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AFTER *BARNETT*: THE INTERSECTION OF NATIONAL BANK INSURANCE POWERS AND STATE REGULATION

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I. INTRODUCTION

The Supreme Court's March 1996 decision in *Barnett Bank of Marion County, N.A. v. Nelson*,¹ affirming the authority of national banks to sell insurance, notwithstanding a restrictive state insurance law, should significantly increase bank participation in the delivery and distribution of insurance products.² As a result, identifying the role of state regulation of these activities is an increasingly important issue for national banks—and for state insurance regulators.

The interplay of state regulation and federally authorized national bank powers is not a new issue. The establishment of the national banking system in 1863 created a federal component to a commercial banking system then comprised of state chartered banks.³ Under this system, national banks are subject to comprehensive federal regulation affecting their organization, operation, examination and supervision.⁴ It has been said that the National Bank Act constitutes a complete system for the establishment and government of national banks.⁵

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1. 116 S. Ct. 1103 (1996).

2. The immediate effect of *Barnett* is to make inapplicable to national banks provisions of several state anti-affiliation laws that prevented national banks from selling insurance in those states. See Howard Kapiloff, *Bank Insurance Sales Likely to Take Off, Analysts Say*, AM. BANKER, Apr. 16, 1996, at 8.

3. See generally EDWARD SYMONS, JR. & JAMES WHITE, BANKING LAW, 1-46 (3d ed. 1991).

4. See, e.g., 12 U.S.C. §§ 21-216d (1994).

5. See *Deitrick v. Greaney*, 309 U.S. 190 (1940).

However, courts have also recognized that many aspects of a national bank's operations are subject to state laws.⁶ This dual structure can create a tension between state regulation intended to address legitimate state concerns and state provisions that prevent federally-created entities—national banks—from exercising the powers vested in them under federal law. Federal preemption of state law is a mechanism that preserves the independence and authority of the federal banking system by limiting the level of state control of the powers and activities of the members of that system.

For years national banks have sold insurance and annuity products without notable adverse experience. However, recent litigation tests the limits of state regulation of these activities.⁷ The *Barnett* decision is a pivotal pronouncement in this area and provides valuable guidance on the application of state regulation to federally-authorized national bank powers. This Article provides a general overview of national bank insurance and annuities activities and discusses what *Barnett* may mean for national banks conducting insurance activities, including the role of the Office of the Comptroller of the Currency (the OCC), in light of that decision.

II. OVERVIEW OF NATIONAL BANK INSURANCE AND ANNUITY ACTIVITIES

National banks currently engage in a wide range of insurance and annuity activities pursuant to authority contained in Sections 92 and 24 of title 12 of the United States Code. A brief survey of these activities provides a useful context for considering how they may be affected by state law.

A. *National Bank Insurance Activities Under Section 92*

Section 92 of title 12 of the United States Code authorizes national banks to sell insurance as agents from small communities. Specifically, § 92 provides, in pertinent part, that:

In addition to the powers now vested by law in national

6. See *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 361-62 (1870) (holding that national banks are “subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation”).

7. See, e.g., *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), cert. denied, 116 S. Ct. 1350 (1996); *NBD Bank v. Bennett*, 67 F.3d 629 (7th Cir. 1995); *Shawmut Bank Conn., N.A. v. Googins*, No. 3:94CV46 (JBA) (D. Conn. July 29, 1996); *First Nat'l Bank of Boston v. Ruthardt*, 96-12075 PBS (D. Mass. Dec. 19, 1996); *Deposit Guar. Nat'l Bank v. Dale*, No. 3:95CV64OWN (S.D. Miss. filed Aug. 21, 1995); *Texas Bankers Ass'n. v. Bomer*, A-96CA-694-JN (W.D. Tex. filed Oct. 9, 1996).

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 . . . 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 agent⁸

The OCC and the courts have construed this authority broadly to permit national banks with their main office or a branch located in a "place" of less than 5,000 in population to conduct a full range of insurance agency activities from an agency located in that "place."⁹

OCC actions and judicial decisions have also addressed the geographic scope of a national bank's insurance activities under § 92. For example, an OCC interpretive ruling dating from 1963 provides that a national bank may act as a general insurance agent under § 92 from any office located in a community of less than 5,000, even if the national bank's principal office is located in a town with a population that exceeds 5,000 inhabitants.¹⁰ In addition, in *Independent Insurance Agents of America v. Ludwig*, the D.C. Circuit upheld an OCC opinion that § 92 does not impose any geographic limitation on the scope of the insurance business.¹¹ In *Ludwig*, the court affirmed the

8. 12 U.S.C. § 92 (1994).

9. See, e.g., Letter from H. Joe Selby, First Deputy Comptroller for Operations (June 30, 1976) (unpublished) (stating that a § 92 insurance agency "may sell all types of insurance to bank customers and non-customers alike."); *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 156 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993) ("Section 92 applies to national banks that 'act as agent for any fire, life, or other insurance company.' We believe that this language makes inescapable the conclusion that Congress intended this provision to apply to 'any . . . insurance company'" (citation omitted)).

10. 61 Fed. Reg. 4849 (1996) (renumbered and to be codified at 12 C.F.R. § 7.1001.) This ruling has been upheld by one court as valid due to laches. *National Association of Life Underwriters v. Clarke*, 736 F. Supp. 1162 (D.D.C. 1990), rev'd on other grounds sub nom. *Independent Insurance Agents of America, Inc. v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), reh'g en banc denied, 965 F.2d 1077 (D.C. Cir. 1992), rev'd and remanded sub nom. *United States National Bank v. Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173 (1993), aff'd on remand, *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

11. 997 F.2d 958 (D.C. Cir. 1993); see also *NBD Bank v. Bennett*, 67 F.3d 629 (7th Cir. 1995).

OCC determination that a “bank is free to solicit and serve insurance customers everywhere”¹² concluding that § 92 “evinces no unambiguous command that the bank may sell insurance only to local townspeople.”¹³

In Interpretive Letter No. 753, the OCC further interpreted the extent to which § 92 allows insurance marketing and sales activities to be conducted outside the “place” of 5,000.¹⁴ The Interpretive Letter articulated two broad principles. First, the agency located in the place of 5,000 must be bona fide. The facts addressed by the letter included the following: agents would be licensed and managed through the agency that was located in the place of 5,000; the agency would be responsible for collecting commissions from insurance carriers and paying commissions to its licensed sales staff; the agency would generally be responsible for processing insurance applications and delivery of policies where this is consistent with the procedures of the relevant insurance carriers; and business records of the agency would be available at the place of 5,000.

Second, the Letter concluded that the bank agency and its agents may seek the same market range and use the same marketing tools and facilities as generally available for a licensed insurance agency, not affiliated with a bank, that was based in the place of 5,000. This second principle would generally allow the following: (1) meetings with customers and solicitations and sales of insurance by the bank’s agents at locations both inside and outside the place of 5,000; (2) mailings to advertise and sell insurance that originate from inside or outside of the place of 5,000 and brochures and other advertising materials that are distributed from locations inside and outside of the place of 5,000, including other offices of the bank; (3) referrals by personnel at bank offices inside and outside of the place of 5,000 to the bank’s insurance agency; (4) use of the telephone and cybermarketing with the calls and messages originating either within or outside the place of 5,000; and (5) contracting with third parties to assist the agency’s sales activities including advertising support, direct mail marketing services, telemarketing services, payments processing, and

12. *Ludwig*, 997 F.2d at 958.

13. *Id.* at 960. In *NBD*, the court also made clear that § 92 delegates regulatory authority to the OCC. In that regard, the Court noted that “[t]he Comptroller believes not only that § 92 permits small-town branches to sell insurance but also that these sales are desirable: they enhance banks’ revenues, diversify their business without creating any threat to insolvency, and increase competition. Banks, buyers of insurance, and the federal deposit insurance fund all gain.” *NBD*, 67 F.3d at 632.

14. OCC Interpretive Letter No. 753 (Nov. 4, 1996) *reprinted in* [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 81-107.

other types of “back office” support.

B. National Bank Insurance and Annuity Activities Under Section 24 (Seventh)

National banks also are authorized to engage in the “business of banking,” and may exercise “all such incidental powers as shall be necessary to carry on the business of banking.”¹⁵ As described below, the OCC has approved certain insurance and annuity activities under this authority.¹⁶

1. Credit Life Insurance

The OCC has long recognized the ability of a national bank to act as agent in the sale of credit life insurance.¹⁷ The OCC found the sale of this type of insurance to be incidental to a national bank’s express lending authority because it protects a bank’s interest in a loan in the event of the death or disability of the borrower.¹⁸ Courts have

15. 12 U.S.C. § 24 (Seventh) (1988 and Supp. V 1993).

16. Various OCC decisions regarding national bank insurance powers under § 24(Seventh) have been the subject of litigation. In *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010, 1014 (5th Cir. 1968), the court found that because the Congress specifically dealt with insurance agency power in § 92, the *expressio unius est exclusio alterius* rule of statutory construction “negates the existence of any other power to act as insurance agent under the general provisions of Section 24(7).” The Second Circuit has aligned itself with the reasoning in *Saxon* in finding that § 92 impliedly bars a national bank in a town of more than 5,000 from selling title insurance as agent. See *American Land Title Association v. Clarke*, 968 F.2d 150 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993). However, there are strong arguments that *Saxon* was wrongly decided. See *Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n.6 (8th Cir. 1984); *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

17. 12 C.F.R. Part 2 (42 Fed. Reg. 48518 (1977)); OCC Interpretive Letter No. 283 (Mar. 16, 1984) *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,547. The OCC has also approved the direct underwriting and reinsurance of credit life insurance as incidental to the business of banking in that it is convenient and useful to performing the bank’s express power to lend money and is a “logical component to a national bank’s power to sell credit life.” OCC Interpretive Letter No. 277 (Dec. 21, 1983) *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441.

18. The OCC has defined the term “credit life insurance” to mean “credit life, health and accident insurance, sometimes referred to as credit life and disability insurance.” See 61 Fed. Reg. 51781 (1996) (to be codified at 12 C.F.R. § 2.2(b)). Part 2 also places limits on the distribution of credit life insurance income by prohibiting bank officers, directors, employees, or principal shareholders, and entities in which these persons own an interest of more than ten percent, from retaining commissions or income from sales of credit life insurance in connection with a loan made by the bank. This income must be credited to the bank, although limited exceptions are provided for bonus and incentive plans and dual employees. See 61 Fed. Reg. 51781 (1996) (to be codified at 12 C.F.R. §§ 2.3, 2.4).

upheld the sale of credit life insurance as within the bank's incidental powers.¹⁹

a. Other Credit Insurance To Reduce Risk of Loss to the Bank

The OCC has also approved the sale²⁰ of other types of credit related insurance under the bank's incidental powers where the sale of the insurance is intended to reduce the risk of loss to the bank. For example, the OCC approved the sale of involuntary unemployment insurance²¹ (intended to protect the bank if the borrower becomes involuntarily unemployed), vendors single interest insurance²² and double interest insurance²³ (special types of credit related insurance insuring the bank or the bank and the borrower, respectively, against loss or damage to personal property in which the bank has a security interest as a result of a loan), and mechanical breakdown insurance²⁴ (protecting an installment loan customer against most major mechanical failures during the life of the loan). The OCC found each of these types of insurance incidental to a national bank's express lending authority.

More recently, the OCC approved the sale of vehicle service contracts intended to protect the value of the collateral from mechanical breakdown.²⁵ The OCC reviewed its prior opinions in this area and concluded that where "a contract protects the value of collateral securing financing extended by the bank and aids in the collection of a particular type of financing extended by the bank, the bank's sale of such contract may properly be viewed as part of or incidental to the business of banking within the meaning of § 24 (Seventh)."²⁶

b. Title Insurance

Title insurance protects banks and customers against unknown encumbrances on the property. The OCC analyzed the linkage be-

19. See *IBAA v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

20. The term "sale" is used to describe sales as agent rather than underwriting.

21. See OCC Interpretive Letter No. 283, *supra* note 17, at 85,547.

22. See *Id.*

23. See Letter from William Glidden, Assistant Director, Legal Advisory Services Division (June 3, 1986) (unpublished) (on file with author).

24. See Letter from William Glidden, Assistant Director, Bank Operations and Assets Division (June 17, 1993) (unpublished) (on file with author).

25. See OCC Interpretive Letter No. 671 (July 10, 1995) *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,619.

26. *Id.*

tween this purpose and national banks' lending authority and approved the sale of title insurance by a national bank as incidental to the express authority of a national bank to make loans secured by real property.²⁷ Nevertheless, the Second Circuit reversed the OCC determination and held that § 92 prohibits national banks located in and doing business in towns with *more* than 5,000 in population from selling title insurance as agent.²⁸

c. Municipal Bond Insurance

The OCC has approved the sale of municipal bond insurance under § 24(Seventh) as functionally equivalent to the traditional banking activity of issuing standby letters of credit.²⁹ The D.C. Circuit upheld the OCC determination.³⁰

d. Fixed and Variable Rate Annuities

In *NationsBank v. Variable Annuity Life Insurance Company (VALIC)*,³¹ the Supreme Court confirmed the power of a national bank to sell fixed and variable rate annuities as financial investment instruments under the authority of § 24(Seventh). The Court found that the OCC had appropriately examined the characteristics of annuities, including the fact that annuities serve a comparable investment purpose and are functionally similar to other bank investment products in meeting the needs of bank customers, and that the OCC had reasonably concluded that annuities are properly classified as investments and not insurance. The *VALIC* decision also has significance beyond its specific conclusions and provides the foundation for maintaining a modern framework for defining the business of banking.³² This framework could accommodate various insurance related activities.

27. See OCC Interpretive Letter No. 368 (July 11, 1986) reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538. The OCC has also approved underwriting of title insurance. OCC Interpretive Letter No. 377 (Feb. 6, 1987) reprinted in [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,601.

28. See *American Land Title Association v. Clarke*, 968 F.2d 150 (2nd Cir. 1992), cert. denied 113 S. Ct. 2959 (1993).

29. See OCC Interpretive Letter No. 338 (May 2, 1985) reprinted in [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508.

30. See *American Insurance Association v. Clarke*, 865 F.2d 278 (D.C. Cir. 1989).

31. 115 S. Ct. 810 (1995).

32. See Williams and Jacobsen, *The Business of Banking: Looking to the Future*, 50 BUS. LAW. 783 (May 1995).

e. Mortgage Reinsurance

In Interpretive Letter No. 743, the OCC concluded that it was permissible under the National Bank Act for a national bank to establish an operating subsidiary to reinsure a portion of the mortgage insurance on loans originated or purchased by the parent bank or its affiliates.³³ Specifically, the bank subsidiary would assume a portion of the primary mortgage insurer's obligation in exchange for a portion of the mortgage insurance premium. The OCC determined that this reinsurance was part of the business of banking because, among other things, it was a functionally equivalent to, or a logical outgrowth of, the bank's business of underwriting mortgage loans and it involved risks similar to those associated with permissible mortgage loan underwriting. In addition, the OCC determined that even if the reinsurance activity was not considered part of the business of banking, it could still properly be viewed as incidental to the business of banking.

C. OCC Advisory Letter 96-8

On October 8, 1996, the OCC issued Advisory Letter 98-6, "Guidance to National Banks on Insurance and Annuity Sales Activities," which provides guidance to national banks on various issues raised by insurance and annuity sales. The Advisory highlights issues that all national banks should consider when structuring their insurance sales programs in order to ensure that these sales are conducted in a safe and sound manner and to provide adequate protection to consumers. The Advisory applies to sales of all types of insurance and annuities by bank employees, bank subsidiary and affiliate employees, and sales by third parties operating from bank premises.

The Advisory highlights issues that the OCC believes banks should consider for both insurance and annuities sales, including evaluation and selection of products, qualifications and training of personnel, inappropriate recommendations or sales, employee compensation, complaints and compliance, advertising, customer privacy, and third party arrangements. The Advisory also includes a review of the Federal prohibitions on tying, which are applicable to all bank sales transactions.³⁴

In addition, the Advisory addresses issues that are more particular to bank insurance sales. These include the sale of insurance

33. OCC Interpretive Letter No. 743 (Oct. 17, 1996) *reprinted in* [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 81-108.

34. See 12 U.S.C. § 1972, 12 C.F.R. § 225.7; OCC Bulletin 95-20 (Apr. 14, 1995).

when a loan application is pending and the setting and circumstances of bank insurance sales. In both situations, disclosures may be appropriate to ensure the customer is aware of the circumstances under which the insurance is sold.³⁵ With respect to annuity sales, the Advisory reiterates certain principles from the Interagency Statement on Retail Sales of Nondeposit Investment Products.³⁶

III. THE *BARNETT* DECISION

A. *Significance of the Barnett Case*

National bank sales of insurance products raise unique preemption issues because of the interplay between the authority delegated to the states to regulate insurance in the McCarran-Ferguson Act,³⁷ and federally granted powers of national banks to conduct insurance activities. *Barnett* is a pivotal case in this area because it provided the Supreme Court with an opportunity to consider the applicability of the McCarran-Ferguson Act in light of a federal statute, § 92, that expressly authorizes national banks to engage in insurance activities.

Specifically, the McCarran-Ferguson Act provides that "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 . . . unless such Act specifically relates to the business of

35. For example, when insurance is required as a condition of a loan, to avoid the impression that a linkage exists between a bank's credit decision and the customer's choice of insurer, the customer should be informed that he or she need not purchase insurance from the bank or any other particular party, that insurance is available from other than the bank, and that the customer's choice of insurer will not affect the bank's credit decision or credit terms in any way. With regard to all sales of insurance, during any customer contact, banks should disclose that an insurance product is not FDIC insured, is not a deposit or obligation of the bank, is not guaranteed by the bank, and (if applicable) is subject to investment risk, unless the bank affirmatively determines, for specific products, that customers would not reasonably benefit from, or might in fact be confused by, these disclosures.

36. The Interagency Statement on Retail Sales of Non-Deposit Investment Products (Feb. 15, 1994) contains standards for retail sales and recommendations of nondeposit "investment products," which include fixed and variable annuities. It addresses a wide variety of issues relevant to sales of these products, including disclosures and advertising, setting and circumstances of sales, qualifications and training of personnel authorized to sell or to provide investment advice, suitability and sales practices, and compensation of sales personnel and other bank employees. The Interagency Statement is applicable to bank employees, recommendations and sales by third party employees (affiliated and nonaffiliated) that occur from or are initiated on bank premises, and sales resulting from a referral of retail bank customers when the bank receives a benefit from the referral.

37. 15 U.S.C. § 1011-1015 (1988 and Supp. V 1993).

insurance.”³⁸ Thus, McCarran-Ferguson shields a state insurance law from preemption by a federal law if two conditions are met: (1) the state law is enacted for the purpose of regulating the business of insurance and (2) the federal law at issue does not “specifically relate to that business.” If this special McCarran-Ferguson “anti-preemption” rule is not available, however, the application of the state law to a national bank exercising insurance authority pursuant to § 92 will be determined under a standard preemption analysis. This is precisely what the Supreme Court did in *Barnett*.

B. *The Supreme Court’s Decision*

Barnett involved a Florida law that generally prohibited an otherwise licensed insurance agent who is associated with or owned by a financial institution from engaging in insurance activities.³⁹ For purposes of these regulations, the term “financial institution” included any bank, except for a bank which is not a subsidiary or affiliate of a bank holding company and is located in a city with a population of less than 5,000.⁴⁰ Thus, the statute had the effect of prohibiting most banks from selling insurance in Florida.

The Court analyzed the purpose and language of the McCarran-Ferguson Act and found that its anti-preemption rule did not apply in this case because § 92 “specifically relates to the business of insurance.”⁴¹ Therefore, well-recognized, standard preemption principles

38. 15 U.S.C. § 1012(b) (1988 and Supp. V 1993).

39. See Fla. Stat. Ann. § 626.988 (1996).

40. See Fla. Stat. Ann. § 626.988(1)(a) (1996).

41. *Barnett*, 116 S. Ct. at 1111. The *Barnett* holding does not affect two possible arguments that state efforts to regulate certain products may fail under the first prong of McCarran-Ferguson. One possible argument is that particular bank products, particularly new products, that are found permissible by the OCC under § 24(Seventh) would fail the first prong of McCarran-Ferguson because the state effort to regulate a specific bank product would be the regulation of the business of banking and the corporate powers of national banks and not regulation of the business of insurance. See, e.g., *First Nat’l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, (8th Cir. 1990), *cert. denied*, 498 U.S. 972 (1990) (holding that because the debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute the “business of insurance” under the McCarran-Ferguson Act). *But see* *American Deposit Corp. v. Schacht*, 84 F.3d 834 (7th Cir.), *cert. denied*, 117 S. Ct. 185 (1996), in which the Seventh Circuit held that national bank underwriting of a particular type of fixed annuity, the so-called “retirement CD,” did constitute the business of insurance, even though the retirement CD was also a permissible bank product. It may also be possible to characterize certain state laws, depending on the language of the state law at issue, as regulating the conduct of the bank and not the business of insurance. See, e.g., *Owensboro National Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994), *cert. denied*, 116 S. Ct. 1350 (1996) (concluding that the state statute “helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute

provided the proper framework to analyze the validity of the Florida statute as applied to national bank insurance sales under § 92.

Initially, the Court noted that where a federal statute does not reveal an explicit congressional intent to preempt state law, courts must “consider whether the federal statute’s ‘structure and purpose,’ or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent.”⁴² A court may discern this preemptive effect in one of two ways. The federal statute may create a scheme of federal regulation so pervasive as to make reasonable that Congress left no room for the states to supplement it.⁴³ Alternatively, the federal law may be in irreconcilable conflict with state law.⁴⁴

In *Barnett*, the Court focused on whether the Florida statute and § 92 presented an irreconcilable conflict. An irreconcilable conflict can arise in two ways. Compliance with both laws may be a physical impossibility.⁴⁵ The Court rejected this prong because § 92 is permissive, not mandatory, in that § 92 says a national bank “may” sell insurance rather than “shall” sell insurance. Alternatively, the state law may “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁶

The Court concluded that the Florida law was an obstacle to the accomplishment of § 92’s purposes. In reaching its conclusion, the Court made two points with important ramifications. First, the Court discussed at length the State of Florida’s contention that the federal purpose of § 92 is to grant the bank only a limited permission, that is, the permission to sell insurance as agent to the extent that the state law also grants permission to do so. The Court’s textual dissection of § 92 reveals that rather than a limited permission, the language of the statute suggests a broad permission, inferring this in part from the unqualified language that a bank “may” act as agent for insurance sales.⁴⁷ Second, the Court confirmed the OCC as the sole source of

the ‘business of insurance’ Since we conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, we need not consider whether § 92 ‘specifically relates to the business of insurance’”).

42. *Barnett*, 116 S. Ct. at 1108 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) and *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141 (1982)).

43. *Id.* at 1108 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

44. *Id.* at 1108 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

45. *Id.* at 1108 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)).

46. *Id.* at 1108 (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

47. *See Id.* at 1108. (“[T]he Federal Statute’s language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks ‘may . . . act as the agent’ for insurance sales.”).

authority regarding the scope of national banks' powers under § 92, emphatically rejecting the contention that state regulation is imported into § 92 to define the scope of authority granted to national banks under that section.⁴⁸

Barnett thus provides clear guidance that state laws that have the effect of preventing national banks from selling insurance under § 92 do not receive the benefit of McCarran-Ferguson protection and would be preempted under traditional preemption analysis. In addition, as discussed below, in dicta, *Barnett* also highlights the tests that will determine whether other types of state laws that could affect national bank insurance activities are preempted under § 92.

IV. AFTER *BARNETT*

A. *Federal Preemption and State Laws That Restrict National Banks' Section 92 Authority*

Following the Court's decision in *Barnett*, it is clear that the inquiry into the permissible bounds of state regulation of national banks engaged in insurance sales activities under § 92 will shift from those state laws that prohibit a national bank from engaging in insurance sales to those that restrict the bank's activity in a particular manner. The laws of different states contain a variety of provisions that may affect national bank sales of insurance products. Following *Barnett*, some states have also moved to adopt new bank-specific laws and regulations to apply to aspects of banks' insurance sales activities.⁴⁹ As one commentator has noted, there is significant uncertainty in this area and little general judicial guidance.⁵⁰ However, a closer look at the discussion in *Barnett* concerning bank powers provides some important guidance regarding the standard for application of state law to national bank insurance sales.

48. *See id.* ("It specifically refers to 'rules and regulations' that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency.").

49. *See, e.g.*, R.I. GEN. LAWS §§ 27-58-1 to -13; Ky. Stmt. of Emergency, 806 KAR 9:240E (filed Sept. 20, 1996); Ill. Amendment No. 2 to House Bill 2927 (introduced May 13, 1996); Pa. Senate Bill No. 23 (introduced Jan. 15, 1997).

50. Kenneth E. Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 692 (1980). ("[T]here is inevitably a certain cloud over that large sector of state regulation that does purport to apply to national banks. It is clear, given the doctrines of federal instrumentality and federal supremacy, that Congress can oust state regulation of national banks to whatever extent it sees fit, but it is less clear when the courts will find the necessary functional impairment or federal preemption in the absence of any express congressional delegation. Existing decisions provide a few general clues but limited assurance.").

In discussing Florida's contention that the federal purpose of § 92 is to grant the bank the limited permission to sell insurance to the extent that the state law also grants permission to do so, the Court notes the historical connotation of the term "power" in national bank statutes and cites several cases for the proposition that grants of enumerated and incidental powers to national banks are grants of authority "not normally limited by, but rather ordinarily preempting contrary state law."⁵¹ However, the Court avoids a sweeping generalization on the status of state laws that conflict with national bank powers by noting that there may be certain circumstances where state law will apply notwithstanding the exercise of a congressionally authorized national bank power. Specifically, the Court comments that "[t]o say this is not to deprive States of the power to regulate national banks, where, (unlike here) doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers."⁵² As examples of this principle, the Court refers to three cases, which in turn point to others, to illustrate the traditional preemption principles that will apply. The facts of these cases are instructive.

At the outset, it is important to note that the Court's observation that state law may apply in some circumstances is colored by its strong reliance on a national bank power as ordinarily preempting state law that intrudes on that power. This view of the preemptive effect of bank powers on conflicting state regulation helps to place the Court's subsequent discussion of permissible state regulation in perspective.

The oldest of the cases cited as examples by the Court, *National Bank v. Commonwealth*,⁵³ considered a state statute that imposed a tax on each share of bank stock. In that case, the Court attempted to place this state requirement in context by viewing the tax required by the state statute as no more of a hindrance than other legal proceedings to which the bank may be subject.⁵⁴ Among other things, the Court noted that the principles of protecting a bank from state legislation has its limitations:

[I]t certainly cannot be maintained that banks or other cor-

51. *Barnett*, 116 S. Ct. at 1108.

52. *Id.* at 1109 (emphasis added).

53. 76 U.S. (9 Wall.) 353 (1870)

54. The Court stated that the state statute "is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner *hinders* it from performing all the duties of financial agent of the government." *Id.* at 363 (emphasis added).

porations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation . . . The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from State legislation, so far as that legislation may *interfere* with, or *impair* their efficiency in performing the functions by which they are designed to serve that government.⁵⁵

In *Anderson v. Lockett*,⁵⁶ a Kentucky statute established a comprehensive process for administering abandoned deposits that included, among other things, a report by the bank to the state and notice to depositors. The appellant, a national bank, contended that the state statute infringed a national bank's authority to accept deposits. According to the Court, the law only allowed the state to step into the depositor's shoes for purposes of demanding payment on the deposit account. This result was insufficient to render the law inapplicable to national banks.⁵⁷ As the Court also notes in the standard recited in the *Barnett* decision, the Kentucky state statute did not create an "unlawful *encroachment* on the rights and privileges of national banks."⁵⁸

*McClellan v. Chipman*⁵⁹ involved a conveyance of real estate to the bank by a customer to secure a debt. At issue was whether National Bank Act provisions permitting a national bank to take real estate for certain purposes preempted a Massachusetts law which in general forbids a transfer of property within a certain time prior to insolvency. In concluding that preemption of state law was not avail-

55. *Id.* at 361-62 (emphasis added).

56. 321 U.S. 233 (1944).

57. *See Id.* at 248. ("Something more than this is required to render the statute obnoxious to the federal banking laws."). An example of something more that could be required for federal law to preempt state law is found in the Court's discussion in *Anderson* distinguishing that case from its prior decision in *First National Bank of San Jose v. California*, 262 U.S. 366 (1923), where the Court found that federal law preempted a California escheat statute. In *Anderson*, the Court distinguished the escheat of bank deposits for "mere dormancy" under the California statute from escheat or appropriation by the state of property "in fact abandoned" under the Kentucky statute. The Court concluded that the confiscatory nature of the California law could operate "as an effective deterrent to depositors' placing their funds in national banks doing business within the state." *Anderson*, 321 U.S. at 251. The Court's distinction illustrates the fine lines that can be drawn based on the particular facts of the case.

58. *Id.* at 252 (emphasis added). The Court also states that "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the bank's functions." *Id.* at 248.

59. 164 U.S. 347, 358 (1896).

able, the Court stated the standard referenced in *Barnett* that “no function of such banks is destroyed or hampered” by submitting the bank to the prescriptions of the state law.⁶⁰

The three examples the Court has selected to illustrate the term “significantly interfere” represent instances in which the federal law was found not to preempt the state law. It is clear from the facts of each of these cases that where the Court has found against preempting state law there was little or minimal qualification of the bank power per se. In certain of the cases, the state laws appeared to subject the bank to laws that did not directly or effectively limit the exercise of those powers, e.g., bankruptcy, tax, or escheat.

Other cases also seem to support this concept. For example, the Court has indicated that requirements for the bank to provide minimal notices to the state may survive a preemption challenge.⁶¹ However, in *Franklin National Bank v. New York*,⁶² the Court found that a state law prohibiting national banks from using the word “savings” in its advertising conflicted with the authority of a national bank to receive savings deposits and to exercise its incidental powers. A subsequent district court case explaining *Franklin* noted that the restriction “inhibited a bank’s ability to perform some of its functions” and therefore was preempted.⁶³

McClellan and other cases also reflect another facet of the preemption analysis: whether the state law discriminates against national banks. In *Davis v. Elmira Savings Bank*, for example, the Court expressly noted that “[n]othing, of course, in this opinion is intended to deny the operation of *general* and *undiscriminating* state laws on the contracts of national banks so long as such laws do not conflict with the letter or the general objects and purposes of con-

60. *Id.* at 358.

61. See *Roth v. Delano*, 338 U.S. 226 (1949). The Court focused on the requirement in *Anderson* that the bank make a report to the state (a fact that did not command much attention in *Anderson*) and noted that there was no interference with the bank’s federal function resulting “from a mere requirement that it make a report to the State of unclaimed property.” *Id.* at 230. The Court further notes that “[i]t would not seem too much to ask that a federal officer, possessed of property claimed by the State to be subject to its taxing or escheat power, make reasonable disclosure thereof to such authority as the State designates.” *Id.* However, “[o]f course, these basic and general rights of the State, including the enforcement of its claims, might be asserted at a time, in a manner or through such means as to interfere with the federal function of orderly liquidation or to conflict with federal law.” *Id.* *Roth*, however, is decided on other grounds.

62. 347 U.S. 373 (1954).

63. *State of Idaho Department of Finance v. Security Pacific Bank*, 800 F. Supp. 922, 926 (D. Idaho) (1992) (emphasis added).

gressional legislation.”⁶⁴ A similar line of reasoning is inherent in *McClellan* itself. *McClellan* states that an exception to the application of state law exists when the law “expressly conflict[s] with the laws of the United States, or frustrates the purpose for which the national banks were created, or impair[s] their efficiency to discharge the duties imposed upon them by the law of the United States.”⁶⁵ This standard has been recited in numerous cases involving national banks.⁶⁶ And, in *Easton v. Iowa*,⁶⁷ the Court noted with respect to national banking legislation: “That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states.” In other words, state statutes that limit or restrict national bank powers effectively discriminate against national banks because those statutes deny the national uniformity of powers that is at the heart of the national banking system.

The fact that the Court uses different formulations in the cases cited in *Barnett*, as well as in other cases, sometimes within the confines of the same decision, indicates the difficulty of establishing a single phrase that captures the preemption standard applicable to state regulations purporting to cover insurance sales activities under § 92.⁶⁸ Banks will have to consider the specific facts and circumstances of any particular situation in light of the principles articulated in and derived from *Barnett*. Notwithstanding that, it seems clear from *Barnett* and the related cases that state law should not apply where the law significantly qualifies the exercise of a national bank’s powers, either by explicitly treating banks in a disparate manner from other insurance sellers, or by applying to banks in a manner that has a disparate impact on them relative to other types of insurance sellers.

64. 161 U.S. 275, 290 (1896) (emphasis added).

65. *McClellan*, 164 U.S. at 350.

66. See, e.g., *Davis v. Elmira Savings Bank*, 161 U.S. at 283; *First Nat. Bank v. Missouri*, 263 U.S. 640 (1924); *First National Bank of San Jose v. California*, 262 U.S. 366 (1923).

67. 188 U.S. 220, 229 (1903).

68. In fact, in a recent decision, the Supreme Court cited two of the cases referred to in *Barnett* and referenced several other cases to illustrate the standards used where state laws were found to apply to national banks. See *Atherton v. FDIC*, No. 95-928, 1997 USSC LEXIS 461 (Jan. 14, 1997).

B. *Applicability of State Laws*

Based on the Court's discussion and cases cited in the *Barnett* decision, OCC's Advisory Letter 96-8, discussed above, describes a basic approach to the application of state laws to national bank insurance activities. According to Advisory Letter 96-8, a state law that applies generally to regulate insurance agents and agencies will apply to national banks provided the law does not effectively prevent national banks from conducting activities authorized under federal law, and provided that, if the law interferes with the those authorized activities, the interference is not significant.

In practice, this should mean that "general and undiscriminating"⁶⁹ state laws that regulate insurance agents and agencies generally would not be preempted because they ordinarily would not prevent national banks from exercising their federally authorized powers and the extent to which they might actually interfere with or impair the ability of a national bank to exercise those powers would be insignificant. A key point imbedded in this analysis is that state regulation per se is not an interference with national bank powers; state regulation becomes a problem when it treats or impacts national banks differently than other insurance agents and that different treatment significantly interferes with their ability to effectively conduct activities authorized under federal law.

The Advisory Letter cites examples of types of state laws that generally would be applicable to national banks. These laws include:

(1) Licensing requirements establishing character, experience, and educational qualifications for individuals selling insurance as agent;

(2) Testing and continuing education requirements, and requirements for license renewals, for individuals selling insurance as agent;

(3) Licensing requirements pertaining to different types of insurance that apply to individuals selling particular types of insurance as agent; and

(4) Market conduct and unfair trade practices standards prohibiting insurance agents from making unfair and deceptive statements; falsifying financial statements; engaging in defamation, boycott, coercion and intimidation; unfairly discriminating; improperly rebating; coercing customers; improperly disclosing confidential

69. *Davis*, 161 U.S. at 290.

information,⁷⁰ and engaging in claims settlement practices.

On the other hand, it would appear that state laws that target and/or attempt to specifically restrict how a bank may sell insurance could be found to impact on a national bank's exercise of its insurance powers.⁷¹ The OCC has recently published notice and requested public comment on whether it should conclude that certain provisions of Rhode Island state law pertaining to sales of insurance by financial institutions are preempted by Federal law.⁷² The provisions raising preemption issues include provisions that: prohibit a bank from requiring or implying that the purchase of insurance products from a bank is in any way related to receiving another banking product or service; restrict where in a bank a bank's licensed agents can solicit or sell insurance; prohibit certain bank employees from soliciting insurance; require separate applications for loans and insurance; and limit the ability of a bank to use its customer information to solicit and sell insurance.⁷³

C. OCC Regulatory Authority

The OCC has not issued regulations to implement the authority of national banks to sell insurance under § 92, but clearly, it could. As national banks expand further into insurance sales pursuant to their § 92 authority, it may become more evident where rulemaking under § 92 would be desirable. Such regulations could cover a broad spectrum of issues relating to insurance sales practices or more narrowly focus on specific consumer protection concerns.

An OCC regulation could effect the application of state laws to national banks. Federal regulations have no less preemptive effect than federal statutes.⁷⁴ In responding to opinions addressing the preemptive effect of a regulation, the OCC would apply the judicially

70. The Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681-1681t (1996), would, however, preempt certain state laws regarding the use of certain information. The FCRA expressly preempts most state laws in a number of key areas relating to the use and sharing of consumer information and establishes the FCRA as the national standard in these key areas.

71. State laws that have the effect of preventing banks from sharing in commissions may raise unique preemption issues. For example, § 92 explicitly provides that a national bank "may receive for services so rendered such fees or commissions as may be agreed between the said association and the insurance company . . ." 12 U.S.C. § 92 (1988 and Supp. V 1993). Moreover, a prohibition on the bank's receiving commissions from the sale of insurance would impair the exercise of its powers under § 92.

72. See 62 Fed. Reg. 1950 (1997).

73. R.I. GEN. LAWS §§ 27-58-6, 27-58-8, 27-58-10, 27-58-11, and 27-58-12.

74. See *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

recognized preemption standards discussed in this article. In addition, if the OCC were to promulgate a regulation under § 92, there is a strong argument to consider another basis for preemption that is mentioned but not used in *Barnett*. As the court noted in *English v. General Electric*:

[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.⁷⁵

This basis for federal preemption, often referred to as "occupation of the field," could become relevant were the OCC to issue regulations pursuant to its authority under § 92, since, as confirmed by the Supreme Court in *Barnett*, the OCC is the sole authority for issuing rules and regulations defining the scope of national banks' powers under § 92.

D. Unresolved Issues Involving Annuities

As noted above, national banks derive their authority to sell annuities from § 24(Seventh), which provides national banks with the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking."⁷⁶ In *NationsBank of North Carolina N.A. v. Variable Life Insurance Company (VALIC)*,⁷⁷ the Supreme Court upheld the OCC's conclusion that this power includes the power to sell fixed and variable annuities.

As described at the outset of this article, the McCarran-Ferguson Act provides 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 . . . unless such Act specifically relates to the business of insurance."⁷⁸ An unresolved issue is whether the Act shields state laws that purport to prevent or restrict national banks' sales of annuities from preemption by

75. *English v. General Electric*, 496 U.S. 72 (1990) (quoting, in part, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

76. 12 U.S.C. § 24(7) (1994).

77. 115 S. Ct. 810 (1995).

78. 15 U.S.C. § 1012(b) (1994).

§ 24(Seventh).⁷⁹ For example, a state law could explicitly or effectively prevent banks from obtaining the licenses they need to sell annuities, or a state law could permit banks to sell annuities, but only from a “place of 5,000.” If the McCarran-Ferguson Act’s ‘anti-preemption’ rule is not available, the application of these types of state laws to a national bank will be assessed under a standard preemption analysis.

The OCC has advanced several arguments supporting why the McCarran-Ferguson Act’s “anti-preemption” rule does not apply to state laws that prevent or restrict national bank sales of annuities.⁸⁰ The first is the threshold issue that annuities simply are not “insurance” for purposes of the Act. Indeed, the Supreme Court has already held in *SEC v. Variable Life Insurance Company*,⁸¹ that variable annuities are not insurance for purposes of the McCarran-Ferguson Act.

Although the Court has not specifically ruled on this issue with regard to fixed annuities, Supreme Court decisions in other contexts, particularly the Court’s reasoning in *VALIC*,⁸² as well as numerous other authorities, support the conclusion that fixed annuities are not insurance for purposes of the McCarran-Ferguson Act.⁸³ For example, because neither the statute nor the legislative history of the McCarran-Ferguson Act define the term “insurance,” as a matter of statutory construction it is appropriate to examine the commonly understood meaning of that term.⁸⁴ Both numerous dictionary definitions of the term and relevant legal encyclopedias support the

79. At least one Federal district court has, however, already ruled, after reviewing the *Barnett* and *VALIC* decisions, that federal law preempted a state law that denied banks a license to sell annuities to the extent that the state law prevented a national bank from exercising its power and right to sell annuities as agent under 12 U.S.C. § 24(Seventh). See *First Nat’l Bank of Boston v. Ruthardt*, 96-12075 PBS (D. Mass. Dec. 19, 1996).

80. See generally OCC Interpretive Letter No. 749 (Sept. 13, 1996) reprinted in [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 81-114.

81. 359 U.S. 65 (1959).

82. The *VALIC* Court stated, among other things, that the OCC’s classification of annuities as distinguishable from insurance, based on their tax deferral and investment features, was reasonable, as was the OCC’s classification of fixed and variable annuities together, based on the fact that they are often packaged together. The Court also noted, with reference to *Black’s Law Dictionary*, that a key feature of insurance is that it indemnifies loss. In addition, the *VALIC* Court reiterated the Comptroller’s observation that annuities are functionally similar to other investments that banks typically sell and observed itself that fixed annuities have significant investment features and are functionally similar to debt instruments. *VALIC*, 115 S. Ct. at 817.

83. See OCC Interpretive Letter No. 749, *supra* note 79.

84. See 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47.28 (5th ed. 1992).

conclusion that annuities and insurance are distinct products.⁸⁵

At least one court has, however, ruled that annuities are insurance for purposes of the McCarran-Ferguson Act. In *American Deposit Corp. and Blackfeet National Bank v. Schacht*,⁸⁶ the Seventh Circuit examined a state law that prohibited a company from transacting insurance business without a state-issued certificate of authority. In its decision, the *Blackfeet* court found that a national bank's issuance of a fixed annuity investment product known as the Retirement CD was the business of insurance within the meaning of the McCarran-Ferguson Act.⁸⁷ It is arguable, however, that the rationale of the *Blackfeet* court is inconsistent with other rulings, including the Supreme Court's *VALIC* decision, as well as additional relevant authorities.⁸⁸

In addition, an argument can be made that even if certain annuities were to be regarded as "insurance" for purposes of the McCarran-Ferguson Act, certain types of state laws flunk the second prong of the Act's test because they do not "regulate the business of insurance" and thus are not protected by the anti-preemption rule. For example, when a state law actually does something other than regulate the business of insurance, such as where the effect of the law is to regulate the powers of national banks as a class of entity, is the state law within the scope of protection provided by the McCarran-Ferguson Act? The OCC argues that state regulation that negates or impairs the existing corporate activity of an entire class of entity is regulation of that type of entity, not regulation of an activity that constitutes the "business of insurance."

For example, in *U.S. Department of Treasury v. Fabe*, the Supreme Court stated that state laws enacted "for the purpose of regulating the business of insurance" under the McCarran-Ferguson

85. See, e.g., BLACK'S LAW DICTIONARY (6th ed. 1990); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1973); OXFORD ENGLISH DICTIONARY (Compact ed. 1971); 44 C.J.S. *Insurance* § 2 (1993); 43 AM. JUR. 2d *Insurance* §§ 1, 5 (1982); COUCH ON INSURANCE 3d (1995) §§ 1:6, 1:22; see generally OCC Interpretive Letter No. 749, *supra* note 79.

86. 84 F.3d 834 (7th Cir.), *cert. denied*, 117 S. Ct. 185 (1996).

87. *Id.* at 844.

88. For example, the *Blackfeet* court based its conclusion that the Retirement CD was within the business of insurance, in part, on its finding that the Retirement CD involves a mortality risk to the issuer. *Id.* at 841. The Supreme Court in *VALIC*, however, rejected the notion that mortality risk is a determinative indicator that a product is insurance. See *VALIC*, 115 S. Ct. at 816. The *Blackfeet* decision also contains a vigorous dissent stating, among other things, that "[a]nnuities are not truly 'insurance,' and thus . . . a national bank selling them is not engaged in the 'business of insurance'." *Blackfeet*, 84 F.3d at 865.

Act are those laws “that possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance.”⁸⁹ The Court noted in *Fabe*, “the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders.”⁹⁰ Thus, state laws that deprive an entire category of entities—national banks—of the capacity to exercise a corporate power they possess under Federal law, rather than “transferring or spreading a policyholder’s risk,” or any other practice that is “an integral part of the policy relationship between an insurer and the insured” would not constitute the regulation of the business of insurance.⁹¹

Courts of appeals that have examined state insurance laws that attempt to restrict the authorized activities of national banks have generally concluded that state law restrictions on the powers of national banks to conduct those activities do not qualify for the preemption shield of the McCarran-Ferguson Act. For example, in *Owensboro National Bank v. Stephens*,⁹² the Sixth Circuit examined a state statute that prohibited national banks from acting as or affiliating with insurance agents except in very limited circumstances. In reaching its conclusion that the state statute did not regulate the business of insurance, and thus was not covered by the anti-preemption effect of McCarran-Ferguson, the *Owensboro* court noted that “[e]xcluding a *person* from participation in an activity . . . is different from regulating the *manner* in which that activity is conducted.”⁹³ The *Owensboro* court concluded that because the state law in question was enacted for the purpose of regulating certain conduct by certain entities, and not for the purpose of regulating the business of insurance, it was not covered by the McCarran-Ferguson anti-preemption protection.⁹⁴

89. 508 U.S. 491, 505 (1993) (quoting BLACK’S LAW DICTIONARY 1236 (6th ed. 1990)).

90. *Id.* at 501 (referencing *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969)). In *National Securities*, the Court found that a state statute aimed at protecting insurance company stockholders, not policy holders, was not enacted for the purpose of regulating insurance within the meaning of the McCarran-Ferguson Act. *National Securities*, 393 U.S. at 457-65. The *National Securities* Court observed that “the core of the ‘business of insurance’” is “[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement.” *Id.* at 460.

91. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

92. 44 F.3d 388 (6th Cir. 1994), *cert. denied*, 116 S. Ct. 1350 (1996).

93. *Id.* at 392 (emphasis added.)

94. *Id.*

V. CONCLUSION

As a result of the Supreme Court's decision in *Barnett*, national banks have gained important clarifications of their insurance powers and a foundation to expand their insurance activities. These activities, in turn, raise novel questions regarding the applicability of particular state laws to national banks. *Barnett* made clear that a class of laws preventing national banks from engaging in insurance sales under § 92 are preempted by federal law. At the next level are those state laws that do not prevent, but do impact or limit in some way, the ability of national banks to exercise their insurance powers.

The application of particular state laws may have to be handled on a case-by-case basis, or the laws may be susceptible of being grouped into generic categories and analyzed by type. In that exercise, however, the *Barnett* discussion of preemption and other related cases referred to by *Barnett* indicate that state laws will be preempted by § 92 if the law prevents or significantly qualifies a national bank's powers under § 92, either by explicitly treating banks differently than other insurance sellers, or by applying to banks in a manner that has a disparate impact on them relative to other sellers of insurance.

In addition, the Supreme Court's decision in *VALIC* made clear that § 24(Seventh) provides authority for national banks to sell all kinds of annuities. Still at issue in the courts, however, is the extent to which the McCarran-Ferguson Act's anti-preemption provisions shield state provisions that prevent or restrict national banks' authority to sell particular annuity products.

