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# BARNETT BANK BRINGS THE BUSINESS OF INSURANCE TO THE ATTENTION OF CONGRESS

*Jeffrey H. Thomas*[*]

## I. INTRODUCTION

The decision of the United States Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*[1] represents a significant victory for national banks in their struggle to dominate the financial services industry. Since winning a series of decisions which upheld Federal Reserve Board determinations that banks, bank holding companies, and their affiliates could engage in certain securities activities,[2] banks have focused intently on the marketing and sale of insurance products. Encouraged by the Comptroller of the Currency and the Supreme Court[3] and fueled by an increasing appetite for additional fee income,[4] national banks have proved themselves to be powerful engines for marketing and selling of annuities.[5] In fact, since banks have entered the annuities market over the past two years, variable annuities have become one of the most popular investment vehicles.[6]

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

2. *See* Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 468 U.S. 207 (1984) (holding that the Federal Reserve Board acted within its authority when it permitted the banking industry to engage in securities brokerage activities). Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 900 F.2d 360 (D.C. Cir. 1990) (upholding a Federal Reserve Board determination that certain nonbank subsidiaries of bank holding companies may underwrite and deal in corporate equity and debt securities); Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 839 F.2d 47 (2d Cir. 1988), (upholding a Federal Reserve Board determination that nonbank subsidiaries of bank holding companies could underwrite and deal in certain bank-ineligible securities activities).

3. *See* Nationsbank of N.C. v. Variable Annuity Life Ins. Co., 531 U.S. 251 (1995) (upholding the Comptroller of the Currency's determination that annuities are investments, not insurance, and may be sold by national banks pursuant to the "incidental powers" provision of Section 24 of the National Bank Act which authorizes national banks "[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking . . . ."); 12 U.S.C. § 24 (1994).

4. *See* Dave McDaniel, *Bancassurance American Style: Opportunities in Partnerships*, BEST'S REVIEW, July 1996. "Insurance revenue for banks will increase from 2% in 1995 to 15% of bank revenue in 2000 . . . ." *Id.* The value of total insurance premiums generated by banks is expected to increase from $23.7 billion in 1995 to $54 billion in 2000 with annuity premiums accounting for $21.1 billion and $42 billion respectively. *See id.*

5. *See* Ronald R. Glancy & Julianna Schulte O'Reilly, *Insurance? Its in the Bank*, NAT'L L. J., Aug. 26, 1996. "In 1994, for example, banks sold $16.4 billion dollars worth of annuities. According to Michael White, of the Radnor, Pa.-based consulting firm Michael White Associates, banks' share was approximately 36.9 percent of the entire annuity market." *Id.*

6. *See* Bridget O'Brien, *Variable Annuities Piggyback on the Bull*, WALL ST. J., Jan. 28,

Pursuant to the *Barnett* decision, national banks have the opportunity to participate in other areas of insurance, including the marketing and sale of the more traditional forms of life, health, and property and casualty insurance products. This represents a significant threat to the independent insurance agent as the lure of an almost unlimited area of opportunity for commissions to be earned by banks[7] has caused a fierce territorial struggle.[8]

To a large extent, *Barnett* resolves preemption issues arising out of the conflict between Section 92 of the National Bank Act[9] (Section 92), and certain state "anti-affiliation" laws which have generally prohibited financial institutions, including national banks, from being licensed as insurance agents or being affiliated with insurance agencies.[10] This holding also highlights the accelerating trend of convergence in the financial services industry.[11] *Barnett* lays the groundwork for further federal regulation of the "business of insurance," which Congress specifically delegated to the states when it enacted

only five years ago. During the first nine months of 1996, the total market value of funds invested in variable annuities increased to $320.1 billion . . . up significantly from $262.1 billion for all of 1995. By comparison, at the end of 1991, assets in stock mutual funds were $412 billion. . . ." *Id.*

7. *See, e.g., National Ass'n of Independent Insurers*, GREENBOOK, 1996. Property and casualty insurance companies reported premiums earned for the first six months of 1996 totaling in excess of $125 billion. *Id.*

8. It appears, however, that the battleground is shifting. On January 16, 1997, the Independent Insurance Agents of America, Inc., a trade organization representing 300,000 member agents, held a news conference to announce the adoption of a new policy supporting federal legislation allowing affiliations between banks and insurance entities so long as state insurance regulation and consumer protections are part of the bill. *See* Robert H. Gettlin, *IIAA to End its Struggle With Banks, Will Support Affiliations Legislation*, BEST WEEK, Jan. 20, 1997.

9. 12 U.S.C. § 92 (1994).

10. *See National Association of Insurance Commissioners Compendium of State Laws on Insurance Topics: State Laws Regulating Banking and Insurance Relationships.* As of November 1995, there were twenty-four states which had laws that in some way restricted the ability of financial institutions to sell insurance products, including: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, and West Virginia. *Id.*

11. *See Street Fight: The High Stakes Struggle to Survive in a Converging Market*, BEST'S REVIEW, Jan. 1997. "An emerging global financial marketplace is forcing U.S. regulators and legislators to allow combinations of banks, insurers and investment firms sooner than previously thought." *Id.*

the McCarran-Ferguson Act.[12] This article will focus on the preemptive aspects of *Barnett* and responses of the various interested parties to its implications.

## II. SECTION 92

Section 92 was originally enacted in 1916 when the Comptroller of the Currency urged Congress to allow national banks in "small communities" to act as insurance agents. The reason for the Comptroller's proposal was to stem the tide of failed national banks in small towns by providing additional sourcesof revenue to augment the return made on their typically small deposit base.[13] The law, as amended, provides in relevant part that:

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12. 15 U.S.C. §§ 1011-1015 (1994). In 1945, Congress intended for the McCarran-Ferguson Act to clarify the authority of the states to regulate the business of insurance. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979). This was necessitated by the Supreme Court's decision in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (holding that insurance was interstate commerce which in turn implicated federal jurisdiction). *South-Eastern Underwriters* brought a near-chaotic condition to state-run systems of control which were established under prior Supreme Court rulings and had received the approval and cooperation of the insurance industry for over seventy-six years. *See* Hooper v. California, 155 U.S. 648 (1895) (holding that insurance is not commerce); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

13. The legislative history of Section 92 is reported at 53 Cong. Rec. 11,001 and consists almost entirely of a letter written by the Comptroller to the Chairman of the Senate Banking and Currency Committee. The letter, dated June 8, 1916, provides in part:

> For some time I have been giving careful consideration to the question as to how the powers of . . . 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 and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking. . . .
>
> My investigations lead me respectfully to recommend to Congress an amendment to the national bank act by which national banks located in [small towns] . . . may be permitted to act as agents for insurance companies . . . .
>
> It seems desireable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This 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. Furthermore, in many small places the amount of insurance policies written . . . is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.
>
> I think it would be unwise and therefore undesireable to confer this privilege generally upon banks in large cities where the legitimate business of banking offers ample scope for the energies of trained and expert bankers.

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

For a detailed discussion of the operations of banks and insurance agents in 1916, see Approval Letter of the Office of the Comptroller of the Currency from Julie L. Williams, Chief Counsel, to First Union Corporation, Robert L. Andersen, Senior Vice-President and Assistant

> 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 or 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.[14]

The compilers of the 1952 edition of the United States Code deleted Section 92 with a note that it had been repealed in 1918 and it appears that it was "lost" to the general banking community although it was relied upon from time to time by the Comptroller and the Federal Reserve Board.[15] In response to the United States National Bank of Oregon's request to sell insurance through a subsidiary insurance agency operating from a town of less than 5,000, the Office of the Comptroller of the Currency (OCC) determined that Section 92 had not been repealed, and the Supreme Court agreed.[16]

## III. THE *BARNETT* DECISION

### A. Facts

This "rediscovery" of Section 92 became the shot heard throughout the banking world and was the incendiary which sparked Barnett Bank of Marion County, N.A. (Barnett Bank) to challenge Florida's anti-affiliation statute. The

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General Counsel, at 6-7 (November 4, 1996).

14. 12 U.S.C. § 92 (1994).

15. Section 92 appeared in the 1920, 1926, 1934, 1940 and 1946 editions of the United States Code but did not appear after 1952 due to what was characterized as "a simple scrivener's error" by the Supreme Court in United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 447 (1993) (observing that several courts, including the Supreme Court, had assumed the validity of Section 92, but that no court had ever addressed a direct challenge to it).

16. *See id.*

Florida "anti-affiliation" law effectively restricted Barnett Bank's ability to sell insurance products pursuant to Section 92 by providing as follows:

> 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, or 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.[17]

> "Financial institution" means any bank, bank holding company, savings and loan association, savings and loan association holding company, or savings and loan association service corporation or any subsidiary, affiliate, foundation of any of the foregoing. . . . Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census.[18]

These provisions were added in 1974 as a part of Florida's Unfair Insurance Trade Practices Act.[19] The purpose of the Act is stated as follows:

> The purpose of this part is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.[20]

Barnett Bank is a national bank and a subsidiary of Barnett Banks, Inc., one of the largest bank holding companies in the southeastern United States.[21] Its principal place of business is Ocala, Florida, whose population exceeds 5,000; however, it maintains a branch in Belleview, Florida, whose population is less than 5,000.[22] In 1993, Barnett Bank purchased an insurance agency in Belleview and hired the owner of the insurance agency, a licensed insurance agent, as its employee.[23] On the day of the purchase, Barnett Bank sought a declaration in U.S. District Court for the Middle District of Florida which

17. FLA. STAT. ANN. § 626.988(2) (West 1996).
18. *Id.* § 626.988(1)(a).
19. *Id.* §§ 626.951 *et. seq.*
20. *Id.* § 626.951 (referring to the McCarran-Ferguson Act).
21. *See* Barnett Bank of Marion County, N.A. v. Gallagher, 839 F. Supp. 835, 837 (M.D. Fla. 1993).
22. *See id.*
23. *See id.*

would allow it to use its agency in Belleview to market insurance to existing and potential customers regardless of where the customers were located.[24] Barnett Bank requested the district court to declare that Section 92 preempted the state statute which effectively prohibited its acquisition of the insurance agency.[25]

In response, the Florida Department of Insurance issued an order to the agency and its licensed agent to cease insurance agency activities other than the sale of credit life and credit disability insurance in accordance with Florida law.[26] Barnett Bank then moved for a temporary restraining order and sought to enjoin the Florida Department of Insurance from acting on its order.[27] The district court denied Barnett Bank's motion and the matter went to trial on the merits.[28]

The application of the McCarran-Ferguson Act complicated the general preemption issue raised by the conflicting federal and state laws. The McCarran-Ferguson Act provides in pertinent part:

> § 1011. Declaration 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; federal law relating specifically to insurance; applicability of certain federal laws after June 30, 1948
> (a) State Regulation
> 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 business.
> (b) Federal Regulation
> 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; provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.[29]

24. *See id.*
25. *See id.*
26. *See id.*
27. *See Barnett*, 839 F. Supp. 835 (M.D. Fla. 1993).
28. *Id.*
29. 15 U.S.C. § 1011-1012 (1994).

The interplay of the McCarran-Ferguson Act with Section 92 and the Florida antiaffiliation statute presented a difficult challenge. To resolve the issue, the district court followed the two-part test established by the Supreme Court in *United States Dep't of Treasury v. Fabe.*[30] The first part of the test was to determine whether the state law in question was enacted "for the purpose of regulating the business of insurance."[31] In determining that the statute was enacted for that purpose, the district court was persuaded by the arguments of the Florida Department of Insurance that the state's main concern was that insurance companies remain solvent in order to be able to pay claims when made.[32]

The district court then engaged in its own hypotheticals which adopted aspects of the Florida Department of Insurance's point of view.[33] The discussion implied that financial institutions are so driven by profits that they cannot be trusted to operate in accordance with principled business practices or even in accordance with other laws that prohibit coercive credit extension. One scenario offered by the district court provided that financial institutions *might* pressure or force insurance agents to accept risks that the agents *might* ordinarily reject in order for the financial institution to close certain loans and thereby make a profit.[34] According to the district court, "[t]his might lead to the over-insurance of risky business, which could result in the insolvency of the insurer."[35]

Another scenario offered by the district court provided that "loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy."[36] To discourage this type of unscrupulous behavior, the district court determined that maintaining an arms-length relationship between financial institutions and insurance agents "is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders."[37] From this series of "what ifs," the district court concluded that the Florida statute was intended to prevent such coercive and unsafe

30. 508 U.S. 491 (1993).
31. *Barnett*, 839 F. Supp. at 840.
32. *See id.*
33. *See id.*
34. *See id.*
35. *Id.*
36. *Id.* at 842.
37. *Barnett*, 839 F.Supp. at 842.

methods of doing business by banks and had been enacted for the purpose of regulating the business of insurance thus satisfying the first part of *Fabe*.[38]

The second part of the test was to determine whether Section 92 qualified for the McCárran-Ferguson Act's exception as a law which "specifically relates to the business of insurance," thereby preempting state law.[39] The district court found that it did not qualify, relying on three points which it found relevant: the Supreme Court's determination that Section 92 was a part of the Federal Reserve Act;[40] the fact that Section 92 was enacted at a time when Congress did not believe it had the authority to regulate the business of insurance;[41] and, another district court's decision that Section 92 was a "bank" law as opposed to an "insurance" law.[42] Accordingly, the court held that the reverse preemption doctrine of McCarran-Ferguson controlled, and the state statute preempted Section 92. Barnett Bank appealed this decision to the Eleventh Circuit Court of Appeals.[43]

The Eleventh Circuit affirmed, and also relied on *Fabe* to hold that Section 92 neither specifically related to the business of insurance nor specifically required that apparently conflicting state laws be preempted.[44] Florida could prevent national bank subsidiaries from conducting insurance activities within the state.[45] The Supreme Court granted certiorari to settle the conflict among lower courts over the preemptive effect of Section 92.[46]

B. The Supreme Court Ruling

Justice Breyer, writing for a unanimous Court, reversed the decision of the Eleventh Circuit. Beginning construction of its analysis by setting aside the McCarran-Ferguson Act, the Court initially focused on whether Section 92

38. *Id.* at 841 (interpreting SEC v. National Sec., Inc., 393 U.S. 453 (1969) to hold that "[s]tatutes aimed at protecting the relationship between insurer and insured 'directly or indirectly' are statutes regulating the business of insurance").

39. *Id.*

40. *Id.* (citing National Bank of Oregon, *supra* n.15, and noting that the Supreme Court did not address whether Section 92 was "specifically related" to the business of banking or insurance).

41. *See id.* at 843, citing *Fabe, supra* n.29.

42. *See id.* (citing Owensboro Nat. Bank v. Moore, 803 F. Supp. 24, 36 (E.D. Ky. 1992)).

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

44. *See id.* at 637.

45. *See id.*

46. *See* Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1107 (1996) (citing Owensboro Nat'l Bank v. Stephens, 44 F.3d 388 (6th Cir. 1994), which held that Section 92 preempted a Kentucky statute that prevented national banks from selling insurance in small towns; and First Advantage Ins., Inc. v. Green, 652 So. 2d 562 (La. Ct. App.), *cert. denied.*, 654 So. 2d 331 (La. 1995); which held that a Louisiana law which prohibited banks from selling insurance was not preempted by Section 92).

should be construed to preempt the Florida anti-affiliation law under general preemption principles.[47] The Court deemed this to be a matter of Congressional intent.[48]

The Court prefaced its conclusion with a distillation of its previous statements on preemption issues:

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 530-531, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. *Id.*, at 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305; *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). Alternatively, federal law may be in "irreconcilable conflict" with state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963); or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941).[49]

In the Court's judgment, the Florida anti-affiliation law stood "as an obstacle to the accomplishment" of one of Section 92's purposes, which is to authorize national banks to sell insurance from places of less than 5,000 inhabitants.[50] The Court found the State of Florida's arguments to the contrary unconvincing, and rejected the proposition that Section 92 permits national banks to sell insurance only to the extent that state law allows such activities.[51] The Court noted that enumerated and incidental powers granted to national banks are "not normally limited by, but rather ordinarily pre-emp[t], contrary

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47. *See id.*

48. "Did Congress, in enacting the Federal Statute [Section 92], intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Id.*

49. *Id.* at 1107-08.

50. *See id.* at 1108.

51. *See id.*

state law"[52] and that Section 92 specifically provides "that its grant of authority to sell insurance is an 'addition to the *powers* now vested by law in national [banks].'"[53] Significantly, the Court recognized that the assumption of preemption does not deprive states of the power to regulate national banks as long as the regulation does not preclude or substantially disrupt the national bank's exercise of its powers.[54]

Florida also argued that the legislative history of Section 92 demonstrated Congress' intent to subject the power granted in Section 92 to state approval.[55] This argument received short shift from the Court which failed to see its relevancy and pointed out that, in supporting Section 92, the Comptroller of the Currency intended to enlarge the federal powers of national banks by providing for an additional source of revenue without mentioning limitations state law might impose.[56] The Court concluded that under "ordinary legal principles of pre-emption, the federal law would pre-empt that of the State."[57]

The Court next turned its attention to the McCarran-Ferguson Act and its "special anti-pre-emption rule."[58] This rule allows state law to govern unless the conflicting federal law "specifically relates to the business of insurance." Whether or not Section 92 "specifically relates to the business of insurance" depended upon the meaning of that term and the Court chose to ascertain it by adopting an "ordinary English" approach to defining each of its individual words.[59]

The word "relates" was considered by the Court to be too general and subject to broad interpretation, particularly in the context of preemption cases.[60] In this sense, the Court determined that "a statute that says that banks may act as insurance agents, and that the Comptroller of the Currency may regulate their insurance-related activities" was at least connected with or referred to the business of insurance.[61]

With regard to the word "specifically," the Court referred to Black's Law Dictionary and found that it could mean "explicitly, particularly, [or]

52. *Barnett*, 116 S. Ct. at 1114 (citations omitted).

53. *Id.* (quoting 12 U.S.C. § 92) (emphasis theirs).

54. *See id.* at 1109 (citations omitted). This language left the door open for continued state regulation of the licensing of national banks as insurance agents and monitoring of their marketing and sales activities for compliance with state unfair trade practice laws.

55. *See id.* at 1110 (citing the Letter from the Comptroller to the Chairman of the Senate Bank and Currency Committee, *see supra* note 13).

56. *See id.*

57. *Id.* at 1111.

58. *See Barnett,* 116 S. Ct. at 1111.

59. *Id.*

60. *See id.* (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) and Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-384 (1992)).

61. *Id.*

definitely."[62] This definition contrasts a "*specific* reference with an *implicit* reference made by more language to a broader topic."[63] The Court thus dismissed Florida's argument that Section 92 specifically relates to banking and not insurance by stating that a statute could specifically relate to more than one thing.[64]

The Court then turned to the phrase "business of insurance" and reiterated that Section 92, by its terms:

> . . . explicitly grants national banks permission to "act as the agent for any fire, life, or other insurance company," to "solici[t] and sel[l] insurance," to "collec[t] premiums," and to "receive for services so rendered. . .fees or commissions," subject to Comptroller regulation. 12 U.S.C. § 92 [12 U.S.C.S. § 92]. It also sets forth certain specific rules prohibiting banks from guaranteeing the "payment of any premium on insurance policies issued through its agency. . ." and the "truth of any statement made by an assured in filing his application for insurance." *Ibid.* The statute thereby not only focuses directly upon industry-specific selling practices, but also affects the relation of insured to insurer and the spreading of risk — matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982) (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979); *see also Department of Treasury v. Fabe*, 508 U.S. 491, 502-504, 124 L. Ed. 2d 449, 113 S. Ct. 2202 (1993).[65]

The Court went on to state what it perceived as the two basic purposes of the McCarran-Ferguson Act, which were viewed as "mutually reinforcing;" namely that state regulation and taxation of the insurance business 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.'"[66] This was not to be construed as preventing Congress from involving itself with the business of insurance entirely. Instead the Court determined that:

> [t]he latter phrase, particularly the word "silence," indicates that the Act does not seek to insulate state insurance regulation from the reach of all

62. *Id.*

63. *Id.*

64. *See Barnett*, 116 S. Ct. at 1113. This point was driven home with a line that lends itself to being often quoted: "Just as an ordinance forbidding dogs in city parks specifically relates to dogs and to parks, so a statute permitting banks to sell insurance can specifically relate to banks and to insurance." *Id.*

65. *Id.* at 1111-12.

66. *Id.* at 1112.

> federal law. Rather, it seeks to protect state regulation primarily against *inadvertent* federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to comprise one part.[67]

To support this argument, the Court reviewed the history of the McCarran-Ferguson Act, referring to its own decision in *United States v. South-Eastern Underwriters Association.*[68] The Court interpreted its holding as follows:

> And *South-Eastern Underwriters'* principle meant, consequently, that other generally phrased congressional statutes might also apply to the issuance of insurance policies, thereby interfering with state regulation of insurance in similarly unanticipated ways.
>
> In reaction to *South-Eastern Underwriters*, Congress "moved quickly," enacting McCarran-Ferguson "to restore the supremacy of the States in the realm of insurance regulation." *Fabe, supra*, at 500, 113 S. Ct. at 2202. But the circumstances we have just described mean that "*restor[ation]*" of "supremacy" basically required setting aside the unanticipated effects of *South-Eastern Underwriters*, and cautiously avoiding similar unanticipated interference with state regulation in the future. It did not require avoiding federal pre-emption by future federal statutes that indicate, through their "specific relat[ion]" to insurance, that Congress had focused upon the insurance industry, and therefore, in all likelihood, consciously intended to exert upon the insurance industry whatever pre-emptive force accompanied its law.

Thus, *Barnett* provides that Section 92 is more than just an "inadvertent federal intrusion" on state regulation, but instead represents a coercive intention by Congress to exert its influence upon the insurance industry.[69] Accordingly, national banks may sell insurance pursuant to Section 92 subject to Comptroller regulation *and* state regulation as long as the state regulation "does not prevent or significantly interfere with the national bank's exercise of its powers."[70]

To place *Barnett* in context, it is important to understand the development of the Court's preemption rationale. This begins with a review of three cases

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67. Citation for this quote.
68. 322 U.S. 533 (1994) (cited in *Barnett*, 116 S. Ct. at 1112).
69. *See Barnett*, 116 S. Ct. at 1112.
70. *Id.* at 1109.

cited by the Court which addressed the language of the McCarran-Ferguson Act in detail. These are the *Royal Drug*,[71] *Pireno*[72] and *Fabe*[73] decisions.

C. Prior Decisions

1. *Royal Drug*

In *Royal Drug*, eighteen owners of independent pharmacies alleged, *inter alia*, that Group Life and Health Insurance Co., also known as Blue Shield of Texas, and three pharmacies had violated Section 1 of the Sherman Act by entering into agreements to fix the retail prices of drugs and other pharmaceuticals.[74] The agreements effectively fixed the price of drugs to Blue Shield of Texas policyholders at two dollars. Blue Shield of Texas would then reimburse the contracting pharmacy for the difference between two dollars and the acquisition cost of the drug.[75] If a Blue Shield of Texas policyholder purchased the drug from a pharmacy which had not entered into such a contract, the policyholder would be required to pay full price and then could seek reimbursement from Blue Shield of Texas for 75% percent of the difference between the price paid and two dollars.[76] Because of the two dollar markup allowed to contracting pharmacies by Blue Shield of Texas, only those pharmacies with distribution costs less than two dollars could profitably participate in the plan.[77]

The Court narrowed the issues to one, "whether the Court of Appeals was correct in concluding that these agreements are not the 'business of insurance' within the meaning of § 2(b) of the McCarran-Ferguson Act."[78] The court of appeals' conclusion would not allow the McCarran-Ferguson Act to shield the arrangement in question from the federal antitrust laws. Writing for a divided Court, Justice Stewart upheld the court of appeals decision.[79]

Initially, the Court distinguished between the "business of insurance" and the "business of insurers."[80] Quoting *SEC v. National Securities, Inc.*,[81] the

71. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).
72. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).
73. Department of Treasury v. Fabe, 508 U.S. 491 (1993).
74. *See Royal Drug*, 440 U.S. at 207.
75. *See id.* at 209.
76. *See id.* This had the effect of driving customers to those pharmacies where the customer would incur the least out-of-pocket expenses, which the Plaintiffs argued constituted an unlawful group boycott. *See id.* The Court did not address this issue. *See id.* at 210.
77. *See id.* at 209.
78. *Id.* at 210.
79. *See id.* at 233.
80. *See Royal Drug*, 440 U.S. at 211.
81. *Id.*

Court recognized that insurance companies engage in a multitude of activities, many of which may be subject to federal regulation, such as securities activities.[82] However, only when insurance companies engage in the "business of insurance" will federal law give way to state laws regulating such business.[83]

The Court then reviewed the agreements to determine whether they fell within the "ordinary understanding" of the phrase "business of insurance," and concluded that they did not.[84] The agreements were essentially analyzed by comparison to typical insurance contracts which involve "the spreading and underwriting of a policyholders risk."[85] Rejecting Blue Shield of Texas' argument that the agreements involved the underwriting of risks,[86] the Court concluded that Blue Shield of Texas had confused the obligations it had undertaken under its insurance policies, "which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage" and the agreements it had with the pharmacies "which serve only to minimize the costs [it] incurs in fulfilling its underwriting obligations."[87] The Court noted further that "it does not follow that because an agreement is necessary to provide insurance, it is also the 'business of insurance.'"[88] The agreements represented to the Court one of many ways insurance companies seek to keep costs down in order to operate more efficiently and pass on to policyholders their savings in the form of lower premiums.[89]

The Court then interpreted the concerns of Congress in passing the McCarran-Ferguson Act and stated:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope

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> The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply.

SEC v. National Sec., Inc., 393 U.S. 453, 459-60 (emphasis in original).

82. *See Royal Drug*, 440 U.S. at 211.
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.* at 213.
87. *Id.* at 213-14.
88. *Royal Drug*, 440 U.S. at 213-14, n. 9.
89. *See id.* at 214.

> of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.[90]

Of course, the agreements were not between Blue Shield of Texas and its policyholders. Blue Shield of Texas argued that it was these contracts that made their contracts with their policyholders reliable and therefore within the McCarran-Ferguson Act exemption.[91] The Court rejected that broad interpretation, which in its view would encompass "every decision made by an insurance company."[92]

Delving deeper into the legislative history of the McCarran-Ferguson Act, the Court confirmed its prior conclusions. Basically, the Court determined that the McCarran-Ferguson Act was intended to protect "intra-industry cooperation or concerted activities" not "contractual arrangements that insurance companies might make . . . to reduce the costs . . . of meeting their underwriting obligations to their policyholders."[93]

Finally, the Court pronounced that implicit and explicit exemptions from the anti-trust laws are to be narrowly construed.[94] A narrow construction prevented the Court from finding a "principled basis upon which a line could rationally be drawn that would extend the McCarran-Ferguson Act exemption" to the Blue Shield of Texas agreements.[95]

In the dissenting opinion, Justice Brennan argued that the term "business of insurance" had been construed too narrowly by the majority.[96] The dissent summed up this argument as follows:

> I disagree: Since (a) there is no challenge to the status of Blue Shield's drug-benefits *policy* as the "business of insurance," I conclude (b) that some provider agreements negotiated to carry out the policy obligations of the insurer to the insured should be considered part of such business, and (c) that the specific Pharmacy Agreements at issue in this case should be included in such part.[97]

According to the dissent, the majority failed to recognize the existence at the time of the enactment of the McCarran-Ferguson Act of pervasive state regulation of hospital-benefit plans which necessarily required provider contracts similar to the ones in question.[98] In fact, the National Association of

90. *Id.* at 216 (quoting SEC v. National Sec., Inc., 393 U.S. 453 (1969).
91. *See id.* at 216.
92. *Id.* at 217.
93. *Id.* at 222.
94. *See Royal Drug*, 440 U.S. at 231 (citations omitted).
95. *Id.* at 232.
96. *See id.* at 235.
97. *Id.* at 234 (Brennan, J., dissenting).
98. *See id.* at 237-38 (Brennan, J., dissenting).

Insurance Commissioners had proposed a model state law in 1945 allowing for insurance commissioner approval of provider agreements.[99]

Noting that deciding what is and is not the "business of insurance" involves a case-by-case analysis, the dissent attempted to fashion a bright line rule but recognized that other factors may be applicable.[100] The rule, simply stated, provides that if the provider agreement directly obtains the very benefits promised in the policy, it directly affects rates, costs, and insurer reliability and thereby constitutes a critical element of risk prediction.[101]

2. *Pireno*

*Pireno* also resulted in a divided Court. Writing for the majority, Justice Brennan distilled the lessons gleaned from *Royal Drug* into a three-part test to determine whether certain activities are exempt from federal antitrust laws as part of the "business of insurance." In *Pireno*, Union Labor Life Insurance Co. (Union Labor) issued health policies which covered certain claims for chiropractic treatment as required by New York law.[102] Some of these policies limited the company's liability to "the reasonable charges" for "necessary medical care and services."[103] To make these determinations, Union Labor contracted with the New York State Chiropractic Association (NYSCA) to utilize NYSCA's Peer Review Committee which was established for just such a purpose.[104]

A chiropractor filed an antitrust action against Union Labor, claiming that it had conspired to fix prices by its use of the Peer Review Committee.[105] He filed the claim because his treatments and his charges had occasionally been referred by Union Labor to the Peer Review Committee which had sometimes determined that his treatments were unnecessary or his charges unreasonable.[106] Union Labor argued that its actions were exempted from antitrust scrutiny by the McCarran-Ferguson Act.[107] The district court agreed but the Second Circuit Court of Appeals reversed, relying on *Royal Drug*.[108]

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99. *See id.* at 238 (Brennan, J., dissenting) (citing *Proceedings of the NAIC*, 76th Session, 250 (1945)). The National Association of Insuarnce Commissioners is a voluntary association of the heads of the state insurance regulatory agencies which celebrated its 125th year of existence in 1996.

100. *See Royal Drug*, 440 U.S. at 238.

101. *See id.* at 243-44 (citations omitted).

102. *See Pireno*, 458 U.S 119.

103. *See id.*

104. *See id.* at 123.

105. *See id.* at 124.

106. *See id.*

107. *See id.* at 124.

108. *See Pireno*, 458 U.S. at 125 (*citing* 650 F.2d 387 (1981)).

The *Pireno* Court affirmed, scrutinizing the questioned activities in three ways (1) "whether the practice has the effect of transferring or spreading a policyholder's risk;" (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured;" and (3) "whether the practice is limited to entities within the insurance industry."[109] The Court noted that "[n]one of these criteria is necessarily determinative in itself."[110] The Court had little trouble finding that the use of the Peer Review Committee did not meet the first and second parts of the test. The Court also determined that the use of third parties outside the insurance industry (practicing chiropractors) in the peer review process did not pass the third part of the test "mandated" by *Royal Drug.*[111]

Justice Rehnquist delivered the dissent, joined by Chief Justice Burger and Justice O'Connor. Therein he found "the claims adjustment function of the Peer Review Committee to be at the heart of the relationship between insurance companies and their policyholders" and therefore "clearly within the sphere of insurance activity which the McCarran-Ferguson Act intended to protect from the effect of the antitrust laws."[112] The dissent essentially dismissed the first and third parts of the *Pireno* test and latched onto the second part as "the essence" of the "business of insurance."[113] The dissent determined that the process of claims adjustment is central to the policy relationship between the insurer and the insured finding support in the legislative history of the McCarran-Ferguson Act.[114] Therefore, the McCarran-Ferguson Act would shield the activities complained of from federal antitrust laws.[115]

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109. *Id.* at 129.

110. *Id.*

111. *See id.* at 133.

112. *Id.* at 135 (Rehnquist, C.J., dissenting).

113. *Id.* at 136 (Rehnquist, C.J., dissenting).

114. *See Pireno,* 458 U.S. at 136-38 (Rehnquist C.J., dissenting). As the *Royal Drug* Court had done, the dissent looked to the bill proposed by the NAIC upon which the McCarran-Ferguson Act was based for guidance as to the meaning of "business of insurance." Enumerated within the NAIC bill were seven (intra-industry) practices intended to be protected from application of the Sherman Act. Included in those seven practices was the process of claims adjustment. *See id.* at 138 (Rehnquist, C.J., dissenting).

115. The dissent ended with a stern admonition that because the majority "misread" the McCarran-Ferguson Act and the Court's prior precedents, it had eliminated by fear of exposure to anti-trust liability "an aspect of the American insurance industry" which had benefited insurance companies and policyholders for years. *See id.* at 140 (Rehnquist, C.J., dissenting).

### 3. *Fabe*

*Fabe* was the next important step in the Court's developing interpretation of the McCarran-Ferguson Act. Again, there was a sharp division among the Justices. Justice Blackmun delivered the opinion for the majority in which Chief Justice Rehnquist and Justices White, Stevens and O'Connor joined.

In *Fabe*, the Ohio Superintendent of Insurance was appointed as the liquidator of an insolvent insurance company pursuant to "a complex and specialized administrative structure enacted by the state for the regulation of insurance companies from inception to dissolution."[116] In the state liquidation proceedings, the United States filed claims as obligee on various surety bonds issued by the insolvent insurer and asserted that its claims should be paid first. As support, the United States cited a federal law which provided that claims of the United States government are entitled to first priority in bankruptcy proceedings.[117] This federal law directly conflicted with a state law which awarded fifth-priority status to the federal government's claim.[118]

The United States argued that the Ohio statute failed the three part test established in *Pireno* by only dealing with the order in which creditors' claims will be paid. The government's reasoning was that (1) the Ohio statute did not deal with "the transfer of risk from insured to the insurer;" (2) the Ohio statute was "not an integral part of the policy relationship between insurer and insured;" and (3) the Ohio statute was "not limited to entities within the insurance industry because it addresses only the relationship between policyholders and other creditors . . . ."[119]

The Court stated that it could not read *Pireno* as narrowly as the government. It noted that *Pireno* and *Royal Drug* "held only that 'ancillary activities' that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the 'business of insurance.'"[120] Here, the Court made an important break from *Pireno* by reviewing the language of section 2(b) of the McCarran-Ferguson Act by its separate parts. It noted a clear distinction between the "first clause" which "commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States" and the "second clause" which "exempts only 'the business of insurance' itself from the antitrust laws."[121] The

116. *Fabe*, 508 U.S at 494.

117. *See id.* at 494-95 (citing 31 U.S.C. § 3713(a)(1)(A)(iii)).

118. *See id.* at 495. The state of Ohio ranked claims of (1) administrative expenses; (2) specified wage claims; (3) policyholder's claims; and, (4) claims of general creditors ahead of the Untied States' claims. *See id.* (citing Ohio REV. CODE ANN. § 3903.42 (Anderson 1996)).

119. *Id.* at 502.

120. *Id.* at 503 (citing *Pireno*, 458 U.S. at 134 n.8).

121. *Id.* at 504.

Court determined in this case that the purpose of the Ohio statute was to enforce the performance of the bankrupt insurer's contracts by ensuring payment of policyholders claims, and that the performance of an insurance contract satisfies all of the requirements established in *Pireno*.[122]

> The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. BLACK'S LAW DICTIONARY 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance." For the reasons expressed above, we believe that the actual performance of an insurance contract is an essential part of the "business of insurance." Because the Ohio statute is "aimed at protecting or regulating" the performance of an insurance contract, *National Securities*, 393 U.S. at 460, 21 L. Ed. 2d 668, 89 S. Ct. 564, it follows that it is a law "enacted for the purpose of regulating the business of insurance," within the meaning of the first clause of § 2(b).
>
> Our plain reading of the McCarran-Ferguson Act also comports with the statute's purpose. As was stated in Royal Drug, the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for "the business of insurance" from the federal antitrust laws. 440 U.S. at 218, n. 18, 59 L. Ed. 2d 261, 99 S. Ct. 1067. Cf. D. Howard, Uncle Sam versus the Insurance Commissioners: A Multi-Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act, 25 Williamette L. Rev. 1 (sic)(1989) (advocating an interpretation of the two clauses that would reflect their dual purposes); Note, The Definition of "Business of Insurance" Under the McCarran-Ferguson Act After Royal Drug, 80 Colum L. Rev. 1475 (1980) (same).[123]

The United States attempted to support its argument with the legislative history of the McCarran-Ferguson Act by arguing that its enactment was intended by Congress to place the states in the position that they held before the *South-Eastern Underwriters* decision when federal laws superseded inconsistent state laws pursuant to general preemption rules.[124] The Court determined instead that the McCarran-Ferguson Act:

122. *See Fabe*, 508 U.S. at 505-06.

123. *Id.* at 505.

124. *See id.* at 507-508. The government relied on the following statement: "It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." *Id.* at 506 (quoting H.R. Rep. No. 79-143, at 3 (1945)).

> [T]ransformed the legal landscape by overturning the normal rules of preemption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise . . . .[125]

This became the two part test of *Fabe.* First, does the federal law "specifically relate to the business of insurance." Since the parties agreed that the federal priority statute did not, the Court proceeded to the second test; that is, whether the state law was enacted "for the purpose of regulating the business of insurance."[126] The Court held that the Ohio law was saved from preemption to the extent that it regulates policyholders. The saved state law provisions were determined to be the payment of administrative expenses and the payment of policyholder claims.[127] The Court remanded to the state court the question of the fate of the other two priority provisions.[128]

The dissent, authored by Justice Kennedy and joined by Justices Scalia, Souter, and Thomas, refused to interpret the term "business of insurance" differently between the two clauses of the McCarran-Ferguson Act. In their opinion, the majority had failed to follow a basic rule of statutory construction, that is, to construe identical words used in different parts of the same act as having the same meaning.[129] The dissent argued that *Royal Drug* and *Pireno* were best viewed as "refinements" on the definition of "business of insurance" established in *National Securities*,[130] and that the Ohio statute failed the three-part test of *Pireno.*[131]

## D. Implications of *Barnett*

The *Barnett* decision represents the logical extension of the *Royal Drug, Pireno*, and *Fabe* decisions. Beginning with *Royal Drug,* the term "business of insurance" was analyzed by the Court to determine whether certain activities were saved from federal antitrust laws by the provisions of the McCarran-Ferguson Act. The analysis was further refined in *Pireno,* which led to the test established in *Fabe* relied upon by the district court and court of appeals in *Barnett.* By defining the term "specifically relates" the Court in *Barnett* further

125. *Id.* at 507.
126. *Id.* at 508.
127. *See id.* at 509.
128. *See Fabe*, 508 U.S. at 509-10.
129. *See id.* at 515 (Kennedy, J., dissenting).
130. SEC v. National Sec., Inc., 393 U.S. 453 (1969).
131. *See Fabe*, 508 U.S. at 516 (Kennedy, J., dissenting).

clarified the standards by which federal statutes will be judged when facing reverse preemption under the McCarran-Ferguson Act.

*Barnett* also represents the first unanimous decision of the Supreme Court in the line of cases beginning with *Royal Drug*. It appears then to be a consolidation of the previous sharp differences, perhaps attributable to the changing face of the Court's membership. Tellingly, there appeared to be little sympathy for the convoluted rationale adopted by the district and appellate courts and a general recognition of the practical marketplace significance of the decision. The Supreme Court based its decision on the strength of Section 92 being "specifically related to the business of insurance" and not on any weakness of the Florida anti-affiliation law.[132] By eschewing a narrow ruling which would have struck down the Florida anti-affiliation law, the Supreme Court short-circuited the enforcement or enactment of other state laws which may indirectly but still effectively prevent national banks from selling insurance under the authority of Section 92. The states' role in the licensing of national banks or their employees may be curtailed, at least to the extent licensing requirements either prevent or significantly interfere with a national bank's sales activities.

Perhaps more importantly, *Barnett* is the second unanimous decision of the Supreme Court upholding interpretations of the National Bank Act by the Comptroller of the Currency regarding national bank insurance powers.[133] This reflects a strong deference to the OCC's determinations regarding the powers of national banks.

## IV. RESPONSES OF INTERESTED PARTIES

### A. Response of the OCC

Shortly after *Barnett*, the OCC issued an advisory letter (Advisory Letter) intended to provide guidance to national banks engaged in insurance and annuity sales, popularly referred to as the "Best Practices Guidelines."[134]

The Advisory Letter does not provide specific rules but instead provides general overall guidance, recognizing that national banks come in all shapes and sizes with different areas of emphasis or expertise. It has been described as a "risk-focused type of approach" based on consumer complaint experience.[135]

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132. *See Barnett*, 116 S. Ct. 1103 (1996).

133. *See Nationsbank*, 531 U.S. 251.

134. Office of the Comptroller of the Currency, *Guidance to Nat'l Banks on Ins. & Annuity Sales Activities* (Advisory Letter 96-8) 4 FED. BANKING L. REP. (CCH) 35-463.

135. *See* Edward J. Stone, *OCC Answers Questions About Advisory Letter*, 12 BANKS IN

The Advisory Letter begins by reminding national banks of the federal law prohibiting tying the availability of credit to the purchase of insurance or annuities offered by the national bank or its affiliate.[136] It further advises national banks to take certain measures to ensure compliance with the anti-tying law including:

- Monitoring to eliminate impermissible coercion when offering customers multiple products or services.
- Training bank employees about the tying prohibitions, including providing examples of prohibited practices and sensitizing employees to the concerns raised by tying.
- Involving management in reviewing training, audit, and compliance programs, and updating any policies and procedures to reflect changes in products, services, or applicable law.

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INS. REP., (Oct. 1996).

> "We recognize . . . that the size of different banks' sales operations, the complexity of the operation, and the different types of products that banks may choose to sell [in the future] mean that there is really no cookie-cutter type of standard, of the right thing to do in all cases for all banks . . . .
> There certainly are some general issues and areas of concern . . . And we sought to identify those in the advisory letter and to highlight the sorts of issues that we want to see banks addressing, as they embark on activities in this area . . . .
> We tried to recap what our approach to supervision would be . . . and indicated that we would try to implement what would be essentially a risk-focused type of approach. We placed a lot of emphasis on trying to identify the complaint experience that banks were having."

*Id.* (quoting comments of Julie Williams, chief counsel of the OCC).

136. The OCC referred specifically to 12 U.S.C. § 1972 which provides in pertinent part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement --
>> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>> (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;
>> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>> (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or
>> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

12 U.S.C. § 1972(1) (1994).

- Reviewing customer files to determine whether any extension of credit is conditioned impermissibly on obtaining an insurance product or annuity from the bank or its affiliates.
- Monitoring incentives, such as commissions and fee splitting arrangements, that may encourage tying.
- Responding to any customer allegations of prohibited tying arrangements.[137]

The Advisory Letter then addresses the applicability of state laws and discusses what the OCC believes *Barnett* provides:

> In practice, these principles should mean that most state laws that apply generally to regulate insurance agents and agencies and that do not discriminate against or have a disparate impact on banks would *not* be preempted because, ordinarily, they 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. If a state law prevented or impaired significantly the ability of national banks to exercise their powers, however, that state law would not be applicable because it would be preempted under the standards set by the Supreme Court.
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> Thus, for example, and provided a particular law is not preempted, the types of state laws applicable to national banks would include non-discriminatory requirements such as:
>
> - Licensing requirements establishing character, experience, and educational qualifications for individuals selling insurance as agent;
> - Testing and continuing education requirements, and requirements for license renewals, for individuals selling insurance as agent;
> - Licensing requirements pertaining to different types of insurance that apply to individuals selling particular types of insurance in an agency capacity; and
> - 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 information; and engaging in unfair claims settlement practices.

137. Advisory Letter, *supra* note 134, 35-463. at 35,755-56.

> When state laws are not preempted, the OCC recognizes the role and ability of state insurance regulators to administer and oversee compliance with those laws.[138]

The Advisory Letter emphasizes management oversight of a national bank's insurance and annuity sales by "senior management, competent personnel and internal controls" and provides a discussion of considerations which detail the OCC's areas of concern. These considerations include: 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.[139]

With respect to insurance sales, the OCC focused on the activities a bank should or should not engage in when extending a loan. For credit related sales of insurance, the OCC stated:

> For example, to avoid the impression that a linkage exists between the bank's credit decision and the customer's choice of insurance seller, the customer should also be clearly and unambiguously informed that he or she need not purchase insurance from the bank, its subsidiary, an affiliate, or any particular unaffiliated third party, that the insurance is available through brokers or agents other than the bank, and that the customer's choice of insurance provider will not affect the bank's credit decision or credit terms in any way. These disclosures should be provided when the bank first informs a customer that insurance required in connection with a loan is available from the bank, a subsidiary, affiliate, or unaffiliated third party selling insurance on bank premises. Banks should also consider:
>
> - Providing the disclosures described above in writing, and obtaining a signed statement from the customer, at or prior to closing the insurance sale, acknowledging that the customer has received, has read, and understands the disclosures.
> - Whether any customer confusion arises because the bank uses combined documentation for related credit and insurance transactions and whether separate and independent documents would effectively reduce this confusion.[140]

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138. Advisory Letter, *supra* note 134, 35-463, at 35,757.
139. *See* Advisory Letter, *supra* note 134, 35-463, at 35,757-60.
140. Advisory Letter, *supra* note 134, 35-463, at 35,760.

The OCC also focused on the setting and circumstances of insurance sales activities and specific disclosures. Recognizing that appropriate measures will vary on a case-by-case basis, the OCC stated:

> Banks should define clearly and limit the roles of bank employees when they operate in a traditional physical setting, generally a "teller window," that is closely associated with and predominantly services insured deposit account transactions. To the extent practicable, a bank's sales of insurance should take place in a location that is distinct from such a traditional teller window setting. The involvement of tellers and individuals not qualified to sell insurance products also should be limited to directing customers to qualified personnel who can provide information. When physical considerations, such as the size or design of a particular bank facility, prevent sales from being conducted in a location distinct from the common teller area, the bank should make every effort to minimize customer confusion.
>
> In addition, during any customer contact, including communication by telephone or other electronic means, banks should disclose to customers 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, including possible loss of principal, unless the bank affirmatively determines, for specific products, that customers would not reasonably benefit from, or might in fact be confused by, these disclosures. Management should address the manner in which the disclosures are provided to a proposed insured, and the point or points during the solicitation or sales transaction at which written or oral disclosures should be furnished to customers. Other aids to customers distinguishing between products include:
>
> - Specifying how individuals selling or recommending insurance products identify themselves and their sales role.
> - Conspicuous signage in the areas where insurance is sold that clarifies that the insurance sold by or through the bank is not a deposit or obligation of the bank, is not guaranteed by the bank, and is not insured by the FDIC.[141]

The OCC has also recognized that state insurance regulators may feel threatened. In fact, the NAIC has formed a Special Committee on Bank Sales of Insurance and has opened a dialogue with the OCC over the states' role in regulating sales of insurance by national banks. Emphasizing a cooperative approach, Julie L. Williams, Chief Counsel to the OCC, stated:

141. Advisory Letter, *supra* note 134, 35-463, at 35,761.

> I look forward to the opportunity to work with the state regulators, . . . I think it's important, as we go forward, that we all get to know each other better—and know that we're both trying to approach this with an attitude of trying to be reasonable, and making things work.
>
> The potential problems that I see fall into two general areas . . . . One is that there may be some situations where particular states don't want to recognize the Barnett decision and have indicated a reluctance to approach insurance licensing in a way that is consistent with that decision. Those are situations in which there may be state laws that prevent banks from selling insurance—or are highly restrictive—that would be preempted under the Barnett standard. And we have to figure out a way to work through those issues, so that we don't have a state saying, 'Well, I'm not going to do anything until the state supreme court or the state legislature decides that they're going to change the law.
>
> Secondly, . . .there may be some pockets of state law in some areas that are restrictive of banks' powers—in a way that would be inconsistent with the standards articulated in the Barnett decision. And those are things that, from the OCC perspective, we need to explain to the banks and the state regulators in those states. We have to explain why we think federal preemption would apply.[142]

These comments were echoed by Comptroller of the Currency, Eugene Ludwig at the NAIC's 1996 Winter National Meeting.[143] Comptroller Ludwig sought to placate independent agent groups by pointing out that securities firms felt much the same way when banks were granted authority to conduct securities activities.[144] He stated that independent agents should not view the world of insurance as a fixed pie, but that banks may do for insurance sales the same that they did for mutual fund sales.[145]

Soon after the Advisory Letter was issued, the OCC issued an opinion letter to First Union Corporation.[146] (First Union Opinion) The First Union Opinion was written in response to First Union Corporation's operating subsidiary notification.[147] The notification provided that the First Union

142. Stone, *supra* note 135.

143. Minutes of Special Committee on Bank Sales of Insurance, *Proceedings of the NAIC*, Atlanta, GA, Dec. 16, 1996.

144. *See supra* note 2.

145. *See* Minutes of Special Committee on Bank Sales of Insurance, *supra* note 138; *see, e.g.*, Arthur Zeibel, *The Future Before Us*, FIN. ANALYSTS J., Vol. 52, No. 5 (1996). Assets in all mutual funds have tripled since early 1990 to exceed $3 trillion in February 1996. Further, the number of mutual funds has grown from 564 in 1980 to nearly 6,000 in 1996.

146. *See First Union Opinion*, *supra* note 13, at 1.

147. Pursuant to OCC regulations, national banks wishing to perform "new activities" through a subsidiary must submit a written proposal to the Deputy Comptroller for the district where the bank's principal office is located. *See* 12 C.F.R. § 5.34(d)(1)(i) (1996).

National Banks of North Carolina, South Carolina, Georgia, Florida, Tennessee, Virginia, Maryland, and First Union National Bank, Pennsylvania, a multistate bank with branches in Pennsylvania, New Jersey and New York, intended to establish operating subsidiaries in each of the states where they are located to engage in the sale of all manner of insurance products.[148] Each subsidiary would be located in a place of less than 5,000 inhabitants and would be licensed as an agency and/or have appropriately licensed personnel.[149]

The heart of the notification dealt with how the insurance activities were to be conducted and it appears that First Union Corporation intended to push the envelope as far as it believed it could be extended.[150] The OCC summarized the activities as follows:

> Contacts and meetings with customers may occur both inside and outside the "place of 5,000," and each agency may use mailings, telemarketing, distribution of brochures, leaflets and other literature, and referrals of customers from other Bank branches, to reach customers outside the "place of 5,000." Affiliated or unaffiliated third parties may be used to assist these sales activities, for example, by providing advertising support, direct mail marketing services, telemarketing services, or other types of "back office" support, subject to appropriate contractual relationships and oversight by the bank agency. In all cases, these solicitation and sales activities will be consistent with what would be generally allowed under state law for a licensed insurance agency or licensed agent, not affiliated with a bank, with its offices in the "place of 5,000."[151]

The First Union Opinion provides an exhaustive analysis of Section 92 and recent case law. More importantly it defines the OCC's position regarding the scope of permissible activity under Section 92. The First Union Opinion provides in pertinent part as follows:

> Accordingly, the following general principles can be distilled from the foregoing analysis to define the scope of solicitation and sales activities permissible for national banks under Section 92:
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> - *The agency located in the "place of 5,000" must, of course, be bona fide*. In the present situation that will clearly be the case. Agents will be managed through the agency and the "place of 5,000" will be the

148. *See First Union Opinion*, *supra* note 13, at 1.
149. *See First Union Opinion*, *supra* note 13, at 2.
150. This also was probably the reason First Union Corporation's letter was the one responded to by the OCC. It allowed the OCC the opportunity to write the broadest interpretation and answer the majority of the questions that it was being asked by national banks.
151. *First Union Opinion*, *supra* note 13, at 2.

agency's business location for licensing purposes. Each agency will be responsible for collecting commissions from insurance carriers and paying commissions to its licensed sales staff. The agency also generally will be responsible for processing insurance applications, delivery of insurance policies, and collection of premiums, where consistent with procedures of the relevant insurance carriers. In addition, business records of the agency, including copies of customer application and policy information, and licensing, customer complaint, and other compliance records, will be available at the "place of 5,000."

- 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 is based in the "place of 5,000." This will generally allow the following:
- Meetings with customers and solicitations and sales of insurance by agents of the bank agency may take place at locations inside the "place of 5,000" as well as at locations outside that "place," provided the agents are managed and paid through the bank agency located in the "place of 5,000" and use that location as their place of business for licensing purposes. If an insurance company has adopted other procedures for its nonbank agents, however, the bank agency may follow the same procedures as other insurance agents selling the company's policies.
- Mailings to advertise and sell insurance may originate from inside or outside of the "place of 5,000," and brochures, leaflets, and other literature alerting potential customers to the bank's insurance activities may be distributed from locations both inside and outside of the "place of 5,000," including other branches of the same bank. Personnel of bank branches outside of the "place of 5,000" also may make referrals to the bank's insurance agency. Likewise, telephone and cybermarketing may be used and the calls and messages need not originate within the "place of 5,000."
- The bank may contract with third parties to assist the agency's sales activities. For example, third parties might provide advertising support, direct mail marketing services, telemarketing services, payments processing, or other types of "back office" support.[152]

The First Union Opinion is 35 pages long, including 161 footnotes, and appears to be extremely well researched which may allow it to withstand any challenges brought in court. Basically, it provides that any national bank, including large multistate national banks, can sell insurance to customers anywhere in the United States by whatever methods are available, including

152. *First Union Opinion*, *supra* note 13, at 33-34 (footnotes omitted).

telemarketing and use of electronic networks, as long as the agency is legitimate and located in a place of less than 5,000. That is, the agency must at least be responsible for processing insurance applications, delivering policies, collecting premiums, collecting commissions, paying commissions to its licensed sales force and managing the sales force from the place of less than 5,000.

## B. Response of the States

Many states have "parity" or "wild card" statutes, that is, statutes which allow state banks to engage in the same activities or exercise the same powers as their national bank counterparts. It is unclear how the Advisory Letter or the First Union Opinion will affect state bank activities. To the extent that state banking commissioners and supervisors have authority to interpret their "parity" laws, the First Union Opinion may have a significant impact on the conduct of state bank insurance operations.

Additionally, however, there are signs that state insurance regulators recognize that the *Barnett* decision extends Section 92 preemption to any state's anti-affiliation laws, not just Florida's. For example, the Texas Insurance Commissioner recently issued a bulletin outlining interim procedures for the licensing of banks to sell insurance until the Texas State Legislature could address Texas' anti-affiliation law.[153] Interestingly, the Texas Commissioner made a point to acknowledge the authority of state-chartered banks pursuant to the parity provision of the Texas Constitution and, the authority of state savings banks under state law, to engage in insurance sales activities in places of less than 5,000 to the extent authorized by the OCC for national banks. As a result of *Barnett*, many states with anti-affiliation laws will likely modify them to the extent necessary to permit banks to sell insurance pursuant to Section 92 while maintaining a supervisory role for their state insurance regulators. At least twenty states are considering some form of new legislation to deal with banks selling insurance.[154] In those states which tenaciously cling to their anti-affiliation laws, litigation has been instigated to bring about the changes *Barnett* dictates.[155]

153. Commissioner's Bulletin No. B-0043-96 (June 20, 1996).

154. *See* Steve Dinnen, *End Game: The Banks, the OCC and IIAA's New Strategy*, INDEPENDENT AGENT, Jan. 1997.

155. *See, e.g.*, First Nat'l Bank of Boston and BancBoston Ins. Agency, Inc. v. Insurance Comm'r of the Commonwealth of Mass., No. 96-12075 PBS (D. Mass. Dec. 19, 1996), wherein the bank obtained an Order for Declaratory Judgment declaring certain portions of Massachusetts' anti-affiliation law (MASS. GEN. L. ch. 175 § 174E) (Supp. 1996) preempted to the extent that it prohibits the bank from selling insurance as an agent under 12 U.S.C. § 92 (1994) or from selling annuities as an agent under 12 U.S.C. § 24 (1994).

C. Response of the Independent Agents

As previously noted, the Independent Insurance Agents of America, Inc. (IIAA) recently announced an end to the war with national banks over insurance sales. However, the IIAA is committed to maintaining a "level playing field."[156] The IIAA is pushing for "functional regulation" of financial services at the Congressional level which allows for state regulation of insurance.[157] Accordingly, it has lined up the support of other trade groups including the National Conference of State Legislatures and the American Legislative Exchange Council, as well as the NAIC, to promote the primacy of state regulation over the insurance activities of all sellers of insurance.[158]

The IIAA has also developed model state legislation in conjunction with the National Association of Life Underwriters and other trade groups for states to consider, a version of which has already been passed in Rhode Island.[159] The IIAA's model act focuses mainly on tying, coercion, confusion and confidentiality but goes much farther than the Advisory Letter.[160] Other states have also introduced legislation based on IIAA's model, including Illinois, New Hampshire, New Mexico and New York.[161]

D. Response of Congress

The 105th Congress opened with the introduction of two major proposals to restructure regulation of the financial services industry. House Banking Committee Chairman James Leach (R., Iowa) joined by co-sponsors Representatives Marge Roukema (R., New Jersey), Rick Lazio (R., New York), and Mike Castle (R., Delaware), introduced the "Financial Services Competitiveness Act of 1997" (Leach Bill).[162] Concurrently, Representative Roukema and

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156. *See* Dinnen, *supra* note 153.

157. *See* Dinnen, *supra* note 153.

158. *See* Dinnen, *supra* note 153.

159. *See* Financial Institution Sales Act, R.I. GEN. LAWS §§ 27-58-1 to 13 (1996). In response to its passage, the OCC issued a notice and request for comment to determine if the Rhode Island law was preempted by Section 92. *See* 62 Fed. Reg. 1950 (1997).

160. *E.g.*, The IIAA's Model Consumer Safeguards Legislation would prohibit a loan officer from "directly or indirectly . . . soliciting" insurance from a customer until the customer has received a loan commitment or loan approval. The Advisory Letter, however, would allow a loan officer "to inform customers that insurance is required in order to obtain a loan or that loan approval is contingent on the customer obtaining acceptable insurance . . . that insurance is available from the bank . . . and indicate how to get additional information."

161. *See* Dave McDaniel, *Banks Face Sales Barriers as Agents Lobby States*, BEST'S REVIEW, Property and Casualty Edition, Sept. 1996, at 33.

162. H.R. 10, 105th Cong. (1997).

Representative Bruce Vento (D., Minnesota), ranking minority member on the House Banking Financial Institutions Subcommittee, which Representative Roukema chairs, offered a competing bill, the "Depository Institution Affiliation and Thrift Charter Conversion Act" (Alliance Bill).[163]

The Leach Bill would allow banks to affiliate with securities firms and insurance companies under a holding company structure, with the Federal Reserve being the primary holding company regulator. This would occur by repealing Section 20 of the Glass-Steagall Act[164] and amending Section 32 to allow commercial and investment banking firms to affiliate.[165] The Leach Bill would allow bank subsidiaries to engage in securities underwriting and brokerage, insurance agency activities, and any other activities that are "incidental to" the business of banking, even if the bank could not directly engage in such activities itself.[166] It would not allow bank subsidiaries to engage in insurance underwriting, merchant banking, and direct investment in real estate. Those activities would have to be conducted by a holding company affiliate. Bank holding companies would be allowed to engage in insurance activities as principal, agent or broker, even in states that have anti-affiliation laws.

The Alliance Bill would allow affiliations under newly created financial services holding companies. While allowing for a broader range of activities than those currently permitted for bank holding companies, the Alliance Bill would not eliminate all current restrictions on affiliations between banks and securities firms. A financial services holding company would have to keep at least 75% of its business in financial activities or financial services institutions, including banks, insurance companies, securities broker-dealers, or wholesale financial institutions. It would prohibit a bank holding company that became a financial services holding company from entering the insurance agency business through a new affiliate unless it purchased an agency that had been in business for two years.

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163. H.R. 268, 105th Cong. (1997). The Alliance Bill is a revised version of a comprehensive modernization bill backed by a coalition of nine financial services industry trade associations called the Alliance for Financial Modernization which is composed of the American Bankers Association, ABA Securities Association, American Financial Services Corporation, America's Community Bankers, Consumer Bankers Association, Financial Services Council, Investment Company Institute, Securities Industry Association, and Bankers Roundtable. The American Council of Life Insurance has also participated in discussions regarding the Alliance Bill.

164. Codified at 12 U.S.C. § 377. Section 20 generally provides that banks cannot be affiliated with anyone who is principally engaged in the securities business.

165. Codified at 12 U.S.C. § 78. Section 32 generally provides that directors, officers and employees are prohibited from establishing management interlocks between banks and securities firms.

166. *See* 12 U.S.C. § 24 (1994).

The Alliance Bill lists activities that are deemed "financial" and types of entities deemed to be financial services institutions. It also creates a new Financial Services Committee to determine if additional activities should be considered financial and additional types of entities should be considered financial services institutions, and would issue regulations describing the methods for calculating compliance with the seventy five percent test. The Financial Services Committee would be headed by the Treasury Department and would include representatives of bank regulatory agencies, the Securities and Exchange Commission, and state insurance commissioners.

The Alliance Bill would subject financial services holding companies to safety and soundness requirements by limiting affiliate transactions, placing prohibitions on credit extensions to nonfinancial affiliates, providing insider lending restrictions and requiring that subsidiary banks be well capitalized. Financial services holding companies could form uninsured bank subsidiaries which could affiliate with an insured bank. Additionally, nonfinancial companies would be allowed to own "national market funded lending institutions" which would be regulated by the OCC and would have national bank lending powers, but would not be allowed to take deposits or receive federal deposit insurance.

The Clinton administration also has been working on its own bill to modernize the financial services industry.[167] Testifying before a House Banking Subcommittee, Chairman of the Federal Reserve Board, Alan Greenspan, supports modernizing banking laws predicting that the financial services industry will change dramatically no matter what Congress does.[168] Treasury Secretary Robert Rubin is studying a proposal which if approved, may bring about administration support for a bill introduced during the last session of Congress by Senate Banking Chairman Alfonse D'Amato (R., New York) which was reintroduced this year. Senator D'Amato's bill would allow banks to be owned by commercial and industrial companies.[169] This contrasts with the Alliance Bill which would only allow banks to get twenty five percent of their revenue from commercial ventures.

As of this writing it appears that the Leach Bill has emerged as the most likely candidate for passage although it has been held up by sharp differences on the definition of "insurance" between the banking industry and insurance agents. The latest version drafted by Rep. Mike Oxley (R., Ohio), chairman of the House Commerce Subcommittee on Finance, and agreed to by Rep. John

167. *See* Edward J. Stone, *Expect Hot Debate on Modernization Bill*, 12 BANKS IN INS. REP., (Feb. 1997).

168. *See* Jeffrey Taylor, *Greenspan Backs Banking-Law Change, But Wants to Restrict Deposit Insurance*, WALL ST. J., February 14, 1997, at A4.

169. *See id.*

Dingell (D., Michigan) was receiving strong backing from insurance agent groups.[170] Rep. Oxley's changes include:

- A statement that all sellers of insurance must be licensed by the states and reaffirmation of the McCarran-Ferguson Act provisions on state regulation of insurance
- A provision that any bank seeking to enter the insurance agency business as of the date of the legislation must do so by buying an agency that has been existence at least two years.[171]

The banking industry has voiced opposition to the proposed "compromise" as it is unclear whether enough support can be mustered for its passage.

## V. CONCLUSION

The authority granted by *Barnett* is very narrow. At this time, national banks are authorized to sell annuities and are authorized to sell other forms of insurance if the national bank agency is located in a place of less than 5,000. Until national banks are allowed to sell all forms of insurance in any setting, *Barnett* leaves many issues unresolved. For example, the OCC has yet to define the word "place" in the term "located and doing business in any place the population of which does not exceed 5,000 inhabitants" provided in Section 92. However, it has gone out of its way not to restrict the word "place" to a town or a municipality. This has caused much concern among independent agents since the word "place" could be defined as almost anything, including a zip code within a metropolitan setting.

More importantly, the Supreme Court's *VALIC* and *Barnett* decisions, and the OCC's First Union Opinion, all represent what appear to be the first ripples of a tidal wave of change occurring in the financial services industry. The chances of a financial services modernization bill passing Congress has gained considerable momentum with backing from the independent agents and the American Council of Life Insurance, groups which previously blocked passage of similar bills introduced in the past. Passage of such a bill will likely render issues raised by *Barnett* moot. Until then, national banks, and in many cases their state bank counterparts, will be operating within the structure outlined by the OCC in their Advisory Letter and the First Union Opinion.

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170. *See* Steven Brostoff, *Deal Remains Elusive on Bank-Ins. Reform*, NATIONAL UNDERWRITER, October 27, 1997.
171. *See id.*

If one thing is certain, the rules have changed. The McCarran-Ferguson Act can no longer be viewed as a shield providing for exclusive state jurisdiction over the "business of insurance." *Barnett* has provided Congress with an opening to become much more involved in insurance regulation. It remains to be seen whether Congress will take the opportunity to walk through it.