71 and accompanying text for a discussion of the history of section 92.

304. 15 U.S.C. §§ 1011-1015 (1994).

305. *Id.*

insurance.³⁰⁶ Thus, under the McCarran-Ferguson Act, state insurance laws could preempt federal laws, unless the federal laws specifically related to the business of insurance.³⁰⁷ In 1945, Congress had already enacted section 92 as an exception to the general rule that national banks could not sell insurance.³⁰⁸

Since Congress enacted the McCarran-Ferguson Act after section 92, it is only logical that it intended for them to coincide. Thus, the idea that laws created under the authority of the McCarran-Ferguson Act could preempt section 92 is illogical. The third paragraph of the amended version of section 92 acknowledges this argument. That paragraph states that section 92 relates to a small portion of the business of insurance. Therefore, no laws promulgated under the authority of the McCarran-Ferguson Act can preempt section 92. The result of this paragraph is that the states remain free to regulate their insurance industries, but that those regulations may not take away the limited powers granted to national banks under section 92.

V. CONCLUSION

The *Owensboro* and *Barnett* decisions illustrate the problems caused by the ambiguous language of section 92 of the National Bank Act. Those decisions both misapplied section 92 and the McCarran-Ferguson Act in a manner that contradicted the original intentions of Congress. Similarly, the Supreme Court was unable to resolve this conflict in accordance with Congress' purpose for both statutes. Thus, Congress needs to clarify the language of section 92 to coincide with its original purpose for enacting that section. The model amendment proposed in Section IV of this Note accomplishes that goal by narrowing the scope of insurance sales that banks may engage in under section 92. Section 92 will once again exist as a limited exception to the general proposition that national banks are not authorized to sell insurance. In that respect, the historical and legislative background of section 92 and the McCarran-Ferguson Act will be served. Additionally, the amendment proposed in this Note reinstates that the several states possess the power to control the insurance industry outside of the limited exception provided in section 92. This was the state of the law in 1945 when Congress enacted the McCarran-Ferguson Act. Finally, by reinstating the original intentions of Congress, the amendment proposed in this Note will bring an end to this chapter of the insurance and banking war.

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306. *Id.*

307. *Id.*

308. Federal Reserve Act Amendments of 1916, Pub. L. No. 270, 39 Stat. 752, 753.