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# INSURANCE SALES POWERS OF NATIONAL BANKS UNDER 12 U.S.C. § 92

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## I. INTRODUCTION

For over twenty-five years, two vastly powerful American industries have been at war.[1] National banks,[2] seeking to regain their share of United States financial assets from an expanding crowd of unregulated competitors,[3] desire general insurance sales powers in order to boost profits.[4] The insurance industry wishes to protect its rich domain from such incursions.[5] Caught in the vortex of this conflict is 12 U.S.C. § 92, a statute which allows nationally chartered banks in towns with a population of less than 5000 to sell insurance.[6] Uneventfully enacted in 1916, this equivocal little statute has proven to be a double-edged sword in the hands of courts called upon to settle disputes over its scope, or even its very existence.[7] Generally, § 92 has been interpreted as a limitation on the incidental powers of banks,[8] and as such has frustrated efforts by

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1. *See, e.g.*, Philip C. Meyer, *Banks Gird for New Fight in Congress over Insurance Powers*, BANKING POL'Y REP., Sept. 6, 1993, at 5 (presenting an initiative led by Sen. Christopher J. Dodd, "a frequent ally of the insurance industry in its 30-year war over bank insurance powers . . . .") *Id.* The author explains that this initiative "marks the perennial offensive of the insurance industry to prod Congress into rolling back the insurance powers of banking organizations." *Id.*

2. This note considers only commercial banks chartered under the National Bank Act (current version in scattered sections of 12 U.S.C.), thereby excluding from consideration commercial banks chartered under state law. *See, e.g.*, JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 119-31 (1992).

3. *See, e.g.*, Ed Furash, *The Information Warehouse: Key to Bank Survival in the 1990s*, THE AM. BANKER, Jan. 3, 1994, at 7A (explaining that the banking industry's share of U.S. financial assets, over 50% in the 1950's, has fallen to 25% in the early 1990's).

4. *See, e.g.*, Barry A. Abbott et al., *Banks and Insurance: An Update*, 43 BUS. LAW. 1005, 1005 (1988) (commenting that bankers are convinced that they must expand their services into non-traditional areas such as insurance).

5. *See, e.g.*, Steven Brostoff, *Senators Seek to Shut Bank/Insurance Sales Loophole*, NAT'L UNDERWRITER, Aug. 30, 1993 (Life and Health/Financial Services Edition), at 1 (reporting on U.S. Senate efforts to close a National Bank Act loophole that allows banks to sell insurance nationally from small town offices).

6. 12 U.S.C. § 92 (1988).

7. *See infra* Parts III-IV (discussing the manner in which § 92 is interpreted differently by the insurance and banking industries).

8. *See infra* Part III (examining the history of § 92 through various court interpretations).

banks to sell insurance.[9] However, the District of Columbia Circuit has recently held[10] that § 92 may be interpreted as a mechanism by which banks can sell insurance products nationwide—as long as they do so from small town branches.[11]

This note examines the present effect of § 92 on the insurance sales powers of banks. Due to the improbability of congressional reform of the law, the note focuses on key judicial decisions concerning § 92 rather than on advocacy of a thoroughgoing reform position.[12] Part II surveys the enactment of § 92 and the conditions which led to the conflict between the insurance and banking industries.[13] Part III explores the traditional role of § 92, that of defender of the insurance industry.[14] Part IV examines the manner by which the rules of statutory interpretation and a change in bank strategy have combined to completely change the focus of the debate, thereby winning important judicial acceptance of increased insurance sales by banks.[15] The brief death of § 92 and its subsequent Supreme Court resuscitation is also reviewed in Part IV, as is state insurance law and its possible challenge to the sale of insurance by banks.[16] Part V concludes this note by reviewing the possibilities of congressional action, by proposing a resolution of the debate, and by summing up what the two industries can expect from the courts failing congressional intervention.[17]

## II. BACKGROUND

### A. *Before § 92*

Traditional bank powers encompassed depository, loan-making, and note-issuing activities.[18] Insurance sales by banks, although not forbidden by law, were not seen as a power of the banking industry,[19] as banks generally had no reason to stray from their traditional spheres of

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9. *See id.*

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

11. *See id.* at 958.

12. *See infra* Part V.

13. *See infra* notes 18-68 and accompanying text.

14. *See infra* notes 69-185 and accompanying text.

15. *See infra* notes 186-321 and accompanying text.

16. *See infra* notes 232-87 and accompanying text.

17. *See infra* notes 322-42 and accompanying text.

18. *See* 12 U.S.C. § 24 (1988 & Supp. V 1993); *See also* MACEY & MILLER, *supra* note 2, at 136.

19. MACEY & MILLER, *supra* note 2, at 158.

operation.[20] The nonparticipation of banks in the sale of insurance was essentially codified by the enactment of the National Bank Act of 1864.[21] Passed by Congress under pressure from the Lincoln Administration in order to finance the Civil War,[22] the Act aimed at establishing a uniform and stable national currency.[23] To achieve this purpose, the Act subjected federally chartered banking associations to sweeping federal regulation under the administration of the newly created Office of the Comptroller of the Currency (OCC). Among the present National Bank Act's many elements is 12 U.S.C. § 24(7), which grants to banks "all such incidental powers as shall be necessary to carry on the business of banking."[24] However, the original National Bank Act neither expressly allowed nor expressly forbade the sale of insurance by banks;[25] in fact, it was utterly silent on this issue.[26]

The consensus that banks had no right to sell insurance is reflected in the opinions of the regulators in charge of national banking in the years following the enactment of the National Bank Act.[27] In 1915, for instance, the Federal Reserve observed that national banks were not able to sell insurance, as such sales were not incidental to any specified power of national banks.[28] In 1916, Comptroller John Skelton Williams, responding to a congressional initiative to amend the Federal Reserve Act,[29] wrote a brief letter to Congress expressing his concern about the financial security of national banks located in small towns.[30] He suggested a statute which would allow these banks to sell insurance to

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20. *See, e.g.*, PETER S. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 28-29 (1987) (discussing the traditional role of banks as deposit acceptors and loan makers).

21. Act of June 3, 1864, ch. 106, § 18, 13 Stat. 99, 101 (current version in scattered sections of 12, 19 & 31 U.S.C.).

22. *See, e.g.*, ROSS M. ROBERTSON, THE COMPTROLLER AND BANK SUPERVISION 37-94 (1968) (discussing the Lincoln Administration's need for a stable currency and banking industry).

23. *See id.* at 51, 52 (discussing Hugh McCullogh's objective of establishing a uniform national currency. McCullogh was the first Comptroller of the Currency.).

24. 12 U.S.C. § 24 (7) (1988 & Supp. V 1993).

25. *E.g.*, Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010, 1013 (5th Cir. 1968).

26. *Id.*

27. *See, e.g.*, 2 Fed. Res. Bull. 73, 74 (1916).

28. *Id.*

29. Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (current version in scattered sections of 12 U.S.C.).

30. 53 CONG. REC. 11,001 (1916).

generate much-needed income.[31] Williams felt that his agency was unable to grant this power because insurance sales were foreign to the business of banking; as such, Congress alone could authorize such sales by banks.[32]

### B. *The Enactment and Adolescence of § 92*

In his letter to Congress,[33] Williams asserted that banks located in small towns often had trouble turning a profit due to modest local deposits, which pressured the small banks to charge inordinately high interest rates on loans.[34] These high rates put the small-town national banks at a disadvantage when competing with state banks and trust companies.[35] These institutions, less heavily regulated than national banks, were thus able to augment their incomes by engaging in various other enterprises,[36] which in turn allowed them to charge lower interest rates.[37] Williams suggested that Congress authorize insurance sales by banks located in villages and towns of 3000 or fewer people.[38] He reasoned that the small insurance market in such a locale would not generate enough business to divert the banks from their primary loan and depository activities.[39] Furthermore, such sales would not infringe on the insurance industry, as small towns presumably did not draw large numbers of insurance solicitors.[40] Finally, this special allowance could refer only to small banks, because sophisticated big-city bankers were kept occupied and profitable with the huge volume of business immediately within their reach.[41]

Congress enacted the law recommended by Williams as part of the Act of September 7, 1916.[42] The only divergence from Williams's recommendation was that Congress set the locale's population limit at

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (mentioning specifically the power to act as agent for insurance companies and to act as brokers for real estate loans).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Ch. 461, 39 Stat. 753 (1916).

5000 rather than 3000.[43] That law ultimately appeared as § 92 of Title 12 of the United States Code.[44] Interestingly, Congress punctuated the 1916 amendment in a manner[45] that apparently added § 92 to § 5202 of the Revised Statutes,[46] a law concerning bank indebtedness.[47] Two years later, Congress amended § 5202, omitting any reference to § 92.[48] The keepers of the Code eventually made note of this, and the 1952 edition indicated that § 92 had been repealed.[49] Participants in the subsequent insurance sales debate have assumed that § 92's inclusion in § 5202, and thus its supposed repeal, had been inadvertent.[50] However,

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43. *Id.*

44. 12 U.S.C. § 92 (1926) (current version at 12 U.S.C. § 92 (1988)). The 1982 amendment occurred by Act of October 15, 1982, 96 Stat. 1511. Section 92 currently reads:

> § 92. Acting as insurance agent or broker; procuring loans on real estate.
> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal; *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

45. *See infra* Part IV.B. (explaining the confusion caused by the placement of certain quotation marks in the amendment).

46. 62 Rev. Stat. § 5202 (1874).

47. *See, e.g.*, United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173, 2185 (1993) (holding that the placement of § 92 in § 5202 was inadvertent).

48. War Finance Corporation Act, ch. 45, 40 Stat. 506, 512 (1918).

49. *See* 12 U.S.C. § 92 (1952) (noting that the 1918 amendment to § 5202 effectively repealed § 92).

50. For example, Congress purported to amend § 92 in 1982. *See* Garn-St. Germain Act, Pub. L. No. 97-320, 96 Stat. 1469, 1511 (1982).

this punctuation issue[51] would eventually have its fifteen minutes of fame before final resolution by the Supreme Court.[52]

Banks are essentially conservative institutions,[53] and remained content to engage in their own traditional business as long as it remained profitable.[54] By the early 1960's, however, external pressures had grown disquietingly as competing, unregulated institutions began to carve out their own empires from banking's traditional and most lucrative turf.[55] Bank deposits suffered from the competition of credit unions, mutual savings banks, savings and loans institutions, and money market funds.[56] Consumers flocked to financing companies such as the General Motors Acceptance Corporation for loan assistance.[57] Most disturbing was that corporate borrowers sought short-term funding directly from investors by issuing commercial paper,[58] or by borrowing from financing companies such as General Electric's credit arm.[59]

These developments alarmed the banking industry as well as its champion, Comptroller James J. Saxon, a flamboyant advocate of the expansion of bank power.[60] In 1962, Saxon created a National Advisory Committee on Banking Regulatory Policies and Practices composed entirely of bankers and lawyers to explore changes in banking law and

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51. *See infra* Part IV.B-C (discussing the D.C. Circuit Court's determination that § 92 had been repealed in 1918, and the Supreme Court's subsequent reversal of that determination).

52. *See* United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173, 2187 (1993).

53. *See, e.g.*, Edward L. Bishop, *Under-used Futures Hedging Galvanizes Bank Earnings*, THE AM. BANKER, Feb. 10, 1982, at 14 (explaining the way in which conservative banking policies affect speculative financial futures trading).

54. *See* ROSE, *supra* note 20, at 6-7 (discussing the erosion of traditional loan and deposit markets).

55. *See id.* at 303-04 (describing the way in which the vacuum left by banks' failure to provide services to consumers was filled by new financial institutions).

56. *See id.* at 312-14 (describing the rise in alternative financial institutions, whereby, for example, money market funds were only available through one outlet in 1972 but grew to multiple outlets with $45 billion in assets by 1978).

57. *See id.* at 331.

58. *See, e.g.*, ROSE, *supra* note 20, at 331; Roger Fillion, *Banking Crisis Appears Over but New Problems Loom*, The Reuter Business Rep., May 9, 1993, *available in* LEXIS, News Library, CURNWS File.

59. *Id.*

60. *See, e.g.*, ROBERTSON, *supra* note 22, at 147-49 (explaining that Saxon, a former commercial banker, was appointed by President Kennedy to stimulate economic change).

regulation which would assist the industry.[61] The committee recommended, among other things, that Congress allow banks to sell insurance in connection with loans made by the bank.[62] Saxon agreed, but bypassed Congress and issued an administrative ruling[63] which stated that, under § 24(7),[64] insurance sales are incidental to the powers of banking.[65] This ruling did not limit its scope to banks located in towns with a population of 5000 or less.[66] The American insurance industry, however, would prove reluctant to surrender any of its market to the bankers.[67]

## III. 12 U.S.C. § 92 AS SHIELD OF THE INSURANCE INDUSTRY: THE *SAXON* ANGLE

### A. Saxon v. Georgia Association of Independent Insurance Agents, Inc.

In 1964, Citizens and Southern National Bank of Georgia (C & S Bank), acting on Comptroller Saxon's administrative ruling,[68] applied for permission to sell insurance.[69] The OCC approved the application,[70] and in 1965 C & S Bank began selling a variety of insurance products to its customers,[71] initially from its Atlanta offices and subsequently from

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61. *See id.* at 149.

62. *See, e.g.*, Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1012 n.4 (1968) (citing COMPTROLLER OF THE CURRENCY, NAT'L BANKS AND THE FUTURE, REP. OF THE ADVISORY COMM. ON BANKING IV-IX, at 58-59 (1962)).

63. *Id.* at 1012 (discussing Office of Comptroller of the Currency Ruling No. 7110 (1963)).

64. 12 U.S.C. § 24(7) (1864) (current version at 12 U.S.C. § 24(7) (1988 & Supp. V 1993)).

65. *See Saxon*, 399 F.2d at 1012 (quoting Office of Comptroller of the Currency Ruling No. 7110 (1963)).

66. *Id.*

67. *See, e.g.*, Paul J. Mason & David A. Massey, *Holes in the Dyke: The Riddled Barrier Between Banking and Insurance*, BANKING EXPANSION REP., Jan. 21, 1991, at 1 (discussing the insurance industry's resistance to incursions by the banking industry).

68. *See Saxon*, 399 F.2d at 1012 (citing Office of Comptroller of the Currency Ruling No. 7110 (1963)).

69. 399 F.2d at 1012.

70. *Id.* at 1012 (stating that approval was requested and received via exchange of letters).

71. *Id.*

its offices in five other cities.[72] All C & S Bank offices selling insurance were located in cities with populations exceeding 5000.[73]

Alarmed by this encroachment upon its business, the Georgia Association of Independent Insurance Agents, Inc., among others, brought suit against C & S Bank and Comptroller Saxon, seeking a judicial declaration that the Comptroller's ruling and C & S Bank's activities were unlawful.[74] The insurers contended that § 92 limited a bank's insurance sales activities to the conditions enumerated therein and thereby controlled the more general powers granted by § 24(7)[75] to banks.[76] The district court granted the insurers' motion for summary judgment.[77]

Comptroller Saxon and C & S Bank appealed.[78] The appellants contended that insurance sales power is incidental to the banking business, and that § 92's grant of insurance sales powers to banks located in towns of less than 5000 is not an exception to any general insurance sales prohibition because the National Banking Act does not explicitly prohibit insurance sales by banks.[79] The Fifth Circuit disagreed and affirmed the opinion below in its oft-cited decision, *Saxon v. Georgia Association of Independent Insurance Agents, Inc.*[80]

The court began its analysis with a review of Comptroller Saxon's ruling that, under § 24(7) bank insurance sales were incidental to the nature of the industry.[81] In the period between the adoption of § 24(7) and the adoption of § 92, agencies charged with regulating banks under the National Bank Act had consistently opined that bank insurance sales were beyond the incidental powers of § 24(7).[82] As such, these agencies deemed themselves without power to authorize insurance sales by banks.[83] This recognition of his office's limitations in these matters had

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72. *Id.* The bank sold "automobile, home, casualty and liability insurance . . . ." *Id.*

73. *Id.*

74. Georgia Ass'n of Indep. Ins. Agents, Inc. v. Saxon, 268 F. Supp. 236 (N.D. Ga. 1967), *aff'd sub nom.* Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968).

75. 12 U.S.C. § 24(7) (1988 & Supp. V 1993).

76. 268 F. Supp. at 238.

77. *Id.* at 239.

78. *Saxon*, 399 F.2d at 1011.

79. *Id.* at 1013.

80. *Id.* at 1012, 1019.

81. *Id.* at 1013.

82. *Id.*

83. *Id.* (citing 2 Fed. Res. Bull. 73, 74 (1916)).

led Comptroller Williams to advocate legislation resulting in the adoption of § 92 in 1916.[84] The court concluded that before § 92 was enacted in 1916, "it seem[ed] to have been universally understood that" banks could not sell insurance.[85]

Having evaluated the opinions held on this matter prior to the enactment of § 92, the court next reviewed the provisions of § 92 itself.[86] With its explicit grant of insurance sales powers to banks, § 92 was viewed by the court as a provision in pari materia, and thus highly relevant to a determination of congressional intent concerning § 24(7).[87]

First, applying the doctrine of expressio unius est exclusio alterius, the court determined that § 92's explicit regulation of certain insurance sales activities excluded insurance sales by banks in different circumstances.[88] More than simply "'*impl[ying]* denial of . . . non-described powers[;]'"[89] the court flatly asserted that § 92's grant of one power "'includes the negative of *any* other . . . .'"[90] And a power denied by Congress through exclusion in § 92 cannot be construed under § 24(7)[91] as a power incidental to banking.[92]

The court buttressed its conclusion with a review of what it considered to be strongly supportive legislative history.[93] In its 1916 bill proposing an amendment to the Federal Reserve Act,[94] Congress had made no provisions for granting insurance sales powers to banks.[95] Thereafter, Comptroller Williams's letter,[96] which recommended a limited sales power, was received by Congress and introduced into the congressional

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1013.

88. *Id.* at 1013-14.

89. *Id.* at 1014 (quoting Continental Casualty Co. v. United States, 314 U.S. 527 (1942)) (emphasis added).

90. *Id.* at 1014 (quoting Service Life Ins. Co. v. United States, 293 F.2d 72 (8th Cir. 1961)) (emphasis added).

91. 12 U.S.C. § 24(7) (1864) (current version at 12 U.S.C. § 24(7) (1988 & Supp. V 1993)).

92. *See Saxon*, 399 F.2d at 1014 (citing First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640 (1924); Baltimore & Ohio Ry. Co. v. Smith, 56 F.2d 799 (3rd Cir. 1932)).

93. *See Saxon*, 399 F.2d at 1015-16.

94. Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (current version in scattered sections of 12 U.S.C.).

95. 399 F.2d at 1015 (describing H.R. 13391, 64th Cong., 1st Sess. 1916).

96. 53 CONG. REC. 11,001 (1916).

record.[97] Williams's recommendations were adopted with only insignificant variations, and later codified as § 92.[98] Based on these facts, the court concluded that, in 1916, Congress accepted Williams's conclusion that banks had no power to sell insurance.[99]

*Saxon* set the tone of the insurance sales debate for years to come.[100] It firmly shut the door on Comptroller Saxon's broad interpretation of the insurance sales power of banks under § 24(7).[101] The OCC responded by applying a very narrow reading to the court's holding.[102] However, even read as such, the general prohibition against insurance sales was clear, and future campaigns by banks and regulators may be characterized as attempts to outflank *Saxon* rather than to take it by storm.[103] While typically arguing that *Saxon* was wrongly decided, the regulators and banks emphasize that their proposed sales effort is different from that in *Saxon*: that the type of insurance to be sold by the bank warrants an exception; or that the manner in which the insurance is sold exempts the bank from § 92 limitations.[104]

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97. *Id.*

98. *Id.*

99. 399 F.2d at 1016.

100. *See* Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295 (5th Cir. 1993) (finding that annuities are a form of insurance, so that their sale by banks is limited by *Saxon*); American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d. Cir. 1992) (following *Saxon*'s expressio unius analysis in denying a bank the power normally to sell unlimited title insurance).

101. *See* MACEY & MILLER, *supra* note 2, at 159-60 (explaining that the court in *Saxon* utilized the principle of expressio unius to find that banks were not permitted to sell insurance in towns of more than 5,000 people).

102. *See, e.g.*, Keith R. Fisher, *Reweaving the Safety Net: Bank Diversification into Securities and Insurance Activities*, 27 WAKE FOREST L. REV. 123, 192 (1992).

103. *See id.* The OCC attempted to limit the court's holding in *Saxon* by confining it to prohibiting a bank from selling "'broad forms of automobile, home, casualty and liability insurance.'" *Id.* The OCC also found that banks were authorized to sell title insurance by characterizing it "as a unique type of insurance analogous to credit life insurance and directly connected to a national bank's lending activities . . . ." *Id.*

104. *See id.*

### B. *Possible Exemptions Based on Characterization of Insurance Product*

Banks and regulators have attempted to narrow the *Saxon*[105] small-town limitation by maintaining that certain insurance coverage is not addressed by § 92.[106] One example of such is *Independent Bankers Association of America v. Heimann*,[107] in which a banking association appealed the dismissal of its suit[108] challenging the OCC's regulations which prohibited bank insiders from profiting individually on credit life insurance[109] sold to the bank's borrowers on their loans.[110] In an ironic role reversal, the bankers' association argued that the challenged regulation violated § 92 because it permitted the sale of credit life insurance without regard to the size of the town in which the selling bank was located.[111] The court of appeals reinstated the case and upheld the challenged regulation.[112] In a swipe at the *Saxon*[113] analysis, the court noted that, on its face, § 92 is a permissive rather than a limiting statute.[114] However, the court's substantive argument focused on the singular nature of credit life insurance: unlike the types of insurance product generally sold by insurance companies, credit life insurance is written to protect the loan, and "[i]n no way [] involve[s] the operations of a general life insurance business."[115] As such, *Saxon* was simply irrelevant; it had merely prohibited banks from selling insurance products which were normally sold by insurance companies.[116] Credit life

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

106. *E.g.*, Independent Banker's Ass'n of Am. v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979).

107. *Id.*

108. *Id.* at 1166.

109. Credit life insurance covers the balance of a debt due, and is payable to the creditor if the debtor dies, is disabled, becomes insolvent or files for bankruptcy. *See* BLACK'S LAW DICTIONARY 552 (abridged 6th ed. 1991).

110. Disposition of Credit Life Insurance Income, 12 C.F.R. § 2 (1979).

111. Independent Bakers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1169-70 (D.C. Cir. 1979).

112. *Id.* at 1166, 1171. The court decided the case on its merits "in the interests of judicial expediency" rather than remanding. *Id.* at 1167.

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

114. 613 F.2d at 1170.

115. *Id.*

116. *Id.*

insurance is easily distinguishable from these basic products.[117] The court concluded that the sale of credit life insurance is a common and essential feature of modern banking, and that permission to offer it for sale was within the OCC's discretion under § 24(7).[118]

In *American Land Title Association v. Clarke*,[119] the Second Circuit came to a different conclusion on an essentially similar issue.[120] In 1989, Chase Manhattan Bank received the OCC's permission to sell title insurance[121] through subsidiaries in connection with the bank's real estate loans without regard to the population of towns where the selling branches were located.[122] A title insurance association challenged the OCC's approval.[123] Following the rules laid out by the Supreme Court in *Chevron v. National Resources Defense Council*[124] for evaluating the propriety of an agency's implementation of a statute, the district court first sought clear congressional intent under § 24(7) concerning insurance sales by banks.[125] Finding an absence of such clear congressional intent, the court then took the next *Chevron* step, which requires only that the agency's implementation of the law be based on a permissive interpretation of the statute's express wording.[126] The district court found that the OCC's authorization to sell was a permissible interpretation of the vague § 24(7).[127] The court of appeals reversed[128] using an

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117. *Id.*

118. *Id.*

119. 968 F.2d 150 (2d. Cir. 1992).

120. *Id.* at 157 (holding that "section 92 prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business . . .").

121. *See* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,836 (July 11, 1986) (containing an OCC interpretive letter that permits national banks to sell title insurance).

122. 968 F.2d at 150.

123. American Land Title Ass'n v. Clarke, 772 F. Supp. 1353 (S.D.N.Y. 1991), *rev'd* 968 F.2d 150 (2d. Cir. 1992).

124. 467 U.S. 837 (1984). The *Chevron* court, in reviewing EPA regulations under the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 1, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.), promulgated a method of judicial review beginning with an inquiry into clear congressional intent, evidenced in either the language of the statute or, failing that, the legislative history. Without a clear message from these, courts may only reject the regulation if it is not a permissible interpretation of the statute. *Id.*

125. 772 F. Supp. at 1358-59.

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

127. 772 F. Supp. at 1359.

analysis closely following *Saxon*. Congress had indeed "'directly spoken to the precise question at issue'"[129] by passing § 92, which by limitation of insurance sales to one mode ruled out all other modes:

> [H]ad Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have limited the grant of authority in § 92 to national banks in locations with under 5000 inhabitants. And if at the time of enactment Congress believed that all national banks—regardless of location—already possessed the authority to sell insurance, this provision would have been superfluous.[130]

The court then noted that the legislative history behind § 92, the Williams letter, further supported the proposition that Congress granted the banks a right to insurance sales which otherwise would have been prohibited but for this legislation.[131] Therefore, the court determined that Congress had directly addressed this precise issue, and that the OCC exceeded its authority when it authorized insurance sales beyond those permitted in § 92.[132]

The court of appeals next dispensed with the OCC's allegation that, similar to credit life insurance sales permitted by *Heimann*,[133] bank sales of title insurance are not controlled by § 92.[134] In the court's view, credit life insurance is unique among insurance products because it "protects only the lender's interest."[135] Title insurance, "by contrast, insures the borrower's equity in the property as well as the bank's interest in the mortgage it holds."[136] Therefore, banks which sell title insurance, unlike those which sell credit life insurance,[137] stray into the insurance

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128. American Land Title Assoc. v. Clarke, 968 F.2d 150, 155 (2d Cir. 1992).

129. *Id.* (quoting *Chevron*, 467 U.S. at 842).

130. *Id.*

131. *Id.* at 155-56.

132. *Id.* at 157.

133. Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979).

134. *American Land Title*, 968 F.2d at 157.

135. *Id.*

136. *Id.* Because the facts were distinguishable from those of *Heimann*, the court in this instance chose to restrict insurance sales power; however, the court was also highly critical of the D.C. Circuit's analysis of § 92 in *Heimann*, and maintained that "*Heimann*'s persuasiveness is further eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history . . . ." *Id.*

137. *Id.* (quoting *Heimann*, 613 F.2d at 1170).

industry.[138] The court then observed that § 92 places definite restrictions on banks acting as agents to insurance companies.[139] Therefore, whenever banks sell title insurance, a product normally sold in the insurance business,[140] such sales are subject to the limitations contained in § 92.[141] Having thus stopped the bank at the first hurdle, the court found it unnecessary to review whether sales of title insurance are incidental to the banking industry under § 24(7).[142]

A different result was obtained in *NationsBank v. Variable Annuity Life Ins. Co.*[143] from a dispute arising in the Fifth Circuit[144]—the birthplace of *Saxon*. In 1989, NationsBank of North Carolina received the OCC's permission to sell annuities contracts through a wholly-owned subsidiary.[145] The plaintiff insurance company sought declaratory and injunctive relief.[146] The district court, using a *Chevron* analysis, first looked to congressional intent, as evidenced in the statute itself and in its legislative history,[147] and next reviewed the agency's exercise of regulatory authority.[148] The court deferred to the OCC's reading of § 24(7) as rational,[149] and affirmed the OCC's approval of the annuity sales.[150]

The Fifth Circuit reversed, taking the district court to task for allowing such deference to the OCC.[151] *Saxon* had determined that § 92's explicit grant of one insurance sales power negated other such powers and had established that this view was clearly supported by the legislative history.[152] Therefore, the district court had no need to reach the second

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138. *Id.*

139. *Id.* at 156.

140. *Id.* (stating that "a title insurance company surely is an insurance company").

141. *Id.*

142. *Id.*

143. 115 S. Ct. 810 (1995).

144. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295 (5th Cir. 1993) *rev'd sub nom.* NationsBank of N.C. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995).

145. *Id.*

146. Variable Annuity Life Ins. Co. v. Clarke, 786 F. Supp. 639 (S.D. Tex. 1991), *rev'd* 998 F.2d 1295 (5th Cir. 1993).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 642.

151. *Clarke*, 998 F.2d at 1299.

152. *Id.*

tier of the *Chevron* analysis.[153] This district court was in the very circuit that had penned *Saxon,* which determined that Congress had indeed directly spoken to this issue in enacting § 92.[154] The Fifth Circuit added that no matter what the deference due to administrative agencies under *Chevron*, the doctrine of stare decisis remains in effect and neither agencies nor subordinate courts may disregard precedent.[155]

The circuit court then reviewed the nature of the annuity product itself.[156] First, the court noted that annuities are by tradition a product sold by insurance companies, a fact the Comptroller conceded.[157] Second, the court observed that all fifty states include the regulation of annuities under their insurance laws.[158] Finally, the court noted that annuities are "functionally . . . the mirror image of life insurance"; for instance, annuity payments, like life insurance payments, are determined through the use of actuarial tables.[159] Consequently, the court determined that annuities are insurance and that their sale would be limited to those circumstances provided under § 92.[160]

Deciding with exceptional rapidity,[161] a unanimous Supreme Court reversed.[162] Justice Ginsburg's decision, following *Chevron*, deferred to the Comptroller's opinion that annuities are investments rather than insurance and that their sale is incidental to the nature of banking under § 24(7).[163] According to the Court, the Comptroller's interpretation was reasonable and thus, under *Chevron*, fully enforceable.[164] Consequently, because annuities are investments rather than insurance for the purpose of

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153. *See supra* notes 126-28 and accompanying text.

154. *Clarke*, 998 F.2d 1295.

155. *Id.* at 1299 (noting that if congressional intent is clear, deference to agencies is not appropriate).

156. *Id.* at 1300-01.

157. *Id.* at 1300.

158. *Id.*

159. *Id.* at 1301.

160. *Id.*

161. NationsBank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995). Argument was heard December 7, 1994, less than six weeks before the Court rendered a unanimous decision; banking advocates were understandably elated. *See, e.g.*, R. Christian Bruce, *Justices Hold for OCC on Annuities, Say OCC Sets Reach of Section 24 Powers*, BNA'S BANKING REP'T, Jan. 23, 1995, at 185 (quoting banking attorney Dennis Gingold's observation that "[t]hat's fast, and remember, you had the Christmas holidays in between").

162. 115 S. Ct. at 810.

163. *Id.* at 811.

164. *Id.* at 812.

their sale by banks, the Court did not need to analyze the issue under § 92.[165] In fact, the Court apparently was unconvinced that § 92 is a limitation at all, declaring only that § 92 "*arguably* implies that banks in larger towns [such as those with more than 5000 people] may not sell insurance."[166]

Thus, efforts by banks and regulators to exempt the sale of insurance-like products from the *Saxon* limitation have had mixed results.[167] When called upon to determine if an insurance-like product is covered by § 92, the courts are generally obliged to evaluate the product based on a consideration of such nebulous factors as the regulatory and operational formalities which generally surround the product.[168] Although these evaluations have been made considerably simpler by *NationsBank*,[169] courts must still determine if the Comptroller's interpretation of § 24(7) was reasonable. Because these are obscure matters on which reasonable judges may differ, a degree of uncertainty continues to attend determination of the products covered under § 92.[170]

### C. *Possible Exemptions Based on Sales Arrangements*

*Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*[171] serves as an example to banks aspiring to circumvent *Saxon*;[172] the banks in question succeeded because they arranged insurance sales through an on-site, separately incorporated insurance agency owned by the parent bank holding company.[173] The Eighth Circuit affirmed the Federal Reserve's approval of the applications of two bank holding companies to sell insurance in this manner.[174] The court criticized *Saxon*, opining that it was incorrectly decided because, in

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165. *Id.*

166. *Id.* at 811 (emphasis added).

167. *See supra* notes 106-60 and accompanying text.

168. *See supra* notes 106-51 and accompanying text.

169. *See supra* notes 161-66 and accompanying text.

170. *See, e.g., Industry Weighs in on Bank Insurance Issue*, 10 FIN. SVCS. REP., Oct. 27, 1993, at 3 (noting the confusion resulting from court decisions concerning insurance sales by banks).

171. 736 F.2d 468 (8th Cir. 1984). The Federal Reserve regulates bank holding companies in much the same way that the OCC regulates national banks. *See, e.g.*, MACEY & MILLER, *supra* note 2, at 342.

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

173. 736 F.2d at 472-73.

174. *Id.* at 469.

the court's view, the legislative record of § 92 indicates congressional concern for the financial strength of banks in small towns, rather than fear of insurance sales by city banks.[175] However, the court avoided open conflict with another circuit[176] by instead affirming the challenged authorization on other grounds: that the insurance sales proposed by the bank holding company did not involve the sale of insurance by a national bank.[177] The court so decided because the holding company's insurance agency entity would employ through contract, and partly pay, the bank employees who sold insurance, and would control their insurance-sales activities.[178]

The conclusion that no national bank was involved in the sale of insurance rendered an analysis of insurance sales under § 92 unnecessary.[179] Circuit Judge Ross dissented, arguing that the separation so heavily relied upon by the majority was illusory:

> The same employees, working in the same building, will sell insurance to the same customers that apply to the banks for credit. In addition, the profits from these sales will flow into the same pockets. The applicant banks will be selling insurance and to conclude otherwise would ignore the realities of the situation. If *Saxon* was correctly decided then it should not be so easily circumvented.[180]

Judge Ross added that, if *Saxon* had in fact been wrongly decided, the court should openly break with the Fifth Circuit rather than skirt the issue in this fashion.[181]

As may be seen, the cases adjudicating attempts to evade the *Saxon* decision demonstrate both the possibility of finessing the circumstances of insurance sale to one's advantage,[182] and, portentously, the intense judicial debate over the central holding of *Saxon* itself.[183] The *NationsBank* decision will only add fuel to this fire.[184] This state of

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175. *Id.* at 477 n.6.

176. *Id.*

177. *Id.* at 477.

178. *Id.*

179. *Id.*

180. *Id.* at 479 (Ross, J., dissenting).

181. *Id.*

182. *See supra* notes 106-51 and accompanying text.

183. *See supra* notes 115, 128, 145, 161, 167, and accompanying text.

184. *See supra* note 166 and accompanying text.

affairs has contributed to the present confusion surrounding the precise parameters of insurance sales activities by banks.[185]

## IV. 12 U.S.C. § 92—SWORD OF THE BANKING INDUSTRY?

### A. *Changing the Focus of the Debate*

While the *Saxon*[186] decision did not end attempts by banks to sell insurance, it at least established the rules of war for more than 25 years.[187] However, in 1983 an OCC attorney set in motion a chain of events which resulted first in the death of § 92[188] and then, following its revival by the Supreme Court,[189] a reinterpretation of § 92 which would set *Saxon* on its head.[190]

Debra A. Chong of the Comptroller's San Francisco Office, responding to an inquiry from a Commerce Department official, asserted that § 92 does not set any geographical limit on the *area* of sales allowed to banks situated in small towns.[191] This led United States National Bank of Oregon (USBO), a subsidiary of U.S. Bancorp, to propose in 1984 that it sell insurance "to customers of U.S. Bank and others" from a branch located, appropriately enough, in the town of Banks, Oregon, population 489.[192] The OCC, aware that USBO was acting on Ms. Chong's letter,[193] instructed USBO to postpone any such activities pending review by the OCC.[194] In 1986, the OCC formally approved Ms. Chong's interpretation of § 92 and permitted USBO's Banks, Oregon

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185. *See, e.g., Industry Weighs in on Bank Insurance Industry, supra* note 170, at 3 (noting the confusion resulting from court decisions concerning insurance sales by banks).

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

187. *See supra* Part III (discussing *Saxon's* impact on § 92).

188. *See infra* notes 232-72 and accompanying text.

189. *See infra* notes 273-87 and accompanying text.

190. *See infra* notes 288-95 and accompanying text.

191. *See, e.g.*, Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 959 (D.C. Cir. 1993) (holding that § 92 allows any bank located in a small town to sell insurance in any geographical area).

192. *Id.*

193. *Id.*

194. *Id.*; *see also* 12 C.F.R. § 5.34(d)(1) (1984) (enumerating the requirements banks must comply with for operation of a subsidy in order to properly engage in "other" business).

office to sell insurance unencumbered by geographical limitation.[195] Insurance industry agencies immediately filed suit against the Comptroller, claiming that the OCC had exceeded its authority by permitting insurance sales without geographical limitations. Furthermore, the agents argued that the OCC stepped out of bounds when it allowed branch offices in small towns to sell insurance without regard to the population of the principal office's site.[196]

In *National Association of Life Underwriters v. Clarke*,[197] the district court utilized the rules set out in *Chevron* to analyze the issue of geographical limitation.[198] The court first reviewed § 92's language to determine whether the statute plainly sets a geographical limitation on insurance sales by banks located in small towns.[199] The court concluded that the terms of the statute granted banks the power to act as agents in the sale of insurance under the regulation of the Comptroller.[200]

> Beyond this [§ 92] does not refer to the market Bank Agency may serve, much less restrict solicitation or sales to the residents of Banks. This silence, coupled with the express delegation of rulemaking authority to the comptroller, suggests that Congress explicitly "left a gap for the [Comptroller] to fill."[201]

Furthermore, the insurance agencies read too much into the statute when they argue that any insurance sales are implicitly limited to the community in which the bank is located.[202] Section 92 limits only the location of the bank, not the location of its customers.[203] Moreover, the limitation urged by the insurance industry would require the bank to

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195. *See* 997 F.2d 958.

196. National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1167-68 (D.C. Cir. 1990), *rev'd sub nom.* Independent Ins. Agents of Am. Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), *rev'd and remanded for review of original judgment sub nom.* United States Nat'l Bank of Or. v. Independent Ins. Agents of Am. Inc., 113 S. Ct. 2173 (1993), *original judgment aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

197. 736 F. Supp. 1162 (D.C. Cir. 1990).

198. *Id.* at 1167-68; *see generally* Chevron v. National Resources Defense Council, 467 U.S. 837 (1984).

199. 736 F. Supp. at 1167-68.

200. *Id.* at 1168.

201. *Id.* (citations omitted).

202. *Id.*

203. *Id.*

transact business only with Bank's residents if it wished to sell insurance.[204] Similarly, when § 92 requires that the insurance company for which the bank sells insurance be authorized to do business in the state, it does not imply a geographical limit; rather, it simply acknowledges that insurance is regulated by the states.[205]

The court believed that its interpretation of congressional intent was substantiated by the overall statutory scheme of § 92.[206] Originally, § 92 had included a provision allowing small town banks to procure "loans on real estate located within one hundred miles of the" bank's office.[207] This indicated that Congress was capable of setting geographical boundaries for activities if it so desired, and that it had decided not to do so in the case of insurance sales by banks.[208]

In a significant break with the past, the court next reasoned that § 92's legislative history did not run in the insurance industry's favor.[209] First, the plaintiffs argued that branches of vast banking interests should be prohibited from selling insurance because the Williams letter had advocated such sales only as a remedy for the profitability problems of small-town banks.[210] The court disagreed, noting that Williams was fully aware that certain small-town banks were quite profitable, but did not advocate size or capitalization limits for banks wishing to take advantage of insurance sales opportunities under § 92.[211] The court took this opportunity to dispense with the plaintiff's argument that branches of large banks are prohibited from taking advantage of § 92 simply because of their small-town location.[212] As early as 1963, the OCC had formally asserted that a small-town branch of a large bank could sell insurance under § 92.[213] These sales were allowed regardless of the population of the city in which the bank's headquarters was located.[214] If the insurance industry objected to this interpretation, the court noted, it had

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204. *Id.*

205. *Id.*

206. *Id.*

207. Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 (current version as amended at 12 U.S.C. § 92 (1993)).

208. *Clarke*, 736 F. Supp. at 1168.

209. *Id.* at 1169.

210. *Id.*

211. *Id.*

212. *Id.* at 1165-66, 1169.

213. *See id.* at 1165.

214. *Id.*

had twenty-three years to act on its objection, and any claim on this ground was barred by laches.[215]

Plaintiff's second argument, also based on Williams's letter, asserted that Williams had proposed the small-town limitation because banks so located would not be distracted from their main banking functions.[216] Considering that insurance agents would presumably not abound in small towns, it would be unlikely that by selling insurance, small-town banks would usurp the insurance agents' business.[217] City banks, on the other hand, had more than enough business and skill to keep themselves profitable.[218] The court disagreed that these observations led to Williams's advocacy of a specific prohibition; rather, where Williams stated that "small-town banks . . . would be *unlikely* 'to trespass upon [an insurance agent's business],'" [219] the court found that Williams was merely making a *prediction* rather than suggesting a *requirement*.[220]

From this review of statutory wording, statutory scheme, and legislative history, the court concluded that it could proceed to the second step of the *Chevron*[221] analysis, which required only a determination that the Comptroller's interpretation of § 92 in this instance was reasonable.[222] The court dispensed with the plaintiffs' three arguments that the OCC's interpretation was unreasonable.[223] First, even if plaintiffs were correct in assuming that a congressional goal of separating banking from commerce was clear, § 92 did not explicate any such separation, and the court declined to champion a supposed congressional policy where Congress was itself silent.[224] Second, § 92 need not be construed in pari materia with § 4(c)(8)(C) of the Bank Holding Company Act,[225] a similar law which sets geographical limits on sales of insurance by certain banks:[226] because their language is different; because the two

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215. *Id.* at 1165 n.11, 1169.

216. *Id.* at 1169.

217. *Id.* at 1169-70.

218. *Id.* at 1169.

219. *Id.* (quoting 53 CONG. REC. 11,001 (1916) (emphasis added)).

220. *Clarke*, 736 F. Supp. at 1170.

221. *See* Chevron v. National Resources Defense Council, 467 U.S. 837, 865 (1984).

222. 736 F. Supp. at 1170.

223. *Id.*

224. *Id.*

225. Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-1849, 1843(c)(8) (1988).

226. *Id.*

provisions were separated by more than sixty-five years, thereby reflecting different concerns and goals; and because § 4(c)(8)(C) itself had not proven to be a bright line separating bank holding companies from insurance sales beyond the small town's border.[227] Finally, previous and apparently conflicting interpretations by the OCC of § 92 failed to invalidate the interpretation at issue, as none of these interpretations purported to be a complete and thorough analysis of the matter, and none had baldly stated that such a sales scheme was improper.[228] Accordingly, the court held that the OCC's interpretation of § 92, granting banks in small towns the power to sell insurance without geographic limitation, was rationally based on the statute, and[229] upheld it.[230]

On appeal, in a manner unanticipated by either side, the insurance industry found fleeting relief from this burdensome holding: § 92 itself was held to exist no more.[231]

### B. *12 U.S.C. § 92: It's Dead*

Courts considering issues involving § 92 have noted that it was apparently omitted from the United States Code in 1918,[232] and these courts had assumed that this omission was inadvertent.[233] When the *National Association of Life Underwriters v. Clarke* decision went to the Court of Appeals for the District of Columbia Circuit (as *Independent Insurance Agents of America, Inc. v. Clarke*),[234] however, the court was

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227. National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1170-72 (D.C. Cir. 1990).

228. *Id.* at 1173.

229. *Id.* at 1173.

230. *Id.* at 1174.

231. *See* Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731, 739 (D.C. Cir. 1992), *rev'd and remanded for review of original judgment sub nom.* United States Nat'l Bank of Or. v. Independent Ins. Agents of Am. Inc., 113 S. Ct. 2173 (1993), *original judgment aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

232. *See infra* notes 232-87 and accompanying text.

233. *See, e.g.*, Commissioner v. First Sec. Bank of Utah, 405 U.S. 394, 401 n.12 (1972) (noting the apparent omission of § 92 and the section's continuing acceptance by the OCC); *see also* National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1163 (D.C. 1990) (assuming that the statute exists *in proprio vigore* due to previous presumptions of continuing validity).

234. 955 F.2d 731 (D.C. Cir. 1992), *rev'd and remanded for review of original judgment sub nom.* United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993), *original judgment aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

disturbed by the omission and by the fact that neither party had addressed it. Both parties were therefore instructed to be prepared to discuss the issue at oral argument.[235] At oral argument, appellants did not discuss § 92's omission, so the court ordered the parties to present supplemental briefs in which appellants, once again, took no position on the validity of § 92.[236]

The court of appeals therefore took it upon itself to review this issue and held that § 92 had indeed been repealed in 1918.[237] The court explained that it was addressing this matter sua sponte, because the existence of laws is within the domain of the court and was in this case a threshold issue to all further adjudication.[238] Thus, the court's inquiry into § 92's existence was proper.[239]

The court then turned to the omission of § 92.[240] Noting that the United States Code is "prima facie evidence of the existence of federal law,"[241] the codifier's omission of § 92 in 1918 was thus prima facie evidence that the law was repealed.[242] The court then further investigated the issue, examining in turn the statutes at large, congressional intent, and subsequent treatment of § 92 by Congress, the OCC, and the courts.[243]

The court first reviewed the statutes at large.[244] Tradition requires that, when an act amending a law represents itself as the amended original, courts are to assume that any matter omitted was repealed.[245] On its face, congressional action apparently made § 92 a component of § 5202 of the Revised Statutes[246] in 1916.[247] The 1916 Act stated, in a sentence unenclosed by quotation marks, that it was amending § 13 of the

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235. United States Nat'l Bank of Or. v. Independent Ins. Agents of Am. Inc., 113 S. Ct. 2173, 2177 (1993).

236. *Id.*

237. 955 F.2d at 733, 739.

238. *Id.* at 733-34.

239. *Id.*

240. *Id.* at 734.

241. *Id.*

242. *Id.*

243. *Id.* at 734-39.

244. *Id.* at 734-35.

245. *Id.* at 735.

246. 62 Rev. Stat. § 5202 (1874).

247. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752.

Federal Reserve Act,[248] and then laid out five paragraphs, the aggregate of which began with a quotation mark and ended with one; each separate paragraph also opened with a quotation mark as well.[249] The 1916 Act then stated, in a sentence unenclosed by quotation marks, that the ensuing paragraphs would amend § 5202 of the Revised Statutes. The aggregate of those ensuing paragraphs once again opened and closed with quotation marks, with[250] each individual paragraph also opening with a quotation mark.[251] Included in this latter aggregate of paragraphs was the precise language of § 5202 as of its 1913 amendment,[252] as well as a paragraph containing the language that eventually became § 92.[253] The court found that this arrangement of quotation marks added § 92 to § 5202, and that the amendment of § 5202 in 1918, which omitted § 92's language, repealed § 92.[254]

The court then reviewed congressional intent.[255] A considerable number of congressional witnesses and commentators had over the years stated that the placement of one of the quotation marks in the 1916 Act was in error.[256] These commentators maintained that the revision of § 5202 of the Revised Statutes was simply another element of the group of paragraphs that preceded it.[257] They argued that the quotation mark closing the group of paragraphs revising § 13 of the Federal Reserve Act, which preceded the language purporting to amend § 5202 (hereafter "the Amending Language"), should in fact have been placed at the beginning of the Amending Language itself.[258] This deprives the Amending

248. Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (current version in scattered sections of 12 U.S.C.).

249. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752. *See also* CHICAGO MANUAL OF STYLE 289 (13th rev. ed. 1982) (explaining the use of quotation marks in this fashion).

250. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752.

251. *Id.*

252. Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (current version in scattered sections of 12 U.S.C.).

253. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752. *See* Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731, 735 (D.C. Cir. 1992), *rev'd and remanded for review of original judgment sub nom.* United States Nat'l Bank of Or. v. Independent Ins. Agents of Am. Inc. 113 S. Ct. 2173 (1993), *original judgment aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

254. 955 F.2d at 735.

255. *Id.* at 735-37.

256. *See id.* at 736.

257. *See id.*

258. *See id.*

Language of its authority over all of the paragraphs following it.[259] This theory grants § 5202 propriety over only the paragraph immediately following the Amending Language.[260] The paragraph containing § 92 is liberated, and placed instead in § 13 of the Federal Reserve Act.[261]

However, the court rejected this interpretation, arguing that this viewpoint was not unanimous, as a minority of congressmen had voiced opposite viewpoints.[262] More importantly, these subsequent opinions, pro or con, were not dispositive of congressional intent in 1916.[263] Furthermore, Congress, in its subsequent amendment of § 5202 in 1918, would certainly have reviewed its text, and would have corrected any inadvertent inclusion of § 92 at that time.[264] Finally, the allegedly misplaced quotation marks did not lead to the sort of obvious distortion of a law properly dealt with by the courts, but rather to a repeal of a law, which is best corrected by the legislative body itself.[265]

Having thus found no legislative history to support § 92's continuing existence, the court finally reviewed § 92's subsequent treatment by the Comptroller, Congress and the courts.[266] The court quickly dismissed those congressional actions which had relied on or assumed § 92's existence as "'a hazardous basis for inferring the intent'"[267] of the law's framers and amenders. The court also dismissed the Comptroller's similar behavior because such action cannot revive a law repealed by the legislature.[268] Furthermore, those courts which had dealt with § 92 had hitherto simply assumed its existence; no court had ever actually found this to be the case, and the Supreme Court's dealings with § 92 had never required a direct address of the omission issue.[269]

The court held that it could only conclude from these facts that § 92 did not exist.[270] As the Comptroller's case for permission to sell insurance had been built entirely around what was in truth a phantom

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259. *See id.*

260. *Id.*

261. *See id.*

262. *Id.* at 736.

263. *Id.*

264. *Id.*

265. *See id.* at 737.

266. *Id.* at 737-39.

267. *Id.* at 737 (quoting Russello v. United States, 464 U.S. 16, 26 (1983)).

268. *Id.*.

269. *Id.* at 737-39.

270. *Id.* at 739.

law,[271] the circuit court reversed and remanded to the district court with instructions to enter judgement for the appellants.[272]

### C. *12 U.S.C. § 92: It's Alive*

In the end, however, rumors of the death of § 92 were proven to be greatly exaggerated. The Supreme Court granted certiorari and reversed in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*[273] A unanimous Court,[274] in a decision by Justice Souter, began its analysis by reviewing the circuit court's sua sponte consideration of the existence of § 92.[275] Justice Souter asserted that courts determining issues raised by the parties may apply constructions of the relevant laws which differ from those asserted by the parties, including, where appropriate, the destruction of said laws.[276] In this case, although the existence of § 92 was not an issue of contention between the parties, the question at hand revolved around a statute whose existence was in doubt.[277] Therefore, the circuit court did not abuse its discretion in reviewing the existence of § 92.[278]

The Court next turned its consideration to the issue of § 92's repeal.[279] When observed only in the light of the placement of punctuation in the 1916 amendment, § 92 was indeed placed in § 5202.[280] However, the Court noted that, as it had itself maintained repeatedly, an analysis based exclusively on commas and semicolons is incomplete and may very well pervert the true motive of the law.[281] The Court then examined the relevant acts and revisions,[282] and

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271. *Id.*

272. *Id.*

273. 113 S. Ct. 2173, 2177 (1993).

274. *Id.* at 2175.

275. *Id.* at 2177.

276. *See id.* at 2178 (comparing Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 405 (1821) (Marshall, C.J.)).

277. *Id.* at 2178-79.

278. *Id.* at 2179.

279. *Id.* at 2179-87.

280. *Id.* at 2182. Despite the ultimate holding, the Court did not take § 92's omission from the U.S. Code lightly; Justice Souter began the Court's opinion noting, amusingly, that "[t]hough the provision has been left out of . . . editions of the United States Code, including the current one . . . the parties refer to it as 'section 92,' and so will we." *Id.* at 2176.

281. *Id.* at 2182.

282. *Id.* at 2182-86.

determined thereby that the "structure, language, and subject matter of the 1916 Act"[283] proved beyond a doubt that Congress had not intended to place § 92 in § 5202, "which narrowly addressed the indebtedness of national banks;"[284] the only evidence to the contrary was a punctuation mark, which was "too weak to trump the rest."[285] The Court accordingly repunctuated,[286] reversed the decision of the court of appeals, and remanded for further adjudication.[287]

### D. *Out from* Saxon?

On remand (as *Independent Insurance Agents of America Inc. v. Ludwig*),[288] the circuit court upheld the judgment of the district court affirming the OCC's interpretation of the statute.[289] In so doing, the court of appeals closely followed the analysis and reasoning of the district court. The court took one step further the district court's criticism of the traditional judicial line on § 92's single-letter legislative history, declaring that "we cannot assume that Mr. Williams's letter was read, much less relied upon, by the majorities in Congress who enacted § 92 . . . . Thus, we can afford it only limited deference."[290]

The court noted that the wealthy bank hereby granted the right to sell insurance nationwide did not fit the profile of the banks whose troubles concerned Mr. Williams, and that Williams and the Congress which enacted § 92 might have been surprised by the result of their initiative.[291] The judicial branch, however, is not the proper body to recast a statute to meet changing times.[292] "[W]hen time and technology open a loophole, it is up to Congress to decide whether it should be plugged, and how."[293]

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283. *Id.* at 2185.

284. *Id.*

285. *Id.* at 2186.

286. *Id.* The Court moved one quotation mark and removed another. *Id. See supra* notes 235-40 and accompanying text (noting the analysis adopted by the Court).

287. 113 S. Ct. at 2187.

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

289. *Id.* at 962.

290. *Id.* at 961. The court compared this to *Murphy v. Empire of America, FSA*, 746 F.2d 931, 935 (2d Cir. 1984), in which it was held that "isolated remarks on [the] floor of Congress 'are entitled to little or no weight.'" *Id.*

291. 997 F.2d 958, 960-61.

292. *Id.* at 961.

293. *Id.*

Unsurprisingly, *Ludwig* did not settle this issue. For instance, in *NBD Bank v. Bennett*,[294] the court held that banks located in small towns are limited by § 92 to selling insurance in the small town in which they are located.[295]

### E. *State Insurance Law Considerations*

Until congressional action is taken to plug the small-town loophole, however, the adversaries continue to probe the present powers and limitations of § 92, either their statutory friend or foe, depending on the circumstances and on the court.[296]

Yet another wrinkle in the convoluted body of case law concerning § 92 derives from insurance law, specifically made a preserve of the states by the McCarren-Ferguson Act.[297] This act safeguards state insurance law from preemption[298] by federal law unless the federal law "specifically relates to the business of insurance."[299] For example, Chapter 626.988 of the Florida Statutes limits insurance sales by banks to those located in towns with a population of less than 5000 and not affiliated with, or subsidiaries of, a bank holding company.[300] When Florida's insurance commissioner acted on this law and ordered Barnett Banks of Marion County, a subsidiary of Barnett Banks, Inc., a holding company, to stop selling insurance,[301] Barnett sued, arguing that the Florida law was preempted by § 92.[302] In *Barnett Banks of Marion County v. Gallagher*,[303] District Judge Schlesinger held that § 92 is a *bank* law rather than an *insurance* law,[304] and, as such, does not specifically relate to the business of insurance in the manner required to

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294. No. IP94-862-C, 1994 U.S. Dist. LEXIS 19686 (Dec. 27, 1994).

295. *Id.* at *12 (examining the totality of the circumstances surrounding the adoption of the amendment and finding a "clear intent" of Congress to limit the activity of small-town banks).

296. *See supra* Parts II-IV.A, IV.D.

297. McCarren-Ferguson Act, 15 U.S.C. § 1012 (1984).

298. *See* U.S. CONST. art. VI, § 2 (Supremacy Clause).

299. McCarren-Ferguson Act, 15 U.S.C. § 1012 (1984).

300. FLA. STAT. ch. 626.988 (1984 & Supp. 1995).

301. *See* Barnett Banks of Marion County v. Gallagher, 839 F. Supp. 835, 837 (M.D. Fla. 1993).

302. *See id.*

303. *Id.*

304. *Id.* at 842.

preempt state insurance law in the face of McCarren-Ferguson.[305] A federal law, Judge Schlesinger asserted, is not an insurance law merely because it relates to insurance; rather, it must bear the clear mark of a law specifically intended to preempt state insurance laws.[306]

According to Judge Schlesinger, § 92 bears no such marks.[307] The fact that § 92 was enacted in 1916, well before McCarren-Ferguson made such a declaration necessary, hurts rather than helps the plaintiff's argument,[308] because, at the time of § 92's enactment, Congress did not believe that insurance regulation lay within its Commerce Clause[309] powers.[310] In Judge Schlesinger's opinion, this only strengthens the argument that § 92 was not specifically enacted as an insurance law.[311]

The Florida law, in contrast, bears the clear mark of a specific insurance law.[312] The Florida legislature went so far as to state that the law's purpose "is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in [the McCarren-Ferguson Act]."[313] Significantly, the law also directly addressed § 92.[314] Therefore, the Florida law, an insurance law, is not preempted by § 92, a bank law.[315] On appeal, the Eleventh Circuit affirmed.[316] In this manner, the Florida legislature has succeeded in limiting the reach of the *Ludwig*[317] decision, portending an ongoing, state-by-state battle for the hearts and minds of the legislatures and the courts. Predictably, court consensus on this issue has proven elusive. In *Owensboro National Bank v. Moore*,[318] A federal district court in Kentucky was confronted with a similar set of facts and held that § 92, a

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305. *Id.* at 842-43. *See also* McCarren-Ferguson Act, 15 U.S.C. § 1012 (1984).

306. *Barnett Banks*, 839 F. Supp. at 842-43.

307. *Id.*

308. *See id.* (citing U.S. Dep't of Treasury v. Fabe, 113 S. Ct. 2202, 2212 (1993)).

309. U.S. CONST. art. I, § 8, cl. 3.

310. 839 F. Supp. at 843.

311. *See id.*

312. *Id.* at 842.

313. *Id.*

314. *Id.*

315. *Id.* at 843.

316. Barnett Banks of Marion Cty. v. Gallagher, No. 93-3508, 1995 U.S. App. LEXIS 1961 (11th Cir. Jan. 30, 1995).

317. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993). *See supra* Part IV.D.

318. Owensboro Nat'l Bank v. Stephens, Nos. 92-6330/92-6331, 1994 U.S. App. LEXIS 36506 (6th Cir. Dec. 29, 1994).

federal law specifically concerning insurance, preempts Section 287.030(4) of the Kentucky Statutes,[319] which prohibits bank holding companies from selling insurance.[320] The Sixth Circuit affirmed,[321] engendering yet another circuit split over the sale of insurance by banks.

## V. CONCLUSION

The chief consequence of this long contest of well-funded litigants has been a baffling judicial jumble.[322] Unfortunately, repeated efforts by Congress to close the small-town loophole have failed,[323] perhaps because, as William Eskridge notes,[324] affirmative congressional action in either direction will bring concentrated gains to one important industry and concentrated losses to another.[325] Elected representatives generally seek to avoid affirmative actions which incur the wrath of such powerful players.[326] The result: institutional solidity.[327]

If this proves to be true, and if the two industries do not give up this contest and work out a compromise,[328] it will rest with the courts to determine the propriety of the *Ludwig*[329] decision. Presumably, the insurance industry will appeal to the Supreme Court, and, even assuming denial of certiorari, an interpretation of § 92 by another circuit court may

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319. KY. REV. STAT. ANN. § 287.030(4) (Michie/Bobbs-Merrill 1994).

320. Owensboro Nat'l Bank v. Moore, 803 F. Supp. 24, 30-37 (E.D. Ky. 1992).

321. 1994 U.S. App. LEXIS 36506 at *2.

322. *See supra* Parts II-IV.

323. *See, e.g.*, Brostoff, *supra* note 5, at 30 (quoting Sen. Christopher Dodd, D-Conn.). Dodd, himself long the champion of the insurance industry, conceded in 1994 that a battle over the reform of insurance sales by banks would unduly consume the energies of the Senate in a busy session, and dropped his reform package. *See Behind Dodd Swan Dive on Sec. 92*, THE INS. REGULATOR, Feb. 28, 1994 (Banks in Insurance Section), at 5.

324. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Policy Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

325. *Id.* at 289-91.

326. *Id.*

327. *See id.*

328. This seems unlikely. *See, e.g.*, Stella Dawson, *Nationwide Banking Faces Another Tough Fight*, The Reuter Bus. Rep., Oct. 5, 1993, *available in* LEXIS, News Library, CURNWS File (in which the ABA's chief lobbyist, Edward Yingling, declares that, if there is any attempt to encroach on insurance sales powers of banks, "it will be nuclear war").

329. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993). *See supra* Part IV.D.

very well conflict with *Ludwig*'s holding that nationwide insurance sales are a permissive implementation of § 92. Such a conflict between circuits may in turn prompt Supreme Court review. Even if the Supreme Court were to reverse *Ludwig*, however, the conflict would undoubtedly continue along more familiar lines, involving the characterization of the product to be sold or the method of sale.[330] Furthermore, assuming that the Supreme Court were to uphold *Ludwig*, a nationwide insurance-law battle would nonetheless loom, as suggested by *Barnett Banks*,[331] with the state legislatures and courts as the arena.[332]

Only comprehensive congressional action will settle this dispute. The challenge is to frame any remedy in a manner relatively palatable to both industries and thereby to the lawmakers. Such action will most likely involve the repeal of § 92, an anachronistic law presently being absurdly manipulated to assist national banks to increase profitability.[333] In its place, Congress should enact legislation which specifically grants insurance sales powers to banks. To avoid endangering the bank's financial well-being, such a law should require a holding company structure, with insurance sold through a subsidiary insurance brokerage.[334] Sales should be limited to insurance coverage of items related to loans made by subsidiary banks, including policies covering repayment of the loan itself, items purchased with the loan, and items offered as collateral for the loan; this limitation is in line with § 24(7),[335] which requires that powers exercised by national banks be incidental to the nature of banking.[336] Finally, this legislation should be deliberately characterized as "specifically relate[d] to the business of insurance[]"[337] to ensure its preemption of contrary state insurance laws.[338] Such a limited but specifically enumerated bank insurance sales

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330. *See supra* Part III.B-C.

331. Barnett Banks of Marion Cty. v. Gallagher, 839 F. Supp. 835 (M.D. Fla. 1993).

332. *See supra* Part IV.E.

333. *See, e.g.*, Abbot, *supra* note 4, at 1005.

334. *See, e.g.*, Emeric Fischer, *Banking and Insurance-Should Ever the Twain Meet?*, 71 NEB. L. REV. 726, 757 (1992) (arguing that Financial Services Holding Companies should be authorized legislatively, thus granting banks the right to be affiliated with, or subsidiary to, holding companies that offer a variety of financial services, while insulating the banks from possible financial failures connected with these services).

335. 12 U.S.C. § 24(7) (1988 & Supp. V 1993).

336. *Id.*

337. McCarren-Ferguson Act, 15 U.S.C. § 1012 (1984).

338. *See supra* Part IV.E.

power would assist banks in raising additional revenue and would foster predictability of dispute resolution, substantially reducing litigation.

As of this writing, however, such action is highly unlikely.[339] As such, the contestants, in assessing their positions, can presume a rough hierarchy of principles concerning bank insurance sales powers under § 92. Most certain is that § 92 is alive and, for the present, well.[340] Somewhat less concrete, but quite traditional and as yet undisturbed, is the notion that the bank branch wishing to sell insurance must be located in a town of less than 5000 population in order to do so.[341] Newly emerged, but relatively untested, is the rule that these banks may reach out from these small towns and sell insurance anywhere they wish.[342] If this last principle survives the test of time, and a probable insurance-law battle in the states, § 92's so-called small-town loophole, unlikely and inappropriate an avenue though it is, may for the future be the banking industry's license to insure.

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339. *See, e.g.*, Brostoff, *supra* note 5, at 1.

340. *See supra* Part IV.C. However, of the thousands of national banks, only 179 in 15 states currently sell insurance under § 92. *See* Richard Whiting, *It's Time for a Truce in War Over Bank Insurance Powers*, BANKING POL'Y REP., Aug. 2, 1993, at 1.

341. *See supra* Part III. Bank sales of credit life insurance in conjunction with loans made to customers are an exception. *Id.*

342. *See supra* Parts IV.A. & D.