SMALL TOWNS, LARGE STAKES: NEW BATTLES OVER BANK INSURANCE SALES UNDER THE NATIONAL BANK ACT

*Troy Cichos**

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I. INTRODUCTION

Due to a sluggish economy and increased competition from non-bank entities, nationally chartered banks[1] are offering new services and a wider variety of

* J.D. candidate, Seattle University School of Law, May 1995; B.S. Finance, University of Utah, 1990. I wish to thank Cary Evans, Ken Miller, and Christina Mills for their comments on earlier drafts of this Article, Professor Kellye Testy for her advice on the structure and content of this Article, and Allison Wheeler for all of her support during the writing of this Article.

1. Commercial banks in the United States operate under a dual banking system. Nationally chartered banks are regulated by the Office of the Comptroller of the Currency (Comptroller) and are chartered under authority of the National Bank Act, 13 Stat. 99 (1864); state chartered banks are regulated by the laws of the fifty states. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988); Daniel J. Goldstein, *Recent Developments Permitting Banks to Engage in the Insurance Business*, 20 COLO. LAW. 35 (1991). The functional difference between a bank with a national charter and one with a state charter is the regulatory structure. Martin Sarch, *A Game of Three Card Monte, Anyone? Banks Find Nothing but Trouble Seeking Expanded Insurance Powers*, 24 RUTGERS L.J. 207, 207 (1992). For detailed information on the requirements to become a nationally chartered bank and motivations for doing so, see *id.* at 210-11.

financial products.[2] Banks have been particularly interested in selling and underwriting insurance because of the synergy between banking and insurance[3] and because of the profitability of insurance products.[4]

The idea of allowing nationally chartered banks to sell insurance as a means of increasing profits and competitiveness was first presented to Congress in 1916.[5] With no apparent discussion on the merits of giving banks the power to participate in insurance sales,[6] Congress passed a law allowing national banks to act as insurance agents as long as the bank was located in a town with a population of fewer than 5000.[7] The purpose of the law was to provide small town banks with additional means to make a profit and compete with state chartered banks.[8] The law did not apply to banks in larger cities because Congress feared insurance sales would divert such banks from the primary business of banking

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2. New services include investment and credit information, courier and security services, monthly billings statements for advertising, and leasing office space to businesses under percentage leases. *Id.* at 208. New products include insurance, real estate agents and brokers, loan packages, and data processing and analysis. *Id.* at 208 n.4.

3. Kalen Holliday, *Automation Seen Giving Banks Edge in Insurance*, AM. BANKER, Jan. 20, 1994, at 9.

4. William Isaac, *Banks May Be Giving Up the War If They Don't Win Insurance Battle*, AM. BANKER, Jan. 13, 1994, at 22.

5. 53 CONG. REC. 11,001 (1916). A letter from Comptroller of the Currency Skelton Williams stated that nationally chartered banks in towns of fewer than 3000 inhabitants should be permitted to act as agents for insurance companies in the "placing of policies of insurance—fire, life, etc." *Id.* Without any explanation, Congress changed this number to 5000 when it passed the amendment. *Id.* at 11,153.

6. Nationally chartered banks had no express or implied authority to act as an insurance agent or broker. 2 FED. RESERVE BULL. 73, 74 (Feb. 1, 1916).

7. The Act states:

> [I]n 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 also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *P[r]ovided, however*, [t]hat no such bank shall in any case guarantee . . . the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, [t]hat the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753-54. Section 92 does not presently appear in the United States Code because it was inadvertently repealed by the 65th Congress in 1918. Courts and the Comptroller generally assume § 92's continued viability. *See infra* text accompanying notes 57-61.

8. 53 CONG. REC. 11,001 (1916).

and because the banks had sufficient profit capacity from the larger customer base from which they could draw.[9]

The ability of national banks to sell insurance under section 92 has recently caused a great deal of controversy in the banking and insurance industries.[10] This controversy is a result of the decision of the United States Court of Appeals for the District of Columbia in *Independent Insurance Agents of America, Inc. v. Ludwig*.[11] In *Ludwig*, the court held that the Office of the Comptroller of the Currency's (Comptroller) interpretation of section 92, which allows qualified nationally chartered banks to sell insurance products to persons without regard to the person's geographic location, was reasonable and should stand.[12] This interpretation means any nationally chartered bank with a branch in a town with a population of fewer than 5000 may sell insurance to any person anywhere in the country. Insurance agents argue this interpretation is too broad and allows banks to infringe on commercial areas that should be inaccessible under the regulatory structure of the National Bank Act (NBA).[13] The banking industry, however, believes this ruling is pivotal because it is the first ruling to agree that section 92 gives qualifying banks the ability to sell insurance on a nationwide basis.[14]

The motivations behind the battle between these two groups are money and power.[15] Because bank profits are being squeezed by less regulation of non-bank entities and greater conglomeration of financial services,[16] insurance sales and underwriting will allow national banks to create new profit centers and better compete in the financial marketplace. The insurance industry is concerned that allowing nationally chartered banks to sell insurance will decrease its ability to sell insurance, thus reducing their market share and income.[17] While the insurance industry has not publicly stated that greed is its primary motivation, it is

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9. *Id.*

10. Russell E. Brooks, *Expect More Courtroom Dueling on Banks' Insurance Powers*, AM. BANKER, Aug. 5, 1993, at 18; Barbara A. Rehm, *Banks Win Big Victory in Fight to Sell Insurance*, AM. BANKER, July 19, 1993, at 1.

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

12. *Id.* at 961.

13. *Id.*

14. David F. Freeman Jr., *Ruling Means Insurance Powers Fight Is Over—and the Banks Have Won*, AM. BANKER, Aug. 25, 1993, at 14.

15. *See, e.g.*, National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1163 (D.D.C. 1990) ("[This] action is only the latest in the long running battle for turf on the part of two powerful industries. . . . [T]he insurance industry seeks protection from incursions into its claimed territory by the commercial banking industry."), *rev'd sub nom.* Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), *rev'd sub nom.* United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993), *aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993); Isaac, *supra* note 4, at 22 (stating the turf fight between banking and insurance industries over permissible insurance activities of banks is "the most important banking issue" being fought in Washington).

16. Richard Layne, *Analyst Worries About Threat to Banks*, AM. BANKER, Oct. 28, 1993, at 24.

17. Isaac, *supra* note 4, at 22. For example, approximately 25% of national banks currently sell annuity products. *Id.* Annuity sales by these banks totaled $7.7 billion in 1992 and generated fee income of $285 million. *Id.* If national banks are deprived of their current ability to sell annuities, they will lose a profit source, and insurance agents will fill the resulting void. *Id.*

apparent by its sole defense of its position: Because the interpretation of the law does not allow nationally chartered banks to sell insurance, it should continue to be interpreted as not allowing national banks to sell insurance.[18] The insurance industry gives no other policy reason for keeping banks out of the insurance field.

Approximately 200 nationally chartered banks sell insurance under the authority granted by section 92.[19] A great number of banks, the insurance industry, bank customers, and insurance purchasers will be affected by the resolution of this issue. A ruling favorable to the banking industry will lead to greater profit for banks, more competition for insurance agents, lower prices, and convenience for consumers.[20] A ruling favorable for the insurance industry, however, will take a profit away from many banks, make the insurance industry less competitive, and likely increase the price of, and convenience in, obtaining an insurance policy.

This Article discusses several issues that must be resolved before banks have the unbridled access to the insurance market that they contend *Ludwig* provides. *Ludwig* merely answers one question that surrounds section 92, and until the remaining questions are answered, the ability of nationally chartered banks to sell insurance will remain a judicial quagmire. Part II of this Article discusses the factual and procedural history of *Ludwig*. Part III discusses the questions that still surround the applicability and extent of section 92 after *Ludwig*, including: What products can be sold? What is section 92's relationship to section 24(Seventh) of the United States Code? What is the effect on a bank's ability to sell insurance out of a small town if the town's population exceeds section 92's population limit? The analysis will show section 92 grants qualified banks the ability to sell general lines of insurance products, section 92 and section 24(Seventh) are not contradictory and in fact supplement one another, and the population limit is a requirement small town banks must meet in order to continue to sell general lines of insurance products under the authority of section 92. Part IV discusses proposed and possible administrative and legislative reform that could serve to define the ability of nationally chartered banks to participate in the insurance industry.[21] It concludes that currently discussed legislation will do little to address the problems. Unless new legislative directions are taken, the problems discussed in this Article will be resolved by the judiciary, leading to continued and increased uncertainty and disparity in law among the circuit courts.

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18. Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731, 738-39 (D.C. Cir. 1992), *rev'd sub nom.* United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993), *aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993); American Land Title Ass'n v. Clarke, 968 F.2d 150, 156-57 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

19. Brooks, *supra* note 10, at 18.

20. Isaac, *supra* note 4, at 22.

21. This Article will not discuss any other statutes that may affect bank or bankholding companies' ability to sell insurance. It is also beyond the scope of this Article to discuss the interplay between federal banking laws relating to insurance and state laws regarding the sale of insurance by bank entities. For information on this topic, see Michael F. Schrader, *Dual Banking and State Bank Insurance Powers: Diversifying Financial Services Through the Back Door*, 66 IND. L.J. 295 (1990).

II. PROCEDURAL AND FACTUAL HISTORY OF *LUDWIG*

Although section 92 was passed in 1916, the current controversy relating to the statute began in 1984. The United States National Bank of Oregon (USBO), a nationally chartered bank headquartered in Portland, Oregon, sought permission from the Comptroller to offer a full range of insurance products through USBO's subsidiary, U.S. Bank Insurance Agency, Inc. (Bank Agency).[22] USBO relied on section 92 of the National Bank Act (NBA), claiming it gave USBO authority to sell such products nationwide through USBO's branch in Banks, Oregon.[23]

The Comptroller approved USBO's request.[24] First, the Comptroller found the original statute did not address the sale of insurance to persons and entities not located in the same state as the selling branch.[25] Second, the Comptroller found the inclusion of an express geographic restriction on the provision allowing the brokerage of real estate loans, and the absence of such a restriction on the provision allowing for insurance activities, indicated Congress did not intend any geographic restriction on banks' marketing of insurance products.[26] Finally, the Comptroller determined the legislative history of the statute[27] indicated its purpose was to provide small town banks an additional source of revenue and to make insurance coverage available to residents of small towns.[28] Some small towns may be too small to significantly improve a bank's profitability if it is limited to selling products within that town; thus, placing a geographic restriction on the area in which the bank may solicit customers inhibits the statute's intent.[29] The Comptroller decided that section 92 allows national banks in towns with fewer than 5000 inhabitants to sell insurance products to persons throughout the country, regardless of their geographic location.[30] This interpretation led to a

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22. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 959 (D.C. Cir. 1993). Under Comptroller regulations, any national bank seeking to perform new activities through an operating subsidiary must submit a written proposal to the Deputy Comptroller for the district in which the bank's principal office is located. 12 C.F.R. § 5.34(d)(1)(i) (1993).

23. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d at 959. Section 92 applies to any branch office located in a community "of less than 5,000 even though the principal office of such bank is located in a community whose population exceeds 5,000." 12 C.F.R. § 7.7100 (1993). In 1980, the population of Banks, Oregon was 489. National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1164 n.6 (D.D.C. 1990), *rev'd sub nom.* Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), *rev'd sub nom.* United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993), *aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

24. OCC Interpretive Letter No. 366, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,536 (Aug. 18, 1986).

25. *Id.* ¶ 77,834.

26. *Id.* The Comptroller applied the maxim of *expressio unius est exclusio alterius*. (The inclusion of one item indicates the exclusion of all others.) *Id.* ¶ 77,834 n.3.

27. The legislative history of § 92 consists merely of a letter from then Comptroller of the Currency Williams to the Senate Banking and Currency Committee. *Id.* ¶¶ 77,834-35. The letter recommends that insurance privileges be extended to national banks located in towns of 3000 or fewer inhabitants. *Id.* (citing 53 CONG. REC. 11,001 (1916)). Congress changed the population figure to 5000 prior to passage of the statute. *Id.* (citing 53 CONG. REC. 11,153 (1916)).

28. *Id.* ¶ 77,835.

29. *Id.*

30. *Id.*

court battle extending all the way to the Supreme Court and back to the Court of Appeals for the District of Columbia Circuit.[31]

A. *United States District Court, District of Columbia Circuit*

Upon release of the Comptroller's interpretive letter, the Independent Insurance Agents of America and the National Association of Life Underwriters (Associations) brought suit in United States District Court, District of Columbia.[32] The Associations, on behalf of life, health, property, and casualty insurance agents nationwide, sought declaratory and injunctive relief against the Comptroller's interpretation of section 92.[33] They argued the Comptroller's interpretation was arbitrary, capricious, and an abuse of discretion and should be overturned.[34]

The court granted summary judgment to the defendants and dismissed the case, finding the Comptroller's interpretation of section 92 was reasonable and not an abuse of discretion.[35] In reaching this conclusion, the court rejected the Associations' arguments that a geographic restriction was implicit in the requirement that the selling office be "located and doing business" in a small town[36] and that USBO did not fall under the ambit of section 92 because it was the forty-fourth largest bank in the country.[37] The court found this distinction irrelevant because the "statute makes no distinction between profitable and unprofitable banks."[38] The court also rejected arguments that the statute violated the policy of separating banking from commerce and that the Comptroller's prior inconsistent interpretations of section 92 indicated the Comptroller arbitrarily reached this decision.[39] The court stated that while the Associations' arguments about the separation of banking from commerce may be true in theory, it was not the court's place to implement congressional policy that Congress itself failed to implement.[40] In regard to the Associations' argument about the Comptroller's prior inconsistent interpretations, the court reasoned that the Comptroller never made a comprehensive analysis of section 92 and, even if the Comptroller had made inconsistent interpretations of the statute, Interpretive Letter 366 provided a "cogent explanation" for the inconsistencies.[41]

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

32. *Id.* at 1163.

33. *Id.* United States National Bank of Oregon intervened as a defendant. *Id.*

34. *Id.* at 1167.

35. *Id.* at 1174.

36. "The phrase 'located and doing business' plainly refers to the location of Bank Agency, not the customers to whom it may sell." *Id.* at 1168.

37. *Id.* at 1169.

38. *Id.*

39. *Id.* at 1172-73.

40. *Id.* at 1170.

41. *Id.* at 1173.

B. *United States Court of Appeals, District of Columbia Circuit*

The Associations appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.[42] This court, unlike the district court, determined that the absence of section 92 from the United States Code indicated its invalidity.[43] The court stated that section 92 was repealed in 1918[44] and, in the absence of alternate grounds with which the court could uphold the district court's decision, reversed the lower court and ordered the entry of judgment for the Associations.[45]

For several reasons, the court, sua sponte, addressed the issue of whether section 92 still had the force of law.[46] First, the absence of the statute from the United States Code created a presumption that it was invalid.[47] The court stated it was not limited by the particular theories espoused by the parties, but retained the power to identify and apply the proper construction of governing law.[48] The question of whether a law exists is a judicial one and must be recognized by the courts of the United States.[49] Unlike the trial court, this court refused to assume the continued existence of section 92 and ruled in favor of the Associations.[50]

C. *United States Supreme Court*

The Comptroller and the USBO separately petitioned the Supreme Court for certiorari.[51] Both parties argued that section 92 was still valid, and USBO

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42. Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992).

43. *Id.* at 733-34.

44. *Id.* at 734. After realizing § 92 did not appear in the United States Code, the court stated that § 92 had been repealed in the Statutes at Large. *Id.* at 734-35. The court reviewed Congress's intent in regards to § 92. *Id.* at 735-39. Both parties argued that the intention of Congress in 1916 was to place § 92 within § 13 of the Federal Reserve Act of 1913, but due to misplacement of a quotation mark the section was placed within the unrelated War Finance Act. *Id.* at 735. The court discounted this argument and said the determinative intent was to amend the statute, not a mistake in the placement of the statute. *Id.* at 739. The court held that, without any concrete evidence to the contrary, it had to assume the 65th Congress knew § 92 was written into § 5202 when it amended the latter, and thus its exclusion from the amended § 5202 denoted repeal of § 92. *Id.* Finally, the court held actions by the Comptroller, the courts, and Congress subsequent to the repeal of § 92 in 1918 had no effect on its continued validity. *Id.*

45. *Id.*

46. *Id.* at 734 (stating "[b]ecause this controversy hangs on the interpretation of a statute that is presumed not to exist, we not only have the right to inquire into its validity, we have the duty to do so").

47. *Id.* (citing 1 U.S.C. § 204(a) (1988)).

48. *Id.* at 733.

49. *Id.*

50. *Id.* at 739. The trial court assumed the continued validity of § 92 because "Congress, other courts, and the Comptroller have presumed its continuing validity." National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1163 (D.D.C. 1990), *rev'd sub nom.* Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), *rev'd sub nom.* United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993), *aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

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

further argued that the Court of Appeals did not have the authority to address the issue of the validity of section 92 sua sponte.[52] The Supreme Court held that the appellate court had the authority to review, sua sponte, the validity of section 92.[53] The Court then considered the continued validity of section 92.[54] Because the circumstances surrounding the adoption of section 92 in 1916 indicated that it was meant to be placed in section 13 of the Federal Reserve Act, and because this section had not been repealed or amended, the Court found section 92 to be a valid and enforceable statute.[55] The appellate court decision was reversed, and the case was remanded for adjudication on the merits.[56]

D. *United States Court of Appeals, District of Columbia Circuit*

On remand, the Court of Appeals for the District of Columbia only considered whether the Comptroller abused its discretion in determining that section 92 allowed qualifying banks to sell insurance products without any geographic restriction.[57] The court found that the Comptroller's interpretation of section 92 was reasonable.[58] Therefore, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[59] the court had to defer to the Comptroller's interpretation.[60] The court affirmed the lower court's ruling that section 92 allowed nationally chartered banks to sell insurance products to persons regardless of their geographic residence.[61]

In applying the *Chevron* test, the court looked for Congress's intent in enacting section 92.[62] The court found no clear intent for three reasons: First, the language of the statute "evinced no unanimous command" that banks in small towns were restricted to sales within that small town.[63] Second, the structure of the statute indicated that Congress did not intend to place geographic sales limits on the insurance portion of the statute because there was just a limitation on the

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52. *Id.* at 2177-78.
53. *Id.* at 2179.
54. *Id.* at 2179-87.
55. *Id.* at 2182-85.
56. *Id.* at 2187.
57. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 958 (D.C. Cir. 1993).
58. *Id.*
59. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . [T]he question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.
60. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d at 960.
61. *Id.* at 962.
62. *Id.*
63. *Id.*

real estate provision of the statute.[64] The absence of such a restriction on the insurance provision indicated no such restriction was intended.[65] Third, the only legislative history of the statute was a letter from the Comptroller to the Chairman of the Senate Banking and Currency Committee.[66] Although the letter suggested that a provision should be made to allow small town banks to sell insurance as a means of making them more competitive with larger state banks and that the small town banks would therefore be less likely to trespass upon business belonging to others, the letter shed little light on the Congress's intent in passing the statute.[67] The USBO was not the type of struggling small town bank the Comptroller had in mind when he made his recommendation to Congress; however, the court was unwilling to assume members of Congress had actually read or relied on the letter in approving the statute.[68]

Having found no specific congressional intent, the court considered the second prong of the *Chevron* test: Whether the Comptroller's interpretation of the statute was based on a permissible construction of the statute.[69] The court summarily found no basis for overturning the Comptroller's interpretation.[70] The Associations argued that allowing large banks to sell insurance was "a departure from the 'overarching policy' of the NBA,"[71] which was to constrain the activities of nationally chartered banks.[72] The enactment of section 92 was, in their view, a relaxation of the constraints on small town banks, and allowing heavily capitalized banks in large cities to act under section 92 violated the policy of the NBA because section 92 was intended to free small town banks from some of the restraints of the NBA.[73] The court, however, found that the critical departure from this overarching policy was in 1963 when the Comptroller allowed any bank located in a town of fewer than 5000 to sell insurance, regardless of the presence of other branches of the same bank in areas of greater than 5000.[74] This rule allowed large banks to sell insurance out of small towns despite the possible constraints Congress may have intended in passing section 92. The court concluded that the Comptroller's interpretation of section 92 was permissible and, if its interpretation of section 92 meant that the exception of allowing small town banks to sell insurance had swallowed the rule prohibiting banks from selling insurance, the solution lay with Congress and not with the courts.[75]

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64. *Id.* This portion of the statute states that nationally chartered banks in towns of fewer than 5000 inhabitants may "act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located." *Id.* This portion of the statute was intentionally repealed in 1982. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, 1510-11.

65. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 960 (D.C. Cir. 1993).

66. *Id.*

67. *Id.* at 960-61.

68. *Id.*

69. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

70. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 961 (D.C. Cir. 1993).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (citing 36 Fed. Reg. 17,000, at 17,015 (1971) (publishing Comptroller's 1963 ruling)).

75. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 961 (D.C. Cir. 1993).

Finally, the court considered the Associations' argument that the Comptroller's current interpretation of the law was inconsistent with previous interpretations.[76] To prove prior inconsistent interpretations of section 92 by the Comptroller, the Associations presented six unpublished letters from the Comptroller's office purported to contain assumptions by the Comptroller that section 92 contained geographic restrictions.[77] The court held, however, that the unpublished letters had no effect as precedent and therefore could not conflict with the Comptroller's current interpretation of section 92.[78]

Having found that no specific intent of limiting insurance sales to the geographic area in which a small town bank is located and that the Comptroller's interpretation of the statute was reasonable, the court upheld the trial court's grant of summary judgment for the defendants.[79] This ruling appears to allow any nationally chartered bank with a branch in a town of fewer than 5000 people to sell insurance products on a nationwide basis. The Associations, and the insurance industry in general, have not given up their fight. The Associations have stated they will appeal the decision to the United States Supreme Court and will lobby Congress to either restrict the scope of section 92 or have it repealed.[80]

E. *The Next Step?*

The insurance industry should focus its attention on lobbying Congress to legislate section 92. The District of Columbia Court of Appeals ruling, although unpopular in the industry, is the correct ruling on section 92. The courts have not been asked whether they would interpret section 92 the same way the Comptroller interpreted it; rather, they have only been asked if the Comptroller's interpretation is reasonable. Given the dearth of legislative history and the geographically restrictive real estate provision included in the original section 92, the Supreme Court will be hard pressed to show the Comptroller was unreasonable in its ruling.

The incomplete rulings by the courts leave the insurance industry better served by a successful lobby in Congress. An appeal to the Supreme Court will only resolve the question of whether there is a geographic restriction implicit in the sale of insurance under section 92. A ruling by the Court will not answer many of the questions about section 92 that persist but do not relate to the geographic part of the statute. By lobbying Congress, the industry could ask that all questions surrounding section 92 be answered, and the industry can suggest the manner in which the questions should be resolved. Thus, lobbying Congress to legislate section 92 is the most beneficial strategy for the insurance industry to pursue.

In *Ludwig*, the Court did not deal with other potential conflicts relating to the statute. These questions are: What products are the subject matter of section

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76. *Id.* at 962.

77. *Id.*

78. *Id.* "In 'the real world of agency practice,' informal unpublished letters 'should not engender reliance.'" *Id.* (quoting Malkan FM Assocs. v. FCC, 935 F.2d 1313, 1319 (D.C. Cir. 1991)).

79. *Id.*

80. Rehm, *supra* note 10, at 11.

92? How does section 92 affect the authority granted to banks under section 24(Seventh) of the NBA? What happens if a bank is operating under the authority of section 92 and the town's population becomes larger than 5000 persons?

III. QUESTIONS REMAINING AFTER *LUDWIG*

A. *Subject Matter of Section 92*

Section 92 states that banks satisfying the small town requirement may act as an agent for any "fire, life, or other insurance company" authorized to sell insurance in the state in which the bank is located.[81] Although *Ludwig* holds section 92 does not limit sales to a geographic area, it is silent as to which products may be sold. The answer to this question is of little importance to banks meeting the section 92 requirements; however, the answer is of great importance to those banks not meeting these requirements. Currently, all banks sell specialized insurance products under the authority of the incidental powers clause of section 24(Seventh) of the NBA.[82] If section 92 is interpreted to allow qualifying banks to sell all forms of insurance,[83] banks in towns of more than 5000 people will be forced to cease their current practice of selling specialized insurance products.[84] This interpretation gives qualified banks authority parallel to or greater than the authority they presently enjoy, and it completely curtails the current insurance authority of large town banks. If section 92 is interpreted to allow qualifying banks to sell only general lines of insurance,[85] banks not qualifying under the population limit still have the authority to sell specialized insurance products under the incidental powers clause of section 24(Seventh).[86]

The first step in determining the powers granted under section 92 is to determine whether the statute is clear on its face.[87] It is evident section 92 is not clear on its face. Section 92 merely states that qualifying banks may act as agents for "fire, life, or other insurance companies."[88] Had the statute been worded so qualifying banks could act as agents for fire, life, and *all* other insurance compa-

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81. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753.

82. 12 U.S.C. § 24(Seventh) (1988).

83. *See* American Land Title Ass'n v. Clarke, 968 F.2d 150, 155 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

84. Specialized lines of insurance refer to products incidental to the business of banking. Examples of these products include title insurance, credit life insurance, credit disability insurance, and debt cancellation contracts. *See* Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); OCC Interpretive Letter No. 499, [1980-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (Feb. 12, 1990).

85. General lines of insurance refer to basic insurance products such as automobile, home, casualty, and liability. *See* Independent Bankers Ass'n v. Heimann, 613 F.2d at 1168; OCC Interpretive Letter No. 499, [1980-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (Feb. 12, 1990).

86. 12 U.S.C. § 24(Seventh) (1988).

87. If the statute is clear on its face or the congressional intent is unambiguous, the intent must prevail. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). If no clear intent may be derived from these sources, any reasonable interpretation by the Comptroller will be upheld. *Id.*; 12 C.F.R. § 1 (1993).

88. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753.

nies, or simply as agents for fire and life insurance companies *only*, then no conflict would exist. However, specifying which insurance companies the bank may act as an agent for with the phrase "or other insurance companies" leaves the construction of the statute of no help in determining the application of the statute.

Because the words themselves and the structure of the statute do not provide a clear interpretation of the statute, it is helpful to consider its legislative history.[89] As stated in *Ludwig*, the only legislative history on section 92 is a letter written by Comptroller of the Currency Williams.[90] This letter states that the ability of small town banks to act as agents for insurance companies would provide these banks with an additional means to compete with the large banks and allow them an additional means of revenue.[91] Comptroller Williams stated that banks should be allowed to act as agents for insurance companies and the draft of the bill allowed qualifying banks "to act as agents for the placing of insurance policies."[92] Whether Comptroller Williams had a specific intent for the bill and used loose language or had no specific intent on the scope of authority that should be granted to banks qualifying under the statute is not clear. Furthermore, it is invalid to assume members of Congress read or relied on Comptroller Williams's letter in drafting or approving section 92.[93] Thus, the sparse legislative history of section 92 does not indicate the intended scope of the statute.

Despite the lack of clear intent on the part of the legislature, some indication of the scope of section 92 may be gained by understanding what is not within the scope of section 92. As early as the first title insurance policy in 1876, and as late as the 1930's, banks were the primary participants in selling and underwriting title insurance.[94] This practice was started in Philadelphia, and other banks quickly began underwriting and selling title insurance throughout the country.[95] Despite having a population of over 5000 at the time section 92 was passed,[96] none of the banks selling title insurance in Philadelphia were forced to quit the business.[97] It was not until the Depression when most banks were divested of their title insurance departments, and the divestment was largely a result of the failure of bank and mortgage guarantee companies,[98] not a legislative restriction on the banks' ability to perform such acts. Congress and the Comptroller did not envision section 92 curtailing the ability of banks to sell title insurance, which

89. Burlington N.R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (stating "[l]egislative history can be a legitimate guide to a statutory purpose").

90. 53 CONG. REC. 11,001 (1916). Several courts consider a letter for the Governor of the Federal Reserve by its counsel an item of legislative history. This letter, however, has no actual tie to the adoption of § 92 and is discussed in relation to the statute because of its content. American Land Title Ass'n v. Clarke, 968 F.2d 150, 155-56 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

91. *Id.*

92. *Id.*

93. Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958, 961 (D.C. Cir. 1993).

94. Harry Mark Johnson, *The Nature of Title Insurance*, 33 J. RISK & INS. 393, 393 (1966).

95. *Id.*; *see* ERNEST F. ROBERTS ET AL., PUBLIC REGULATION OF TITLE INSURANCE COMPANIES AND ABSTRACTERS §§ 0.10-0.30 (E.F. Roberts ed. 1961).

96. The 1910 census population of Philadelphia was 1,549,008.1. U.S. DEPARTMENT OF COMMERCE BUREAU OF CENSUS, 1980 CENSUS POPULATION, ch. A, part 1, at 1-177 (1980).

97. *See* ROBERTS ET AL., *supra* note 95.

98. *Id.*

indicates Congress intended the section to apply merely to general lines of insurance. Had Congress intended section 92 to apply to all lines of insurance, title insurance would have fallen under the ambit of section 92 and banks in Philadelphia would have been barred from selling title insurance. Because banks in Philadelphia were not barred from selling title insurance, the intent of Congress in passing the statute must have been that it apply only to general lines of insurance. While this inference is not unambiguous or conclusive, it adds support to the proposition that section 92 was not intended to cover all forms of insurance.

While there is some indication section 92 only allowed qualified banks to sell general lines of insurance, it is still necessary to look to other rules of statutory construction to fully determine the scope of authority granted under section 92. One doctrine of statutory construction is the doctrine of *ejusdem generis*, which gives meaning to words used as a qualifier to a previously denoted list.[99] This doctrine is used to determine the correct meaning of words used in a statute when there is uncertainty as to their plain meaning.[100] The doctrine is not applicable, however, if it would make a portion of the statute meaningless.[101] Furthermore, the rule is inapplicable when there is a clearly manifested intent that the general words be given a meaning broader than the scope of the specific words.[102]

In the case of section 92, the doctrine of *ejusdem generis* is clearly applicable. First, the structure of the statute is amenable to the doctrine because two specific items are listed, followed by a general term. Second, application of the doctrine would not make any portion of the statute meaningless.[103] Third, Congress did not show a clear intent to have the general words of the statute refer to items outside the class that includes the specific items. Thus, application of the doctrine of *ejusdem generis* limits the general words "or other insurance" to the same class as the specific items listed—general lines of insurance. Therefore, under this doctrine, section 92 appears to grant qualifying banks the authority to act as agents for general lines of insurance and not all lines of insurance.

Although the words and construction of the statute may be inconclusive, the actions of banks selling title insurance after section 92 was adopted and the doctrine of *ejusdem generis* support the conclusion that the statute should be read to allow banks in towns of fewer than 5000 persons to sell general lines of insur-

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99. "Under the [doctrine] of *ejusdem generis*, where general words follow an enumeration of specific items, the general words are [deemed to be a reference] only to other items [similar] to those specifically enumerated." Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980). *See* Gooch v. United States, 297 U.S. 124, 128 (1936); Romualdo P. Eclavea, Annotation, *Supreme Court's Application of the Rules of Ejusdem Generis and Noscitur A Sociis*, 46 L. Ed. 2d 879 (1992).

100. Harrison v. PPG Indus., Inc., 446 U.S. at 588; Gooch v. United States, 297 U.S. at 128.

101. Gooch v. United States, 297 U.S. at 128. If the specific words exhaust the entire class, then application of the doctrine will render the general words of the statute meaningless. *See* Eclavea, *supra* note 104, § 3a.

102. *Id.* § 2.

103. Fire and life insurance do not exhaust the class of general lines of insurance; therefore, the general words of "or other insurance" are deemed to refer to the remaining lines of general insurance and are not rendered meaningless.

ance.[104] Nonetheless, this interpretation does not restrict the ability of nationally chartered banks to sell specialized insurance products under the incidental powers clause of section 24(Seventh) of the NBA.

B. *Conflict with Section 24(Seventh)*

A second question not addressed by the court in *Ludwig* is the effect of section 92 on the ability of nationally chartered banks to sell insurance products under the incidental powers clause of section 24(Seventh) of the NBA, which gives banks the authority "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."[105] This section is the basis of authority under which banks currently sell several types of specialized insurance products.[106] There are two possible interrelationships between sections 24(Seventh) and 92. First, section 92 may be deemed the only section under which banks have the authority to sell insurance products.[107] This interpretation takes away the authority to sell insurance products under section 24(Seventh).[108] The other option is that section 92 is a supplement to section 24(Seventh).[109] Under this interpretation, all banks may sell specialized insurance products under section 24(Seventh) and banks qualifying under section 92 have additional authority to sell general lines of insurance.[110] Because this issue was not addressed in *Ludwig*, it remains a potential block to nationally chartered banks' ability to sell insurance nationwide. The best interpretation of section 92 is that it allows nationally chartered banks in towns of fewer than 5000 people to sell general lines of insurance products and that all national banks should have the authority to sell insurance products incidental to the business of banking as authorized by section 24(Seventh).

1. *Judicial History*

As mentioned, there are two possible interpretations to the potential conflict arising between section 24(Seventh) and section 92. In response to this conflict, courts have applied two different rules. First, as was found in *American Land Title Ass'n v. Clarke*,[111] section 92 may be the only grant of authority to nationally chartered banks to sell insurance products.[112] Under this interpreta-

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104. This conclusion is also supported by at least one circuit court of appeals decision. *See* Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

105. 12 U.S.C. § 24(Seventh) (1988).

106. OCC Interpretive Letter, 1991 WL 338369, at *1 (Jan. 4, 1991).

107. *Id.*

108. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295, 1302 (5th Cir. 1993), *rev'd sub nom.* Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995); American Land Title Ass'n v. Clarke, 968 F.2d 150, 155 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

109. OCC Interpretive Letter, 1991 WL 338369, at *2 (Jan. 4, 1991).

110. *Id.*

111. American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

112. *Id.* at 155. This rule is premised on the doctrine that a statute discussing a matter in specific terms controls over one that discusses the same matter in general terms. *Id.* Because sec-

tion, any bank located in a town of greater than 5000 people may not sell any insurance products. This result severely restricts the ability of all nationally chartered banks to sell specialized insurance products. The second interpretation is that section 92 grants qualifying small town banks the authority to sell general lines of insurance and section 24(Seventh) allows all nationally chartered banks to sell specialized lines of insurance.[113] This interpretation makes section 92 a supplemental power to section 24(Seventh) and does not restrict the authority of large city banks to market specialized products.

The argument that section 92 is the only authority for nationally chartered banks to sell insurance products is based on the history of the NBA. When the NBA was passed, it contained no explicit provision allowing nationally chartered banks to sell insurance products, but it contained the incidental powers clause of section 24(Seventh).[114] In 1916, however, Comptroller of the Currency Williams sent a letter to the Senate Banking and Currency Committee stating that even though nationally chartered banks had no authority to sell insurance products under the NBA, small town banks should be given the authority to sell such products.[115] This letter, along with a similar one written for the Governor of the Federal Reserve Board stating nationally chartered banks had no express or implied power to sell insurance products,[116] is the crux of the argument against allowing nationally chartered banks to sell specialized insurance products under the authority of section 24(Seventh).

The Fifth Circuit adopted the view that section 92 prohibited nationally chartered banks in towns of greater than 5000 people from selling insurance products in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*[117] In *Saxon*, nationally chartered banks in Atlanta, Georgia were attempting to sell automobile, home, casualty, and liability insurance based on a Comptroller's administrative ruling.[118] The agents claimed that the Comptroller's ruling violated section 92, and that section 24(Seventh) did not provide broad incidental powers.[119] The court agreed, holding nationally chartered banks in towns of greater than 5000 people had no authority to sell insurance products.[120]

The *Saxon* opinion was based on several factors. First, the court found that the incidental powers clause of section 24(Seventh) must be interpreted in light of section 92.[121] In applying the *expressio unius est exclusio alterius* rule to section

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tion 92 explicitly refers to insurance sales, and section 24(Seventh) does not, section 92 is the relevant statute relating to a bank's ability to sell insurance products. *Id.*

113. Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1170-71 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); OCC Interpretive Letter No. 499, [1980-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 71,213-14 (Feb. 12, 1990).

114. 12 U.S.C. § 24(Seventh) (1988).

115. 53 CONG. REC. 11,001 (1916).

116. 2 FED. RESERVE. BULL. 73, 74 (Feb. 1, 1916).

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

118. *Id.* at 1011. This ruling reads: "Incidental to the powers vested in them under 12 U.S.C. Sections 24, 84 and 371, National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions. Commissions received therefrom or service charges imposed therefor may be retained by the bank." *Id.* at 1012.

119. *Id.* at 1012-13.

120. *Id.* at 1016.

121. *Id.* at 1013.

92, the court found that allowing small town banks to sell insurance products implied that large city banks could not do so because it was the only section granting authority to banks to sell insurance, and it did not allow banks in large cities to participate.[122] Second, the court relied on the legislative history of section 92.[123] The court considered the letter from Comptroller Williams to the Senate Banking and Currency Committee,[124] stating it was clear Congress had acquiesced in the Comptroller's opinion that nationally chartered banks at that time had no authority to sell insurance products.[125] Finally, the court noted that no subsequent legislature has given nationally chartered banks authority to sell insurance outside the scope of section 92.[126] Thus, the court concluded, the Comptroller's ruling violated section 92, and nationally chartered banks in towns of greater than 5000 people had no authority to sell insurance products.[127]

While the *Saxon* court appeared to have no difficulty finding that section 92 prevented nationally chartered banks from selling insurance products under section 24(Seventh), not all courts approached the subject as casually as the *Saxon* court. In *Independent Bankers Ass'n v. Heimann*,[128] independent bankers alleged that the Comptroller exceeded its authority by allowing all nationally chartered banks to sell credit life insurance.[129]

In *Heimann*, the court found that credit life insurance did not fall under the ambit of section 92 because the section did not address the authority of nationally chartered banks to sell insurance products in towns of greater than 5000 people.[130] The court stated that credit life insurance was a special form of insurance coverage written to protect loans and that it was not similar to general life insurance products and, therefore, did not fall within the scope of section 92.[131]

The court also considered the applicability of section 24(Seventh).[132] Because credit life insurance was commonplace and essential for loans in which personal security was involved, the court held its sale was, under section 24(Seventh), incidental to the business of banking and thus a proper product to be sold by any nationally chartered bank.[133] The court also distinguished the facts from *Saxon*, in which the banks were attempting to sell broad forms of automobile, home, casualty, and liability insurance, which fell within the broad forms of insurance regulated by section 92.[134] In contrast, *Heimann* involved credit life

122. *Id.* at 1014. It is noteworthy, however, that the court did not consider the scope of authority granted under § 92; the court simply assumed that § 92 allowed small town banks to sell all forms of insurance products.

123. *Id.* at 1015.

124. *Id.*

125. *Id.* at 1016.

126. *Id.*

127. *Id.* at 1017.

128. Independent Bankers Ass'n v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

129. *Id.* at 1166.

130. *Id.* at 1170 n.18.

131. *Id.* at 1170.

132. *Id.*

133. *Id.*

134. *Id.*; *see* Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1011 (5th Cir. 1968).

insurance, which did not fall under the ambit of section 92.[135] Thus, the court held that it was within the power of nationally chartered banks, per the incidental powers clause of section 24(Seventh), to sell credit life insurance and that section 92 did not restrict this authority.[136]

The court's decision in *Heimann* appeared to signal the beginning of a two step approach regulating insurance products sales under the NBA. Small town banks could sell general lines of insurance under section 92, and all nationally chartered banks could sell insurance products that were incidental to the business of banking under section 24(Seventh). This two-step approach, however, has been questioned because of two recent circuit court decisions.[137] Both courts moved in the direction of *Saxon* and held that section 92 impliedly prohibits nationally chartered banks in towns of greater than 5000 people from selling any insurance products.[138]

The first case to diverge from *Heimann*, *American Land Title Ass'n v. Clarke*,[139] involved the ability of nationally chartered banks to engage in the title insurance agency business.[140] Acting under authority of a Comptroller's Interpretive Letter,[141] Chase Manhattan Bank attempted to sell title insurance products.[142] The plaintiffs brought suit arguing the Comptroller's interpretation violated the NBA.[143] Although the court found section 92 contained no explicit limitation on national bank activity, the rule of *expressio unius est exclusio alterius* led the court to conclude that section 92 prohibited nationally chartered banks in towns of greater than 5000 people from selling insurance products.[144] The court then considered the legislative history of section 92.[145] After discussing a letter from Comptroller of Currency Williams to the Senate Banking and Currency Committee[146] and a letter to the Governor of the Federal Reserve Board from its counsel,[147] the court held that the letters clearly indicated section 92 was the only authority under which nationally chartered banks could sell insurance products and that the authority was limited to towns of fewer than 5000

135. Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

136. *Id.* at 1171.

137. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295 (5th Cir. 1993), *rev'd sub nom.* Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995); American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

138. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d at 1300; American Land Title Ass'n v. Clarke, 968 F.2d at 157.

139. American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

140. *Id.* at 151.

141. *Id.*; *see* OCC Interpretive Letter No. 450, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,674 (Sept. 22, 1988).

142. American Land Title Ass'n v. Clarke, 968 F.2d at 151.

143. *Id.*

144. *Id.* at 155.

145. *Id.*

146. 53 CONG. REC. 11,001 (1916).

147. 2 FED. RESERVE BULL. 73, 74 (Feb. 1916).

people.[148] Thus, the court concluded section 92 restricted the sale of insurance by nationally chartered banks in towns of greater than 5000 people.[149]

Having decided section 92 barred banks from selling insurance in towns of greater than 5000 people, the court next considered the scope of products that could be sold under section 92.[150] The court first held that the words "any . . . insurance company" meant that section 92 granted authority to sell any type of insurance and was not limited to general lines of insurance.[151] The court stated that this case did not fall within the ambit of the *Heimann* court's ruling because the unique character of credit life insurance as a form of protection of the lender's interest was the determinative factor in that holding; the court held title insurance did not possess the same unique character.[152]

The court summarily dismissed the applicability of section 24(Seventh) by stating that when two statutes conflict, the one that discusses the matter in specific terms will control over the statute that discusses the matter in general terms, unless Congress manifested an intent to the contrary.[153] Finding no such congressional intent with sections 24(Seventh) and 92, the court found section 92 applicable due to its specific discussion of the ability of nationally chartered banks to sell insurance products.[154] The court thus concluded that nationally chartered banks in towns of greater than 5000 people had no authority to sell title insurance products.[155]

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148. American Land Title Ass'n v. Clarke, 968 F.2d 150, 156 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 157. This reasoning appears to beg the essential question. The court uses the type of insurance involved in *Heimann* to distinguish the rule of that case; however, given this court's holding, the type of insurance sold is irrelevant to the analysis. Thus, the court used the type of insurance sold to get out of a precedent, which allowed them to hold the type of insurance sold is not a relevant factor.

153. *Id.* This is the canon of statutory construction *in pari materia*. *See* BLACK'S LAW DICTIONARY 649 (6th ed. 1990).

154. American Land Title Ass'n v. Clarke, 968 F.2d 150, 157 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

155. *Id.* The second case to diverge from *Heimann* was Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295 (5th Cir. 1993), *rev'd sub nom.* Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995). This case involved the ability of nationally chartered banks to sell annuity products. *Id.* at 1296. After concluding annuities were insurance products, the court applied the same logic as the *American Land Title Ass'n* court in holding § 92 was an implicit limitation on the ability of nationally chartered banks to sell insurance products if they were located in a town of more than 5000 persons. *Id.* at 1301. The court also found § 92 was predominant over § 24(Seventh) because it specifically addressed the controversy involved. *Id.* at 1302-03. This holding appears to be an extension of the court's earlier ruling in *Saxon*. *Id.* at 1303.

The Supreme Court, however, recently reversed the Fifth Circuit's ruling. Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995). The Court ruled that selling annuity products is incidental to the business of banking and therefore falls within the authority of § 24(Seventh) of the NBA. *Id.* The Court did not reach the question of the scope of § 92 or the interplay between § 92 and § 24(Seventh). *Id.* Accordingly, the Court's decision reversing the Fifth Circuit's holding has no effect on the controversy discussed in this Article.

Given these conflicting holdings, the ability of nationally chartered banks to sell insurance products depends upon the circuit in which the bank is located. The Fifth Circuit follows *Saxon*, and the Second Circuit follows *American Land Title Ass'n*, so banks in those circuits may only sell insurance products if they are in a town of fewer than 5000 people. The District of Columbia Circuit follows *Heimann*, which allows banks in towns of fewer than 5000 people to sell general lines of insurance and allows all banks to sell specialty insurance. While the two most recent cases found that section 92 limits the authority to sell insurance under section 24(Seventh), these cases are based upon incomplete analyses and faulty logic. The approach taken by the *Heimann* court is more thorough and gives the most reasonable interpretation of the statutes.

2. *Supplemental or Repetitive*

The insurance industry argues that section 92 directly limits the ability of national banks to sell insurance products under the authority of the incidental powers clause of section 24(Seventh). This argument is based on the logic of the *American Land Title Ass'n* and *Variable Annuity Life Insurance Co.* courts, which held that because section 92 directly concerns insurance sales, it excludes section 24(Seventh). Thus, the insurance industry argues that small town banks may sell all lines of insurance within a geographic area, and banks in towns of greater than 5000 people may not sell any insurance products. Section 92, however, should be interpreted to grant banks the authority to sell only general lines of insurance. Such an interpretation of section 92 makes a direct conflict with the incidental powers clause of section 24(Seventh) impossible. This interpretation makes section 92 a supplement to the incidental powers clause of section 24(Seventh) and is consistent with the purpose of section 92—to provide small town banks with an additional source of revenue.[156] Such an interpretation allows all national banks to sell specialized insurance products such as credit life insurance and gives national banks in towns of fewer than 5000 people the additional authority to sell general lines of insurance, such as property insurance. Thus, the holdings of *American Land Title Ass'n* and *Variable Annuity Life Insurance Co.* that section 92 was an implied restriction on the ability of large city banks to sell insurance products under section 24(Seventh) were too broad. Because section 92 should be read to authorize qualified banks to sell only general lines of insurance, the only implied restriction is that non-qualifying banks may not sell general lines of insurance under section 24(Seventh). This conclusion is supported by the legislative history of sections 92 and 24(Seventh) and the canons of statutory construction.

The letter constituting the legislative history of section 92 is consistent with the sale of specialized insurance products under the incidental powers of section 24(Seventh).[157] At the time the letter was written, the only specialized form of insurance was title insurance.[158] Large city banks selling this product when sec-

156. 53 CONG. REC. 11,001 (1916).

157. *Id.*

158. *See* ROBERTS ET AL., *supra* note 95; COLLEGE OF BUSINESS ADMINISTRATION OF OHIO UNIVERSITY, CONSUMER CREDIT LIFE AND DISABILITY INSURANCE 7-13 (Charles L. Hubbard ed., 1973) [hereinafter CONSUMER CREDIT].

tion 92 passed were not forced to stop selling title insurance after the adoption of section 92.[159] Even if the sale of title insurance was considered a unique power of national banks, these letters can be reconciled with the sale of specialized insurance products under the incidental powers clause of section 24(Seventh). In 1916, when section 92 was passed, the products now considered specialized insurance products were non-existent.[160] If no existing insurance product was incidental to the business of banking, it was correct to say that, prior to section 92, banks had no authority to sell insurance products. Thus, as specialized insurance products developed and became important to the business of banking, it was possible for them to fall within the incidental powers clause of section 24(Seventh).

Just as the scope of section 92 was unclear when it was enacted in 1916, the intent and scope of the incidental powers clause of section 24(Seventh) is also unclear. In passing the NBA, Congress was not concerned with defining the powers of national banks.[161] It is thus impossible to determine how wide a scope Congress intended to give the clause. In light of the absence of a legislative intent, courts are left to fashion their own definition of what powers are incidental to the business of banking. While many tests have been used,[162] the one most often cited is set out in *Arnold Tours, Inc. v. Camp*.[163] This test indicates that as new products and services develop, they may become necessary to carry on the business of banking due to their importance in relation to one of the express powers of national banks.[164] Thus, the letters constituting the legislative history of section 92 may be correct in stating that national banks had no authority to sell insurance products prior to section 92, yet the letters can still be reconciled with the current ability of nationally chartered banks to sell specialized insurance products under the incidental powers clause of section 24(Seventh).

A third argument in support of the construction that renders section 92 a supplement to the powers of section 24(Seventh) is a refutation of arguments made in *American Land Title Ass'n* and *Variable Annuity Life Insurance Co.* In those cases, the courts that held when two statutes conflict, the one that discusses the controversy in specific terms predominates over the one that discusses the controversy in general terms, unless Congress has manifested an intention other-

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159. Johnson, *supra* note 94, at 393.

160. CONSUMER CREDIT, *supra* note 158, at 7-13. The first credit life insurance policy was not sold until 1917, and the industry did not mature until after World War I. *Id.* Credit disability insurance lagged behind credit life insurance by several years. *Id.*

161. Carol Conjura, Independent Bankers Association v. Conover: *Nonbank Banks Are Not in the Business of Banking*, 35 AM. U. L. REV. 429, 439 (1986).

162. Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 679 (1983).

163. Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972). This test states "a national bank's activity is authorized as an incidental power, 'necessary to carry on the business of banking,' within the meaning of 12 U.S.C. § 24, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Id.* at 432.

164. M&M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1382 (9th Cir. 1977) (stating "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking"), *cert. denied*, 436 U.S. 956 (1978).

wise.[165] This canon of statutory construction involves two steps, and those courts skipped to the second step before applying the first step.[166] Under this canon, section 92 and section 24(Seventh) must be harmonized, if possible. By adopting the approach taken in *Heimann*, these two statutes are easily reconciled. Had the *Variable Annuity Life Insurance Co.* and *American Land Title Ass'n* courts applied the first step of the canon as forcefully as they did the second step, they would not have reached the second step because the two statutes are easily harmonized—section 92 simply allows small town banks to sell general lines of insurance in addition to the authority all banks have to sell specialized insurance products under section 24(Seventh). Thus, the canons of statutory construction support the view adopted by *Heimann*.

3. *Policy*

Finally, the policy behind section 92 and the implied powers clause of section 24(Seventh) support the conclusion that section 92 provides supplemental powers to small town banks and does not restrict the power granted under section 24(Seventh). The letter from Comptroller Williams to the Senate Banking and Currency Committee stated that small town banks needed an additional avenue in which to create profits and maintain competitiveness with larger banks.[167] The Comptroller withheld this authority from large city banks out of the concern that giving large banks similar authority would turn them into department stores and that the business of banking kept these large city banks busy.[168] The powers granted to national banks under the incidental powers clause of section 24(Seventh), however, is not violative of the concerns or structure set out in the letter. In order for an insurance product to be authorized under section 24(Seventh), it must be convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the NBA. Thus, allowing a large city bank to sell such products under section 24(Seventh) would not turn the bank into a department store and would not take the bank away from its core business of banking. Rather, allowing the sale of such products would merely allow the bank to expand its business and achieve

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165. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295, 1302 (5th Cir. 1993), *rev'd sub nom.* Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995); American Land Title Ass'n v. Clarke, 968 F.2d 150, 157 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993).

166. The full canon states:

> General and specific acts may be *in pari materia*. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears the legislature intended to make the general act controlling.

2A SUTHERLAND STATUTORY CONSTRUCTION § 51.05 (4th ed. 1985); *accord* Creque v. Luis, 803 F.2d 92, 94 (3d Cir. 1986); Utah v. Kleppe, 586 F.2d 756, 768-69 (7th Cir. 1978), *rev'd on other grounds sub nom.* Andrus v. Utah, 448 U.S. 907 (1980).

167. 53 CONG. REC. 11,001 (1916).

168. *Id.*

the ultimate goal sought by the NBA: to make nationally chartered banks competitive with state chartered banks.[169]

In direct contrast to the argument that allowing national banks to sell insurance will turn them into department stores and negatively affect their core business of banking, banks have numerous facets that will produce synergy with the sale of insurance. For example, when a bank loans money to a customer to purchase an automobile, it is easy for the bank to offer declining balance credit disability insurance, which will ensure payment of the loan should the customer become disabled. For the customer, this is much more convenient than going to an insurance agent, informing the agent of the details, and filling out new paperwork. Moreover, this provides the bank with an additional profit center without abandoning the core business of banking. Furthermore, banks are more competitive than insurance companies because they have been exposed to more direct competition and they have technological superiority over insurance companies.[170] These factors will allow banks to provide the same product to customers more efficiently and with fewer overhead costs, which should lead to a lower price for the product.

While recent court decisions have held that section 92 impliedly prohibits non-qualifying banks from selling any insurance products, this view is questionable. Given an interpretation that section 92 gives qualifying banks the authority to sell only general lines of insurance, it is hard to see how it can be viewed as a barrier to all nationally chartered banks having the authority to sell specialized products. Such a two-step approach to regulating insurance sales by nationally chartered banks is consistent with the canons of statutory construction and fulfills the intent of Congress. Section 92, therefore, should be interpreted to allow nationally chartered banks in towns of fewer than 5000 people to sell general lines of insurance products, and all national chartered banks should be granted the authority to sell insurance products incidental to the business of banking as authorized by section 24(Seventh).

C. *Purpose of Population Limit*

The final question not addressed by the court in *Ludwig* was the role of the population limit in section 92. There are two possible interpretations of the role played by the population limit. The first possibility is that the population limit is a continuing obligation, and as soon as a town grows larger than the 5000 population limit, a bank selling general insurance products out of the town must cease selling general lines of insurance.[171] The second possible interpretation is that the population limit is a barrier only to entry. Under this interpretation, upon

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169. *See* Symons, *supra* note 162, at 699 (discussing Congressional intent to extend powers available to banks under a national charter to be at least as extensive as powers available to a state chartered bank).

170. Holliday, *supra* note 3, at 9.

171. An example of such a law is qualification for Medicaid by the categorically needy. In order to qualify for Medicaid privileges, the categorically needy must prove that their discretionary income is below a certain level in order to qualify for privileges for a given period of time. 42 C.F.R. § 435.831 (1993). At the end of that time the recipient loses the privilege unless it can be shown she is still categorically needy. *Id.*

beginning operations under section 92, a bank will have to prove the town has fewer than 5000 people; after that time, however, it is irrelevant how large the town becomes. The better interpretation of the population limit is that it is an ongoing obligation which must be met by the bank each decennial census or it will lose the statutory privilege.

This issue has yet to be addressed by either the Comptroller or the courts. As more banks take advantage of section 92, however, it is likely that this issue will become volatile.

The statute, on its face, does not indicate Congress's intent in placing the population limit in the statute. The statute states the bank must be in a town that does not exceed 5000 people, but it does not state that once the town becomes larger than 5000 the bank must cease operating under authority of the section.[172] Furthermore, the qualifying words "located and doing business"[173] may be read as implying that if a bank satisfies the population requirement at the time it requests authority to act under the section, it may operate under the section regardless of the change in the town's population. Thus, the words and structure of the statute provide no indication of the role filled by the population restriction.[174]

Having received no indication of the intent of the population limit from either the statutory construction or the legislative history, the interpretation of its role must be based on policy considerations. The purpose of the statute was to provide small town banks with additional means by which they could produce a profit and compete with state chartered banks.[175] Further, large city banks were not included within its scope due to concern about diverting the banks from banking and because they had sufficient profit capacity from their larger customer base.[176]

In light of these policies, several arguments support the less attractive conclusion that the population limit was simply meant as an initial barrier to entry. First, once the small town bank is established and operating under section 92, nothing significant occurs when the town's population reaches 5001 or more. Assuming the bank has operated under section 92 for a period of time, operating in a town larger than 5000 will not suddenly make the bank unable to tend to the traditional business of banking and also act as an agent for general lines of insurance products. Because the bank acts as an agent for a period of time, nothing

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172. *See* Act of Sept. 7, 1916, ch. 461, 39 Stat. 753.

173. *Id.*

174. A second place in which congressional intent may be derived is the legislative history of the statute. Burlington N.R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (holding "legislative history can be a legitimate guide to a statutory purpose"). Similar to the construction of the statute, the legislative history of § 92 does not indicate the role Congress intended it to serve. While Comptroller Williams wanted the statute to apply only to small town banks, the legislative history does not indicate whether the bank is to lose the privilege once the town grows to greater than 5000 people. Furthermore, even if an intent could be derived from Comptroller Williams's letter, there is no indication Congress interpreted it the way he intended or that Congress had the same intention for the population limit. Murphy v. Empire of Am., 746 F.2d 931, 935 (2d Cir. 1984) (stating isolated remarks on floor of Congress are entitled to little or no weight).

175. 53 CONG. REC. 11,001 (1916).

176. *Id.*

will change because the town has grown larger than the 5000 population limit. The same is not true if a bank in a large town attempts to initially set up a general insurance business. It is likely it will take the bank time to learn about the insurance field and integrate the service into the bank's operation. This will lead to Comptroller Williams's fear — neglect of the primary business of banking.

The second policy argument to support interpreting the population limit as a barrier to entry is the inequity involved if the town does grow to larger than 5000 people. A bank may invest money in obtaining office space, build a reputation with the local population, and encourage employees to settle in the small town. It seems inequitable to force the bank to restrict its operations and discontinue a service to the local population because of an event that is out of the bank's control.

Finally, interpreting the population limit as an ongoing obligation encourages behavior that is antithetical to societal norms. First, although the one goal of the statute appears to make opportunities in small towns comparable to those in large towns, requiring the town to continually remain smaller than 5000 people does not satisfy this goal. A bank in such a position may choose to encourage its employees to live outside the town limits to keep the population to a minimum. It also encourages the bank to discourage immigration to the city. If the bank becomes a dominant force in the city, the city administration may face the unpleasant choice of implementing barriers to immigration to the town or lose its largest employer, the bank. Finally, such a reading of the population limit may encourage the bank to manipulate the makeup of the town for census purposes. Thus, the bank may relocate many of its employees immediately prior to the census and upon completion of the census transfer the employees back to the town.[177]

While many of these arguments may sound ludicrous, a great deal is at stake in this controversy. A bank must invest in buildings, train employees, establish relationships, and obtain regulatory approval in order to operate under this statute. Such an investment of time and resources is a powerful incentive for a bank to go to extreme lengths to protect its investment. Moreover, any town with a bank operating under section 92 will likely go to all possible ends to keep the bank in the area. Thus, to not make an effort to stay in a location hurts both the town and the local consumers of insurance products who have no reasonable alternative from which to buy insurance.

Despite the above arguments that support reading the population limit as simply a barrier to entry, the better interpretation of the limit is that it is an ongoing obligation that must be met by the bank each decennial census or it will lose the privilege provided by the statute. Again, this conclusion is based on several policy considerations.

First, there is nothing significant about the population of 5000, but it is the number Congress chose to define a small town. Moreover, Congress chose to adopt a 5000 population limit when Comptroller Williams suggested a 3000 pop-

177. While such actions are admittedly outrageous, if a bank has a large capital investment in operating an insurance business out of a town, it may be cheaper to initiate such activity than it would be to relocate in a new town.

ulation limit.[178] While it can be argued that nothing significant occurs when a town in which a bank operating under section 92 grows larger than 5000, something significant does, in fact, occur. Once the town gets larger than 5000 people, it is larger than the arbitrary population limit Congress chose for the statute. While the number is arbitrary, Congress must have believed it represented a good division between small towns that should benefit from the effects of section 92 and large towns that did not need the benefit provided by the extra line of business. This choice represents Congress's desire to make insurance sales under section 92 a bright line rule rather than a more flexible standard. Furthermore, if the number was too arbitrary or needed to be changed to more accurately reflect the changes in society since 1916, any subsequent Congress could have changed the population limit. The failure of any Congress to even discuss changing the population limit indicates that it is still a number that accurately, albeit arbitrarily, reflects an important distinction.[179]

The second policy factor that supports reading the population limit as an ongoing obligation is the notice involved in the statute. Because the population limit is the only factor in determining whether a bank can operate under section 92, when a bank moves into a small town and begins selling general lines of insurance it is aware that the town must have fewer than 5000 inhabitants. Furthermore, given the importance of population to the privilege of participating in the general insurance business, should a town grow larger than 5000, it is likely the bank operating under section 92 will be aware of this fact. Thus, the bank will likely be aware of the population increase long enough before the census that it can take steps to either reduce the population of the town through relocation or adjustment of the town's geographic size, or make arrangements to shift operations to a new town.

Finally, the treatment the statute has received from courts indicates the population limit should be interpreted as an ongoing obligation. Every court that has reviewed the scope of section 92 has held that it impliedly bars banks in towns of greater than 5000 from selling the same products allowed under section 92.[180] Furthermore, banks that have chosen to operate under section 92 choose to operate out of very small towns.[181] If banks believed the population limit was merely a barrier to entry, they would begin operations in a town as close to the 5000 population limit as possible to have as large a customer base as possible.

178. 53 CONG. REC. 11,001 (1916).

179. *See* Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1016 (5th Cir. 1968) (stating Congress's failure to change the act since its enactment indicates it is consistent with Congress's continuing intent for the statute).

180. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295, 1301 (5th Cir. 1993), *rev'd sub nom.* Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995); American Land Title Ass'n v. Clarke, 968 F.2d 150, 155 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993); Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert denied*, 449 U.S. 823 (1980); Saxon v. Georgia Ass'n Indep. Agents, 399 F.2d 1010, 1016 (5th Cir. 1968).

181. *E.g.*, National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1164 n.6 (D.D.C. 1990) (involving a bank operating in a town with a population of 489), *rev'd on other grounds sub nom.* Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), *rev'd on other grounds sub nom.* United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173 (1993), *aff'd sub nom.* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993).

Such actions appear to allow the banks to circumvent the intent of section 92, and the fact that banks are not moving into towns close to the 5000 population limit indicates that they interpret the limit as an ongoing obligation.

Finally, the lack of precedent for such a reading of the statute supports the conclusion that the population limit is an ongoing obligation. While no current law can be found that grants such an entitlement to an entity qualifying under a barrier to entry, numerous laws can be found that grant an entity an entitlement for a period of time and require the entity to meet continuing obligations to continue enjoying the benefit. Moreover, giving a bank an entitlement to the opportunity to sell general lines of insurance would turn the entitlement into a commodity in itself. Thus, if the bank decided to sell a branch that had an entitlement under section 92, the price and structure of the sale would be largely affected by the presence of the entitlement and the bank may be sought by a suitor simply for the entitlement to sell insurance products. This is antithetical to Comptroller Williams's desire that banks not be diverted from the primary business of banking. The problem is of much less importance if the population is deemed an ongoing obligation because the purchasing entity is only obtaining an entitlement to sell insurance until the next census period and not for an unlimited time.

Interpretation of the role played by the 5000 population limit in section 92 is determined largely by policy considerations. While many arguments can be made that support reading the population limit as merely a barrier to entry that once met is no longer an obligation, it is not the best reading of the law. The absence of changes to the limit by subsequent Congresses and the complete lack of any other law containing such a barrier to entry support the view that the population limit is an ongoing obligation. Thus, regardless of how long a bank has operated in a small town under section 92, as soon as the decennial census shows that the town has more than 5000 inhabitants, the bank should lose the privilege to operate under the authority of section 92.

IV. LEGISLATIVE AND ADMINISTRATIVE REFORMS

A. *Need for Reform*

The ability of nationally chartered banks to sell insurance products is anything but clear. The bank's rights depend upon the circuit in which it is located. Moreover, at least one vitally important aspect of the statute, the population limit, has yet to be discussed by any court, leaving more indecision and the possibility of conflict between circuits.

There are several reasons legislative and administrative relief is needed in this area. First, section 92 was passed in what appears to be a shroud. Little information is available about the intended scope of the statute or the exact needs that Congress intended it to satisfy. This lack of substance allows courts to highlight the factors from the legislative history that support the conclusions they adopt and disregard as unclear those factors that do not support their conclusions. Moreover, it leaves the Comptroller and banks guessing as to the authority provided banks under the NBA, which leads to a strategy of "let's try it and see what happens." Unfortunately, the only way to determine if the action is authorized is

through lengthy court battles such as the one in *Ludwig*. Legislative action stating the scope and purpose of section 92 would serve to alleviate much of the current vagueness and confusion surrounding the statute.

A second factor supporting legislative intervention in defining the scope and role of section 92 is the structure of the legal system. Currently, the Comptroller must decide whether a proposed action is within the scope of the statute. If this decision is disputed in the courts, under the Administrative Procedure Act[182] and *Chevron*,[183] the court must defer to the Comptroller's interpretation as long as it is reasonable.[184] This review structure is especially troublesome with section 92 because of the lack of legislative history. Thus, each major change at the Office of the Comptroller of the Currency could lead to a different interpretation of a particular law. Moreover, it is likely that what one court perceives as a reasonable interpretation of the statute another court will perceive as unreasonable.[185]

A final factor supporting legislative or administrative intervention to clarify the scope and role of section 92 is the increased popularity of the statute. At the time *Ludwig* was decided, approximately 200 banks sold insurance products under section 92.[186] It is expected that, given the ruling in *Ludwig*, the number of nationally chartered banks selling insurance products under section 92 will rapidly increase.[187] Moreover, because state chartered banks in twenty-one states may perform the same functions as a nationally chartered bank, the number of banks trying to sort out the maze will be even larger.[188] Thus, the answers to questions relating to section 92 will only grow in importance and quantity as more banks participate in the activities allowed by section 92.

B. *Proposed Reforms*

The first method of resolving the questions surrounding section 92 is through an agency rule enforced by the Comptroller.[189] Presently, as is indicated by the Comptroller's ruling on the geographic scope of section 92 in *Ludwig*, the Comptroller has addressed questions as they are advanced by entities trying to delineate the scope of section 92. A more pro-active approach would be much more efficient than the current approach. A set of guidelines delineating the

182. 5 U.S.C. §§ 701-706 (1988).

183. Chevron U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837, 843 (1984).

184. 5 U.S.C. § 706(2)(A) (1988); National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1167 (D.D.C. 1990).

185. *Compare* American Land Title Ass'n v. Clarke, 968 F.2d 150, 157 (2d Cir. 1992) (holding Comptroller's interpretation that § 92 does not impliedly bar banks in towns of greater than 5000 people from selling insurance does not pass the *Chevron* test) *with* Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1171 (D.C. Cir. 1979) (holding Comptroller's interpretation that § 92 does not impliedly bar banks in towns of greater than 5000 people from selling insurance passes the *Chevron* test).

186. Brooks, *supra* note 10, at 18.

187. Rehm, *supra* note 10, at 11.

188. Brooks, *supra* note 10, at 18.

189. *See* 12 U.S.C. § 1 (1988) (enabling Comptroller to make rules as to scope of § 92 of the NBA).

scope of section 92, the role of section 92 as seen by the Comptroller, and guidelines as to how to operate under section 92 would give banks participating under, or considering participation under, the section a frame of reference.

While enactment of an exhaustive set of guidelines by the Comptroller would be a step in the right direction, it would only be a very small step. The guidelines would only give banks some guidance, they would not automatically carry the force of the law. Thus, as in *Ludwig*, if a group feels the Comptroller's interpretation of the section is incorrect, it may institute court action to reverse the interpretation. Different circuits could have different rulings, and the scope of authority to operate under section 92 would greatly depend on the circuit in which a bank is located.

A second approach to resolving the questions surrounding section 92 is congressional action. Action by Congress, in addition to unifying the standard applied to all national banks, would be the result of a bipartisan democratic process in which all interested parties could espouse their views. Although enactment of federal legislation will be difficult because of the polar opinions of the banking and the insurance industries, compromise legislation would allow both groups to cease their court battles and focus on satisfying consumers' needs.

Currently, it is rumored that one congressional bill designed to resolve the problems surrounding section 92 is being discussed in the Senate.[190] This bill is concerned with interstate branching for banks; it is rumored, however, Senator Dodd of Connecticut plans to attach an amendment to this bill dealing with the ability of nationally chartered banks to sell insurance products.[191] This amendment is reported to repeal section 92 and allow banks currently acting under section 92 to continue to do so.[192] In place of section 92, nationally chartered banks would have parity with state banks, and they could perform any insurance related functions authorized to be performed by state chartered banks in the state where the bank is located.[193] Finally, Senator Dodd's amendment would remove the authority of the Comptroller to declare any additional insurance powers as incidental to the business of banking under section 24(Seventh).[194]

Senator Dodd has set out a plan by which no new problems relating to the scope of section 92 and insurance powers will arise. He has not, however, proposed a resolution to the problems that currently exist in the area. What is needed is legislation that delineates the scope of authority for banks already operating under section 92. A comprehensive package would include the purpose of maintaining section 92, the scope of authority granted under section 92, and

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190. S. 371, 103d Cong., 1st Sess. § 2 (1993).

191. Robert M. Garsson, *GOP Likely to Block Branching Vote Till '94*, AM. BANKER, Nov. 17, 1993, at 1. Senator Dodd had long planned to attach this amendment to a pending bill that would allow interstate bank branching. However, due to the incompatability of the two issues, and great support to pass interstate bank branching, which would be in jeopardy with the insurance amendment, Senator Dodd agreed not to attach his amendment to this particular bill. Senator Dodd has stated he still intends to add the amendment to a forthcoming bill, but he has not stated if he has determined which bill that will be. Roderer, *supra* note 138, at 13; Robert M. Garsson, *Branching Advocates Gain as Dodd Drops Amendment*, AM. BANKER, Feb. 7, 1994, at 3.

192. Garsson, *supra* note 191, at 1.

193. *Id.*

194. *Id.*

guidelines under which banks may participate under section 92. Thus, while Senator Dodd's proposed amendment would put out the fire, it would leave the embers of controversy smoldering for those already operating under the authority of section 92.[195]

The ideal legislation in this area would simply serve to coordinate the circuits so that all nationally chartered banks have the same ability to sell insurance. This legislation should also address the proposed role of section 92 and answer questions as to the scope of, and authority granted under, section 92. This approach would give all nationally chartered banks the same ability to sell insurance products, and that authority would no longer be dependent on the circuit in which a bank is located. The best interpretation of the role of section 92 is that it provides authority to small town banks which supplements the authority granted under the incidental powers clause of section 24(Seventh).[196] Any legislative enactment designed to elucidate this area must reflect the distinction and interplay between these two sections of the NBA.

The quickest and most decisive way to resolve all problems currently surrounding the ability of nationally chartered banks to sell insurance is congressional legislation. While guidelines issued by the Comptroller would act as a source of reference for banks, they do not hold the force of law and are extremely susceptible to contradictory judicial resolutions. A comprehensive congressional bill that clearly delineates the purpose, scope, and requirements of section 92 would unify the powers of all nationally chartered banks and resolve many questions that currently have not been addressed. Until such legislation is passed, the industry is likely to be fragmented and shrouded in a cloud of uncertainty.

V. CONCLUSION

The court's ruling in *Independent Insurance Agents of America v. Ludwig*[197] greatly expanded the authority of banks to participate in the insurance industry. Rather than being limited to selling general lines of insurance in small towns, qualifying banks may simply base operations out of small towns and sell insurance to persons nationwide.[198] However, despite the banking industry's elation that all regulatory burdens have been removed and that it now has the unfettered ability to compete in the insurance field, the court in *Ludwig* did not

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195. It is predicted that S. 371 will not be passed in this congressional session because of the incompatibility of interstate branching and insurance sales by banks. Robert M. Garsson, *Vote on Curbing Insurance Power Stalled by Absence of Senators*, AM. BANKER, Nov. 19, 1993, at 2. The banking industry is arguing for interstate branching and strongly opposes Senator Dodd's insurance amendment. *Id.* Furthermore, linking interstate branching and insurance would require the House Banking Committee to share jurisdiction over the bill with its archrival, the Energy and Commerce Committee. *Id.* This possibility of shared jurisdiction is an additional factor indicating insurance regulation will not be passed so long as it is tied to the issue of interstate branching.

196. *See* Independent Bankers Ass'n v. Heimann, 613 F.2d 1164, 1171 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

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

198. *Id.* at 962.

address several questions which must be resolved before the banks have such unfettered ability.

Circuit courts have yet to agree on the scope of authority granted under section 92 and how this authority affects the authority granted under the incidental powers clause of section 24(Seventh). Viewed in concert, the two sections can be easily reconciled with one another. Section 92 should be interpreted as granting small town banks the ability to sell only general lines of insurance. This interpretation is consistent with the probable congressional intent in passing the statute and with the canons of statutory interpretation. Furthermore, this interpretation can be reconciled with the incidental powers granted banks under section 24(Seventh), which should be interpreted as granting banks the power to sell specialized lines of insurance.

Another question left unanswered by the *Ludwig* court is the role played by the population limit in section 92. Even though many banks may assume it is an ongoing obligation, as soon as a town grows larger than 5000 people and houses a bank acting under the authority of section 92, the bank, and possibly the town, will argue the population limit was meant merely as a barrier to entry. The question is a novel one, policy factors, however, support reading the obligation as an ongoing obligation.

Therefore, while banks' powers were expanded under *Ludwig*, they still have many impediments in their path to freedom in insurance sales. If these matters are left for the courts to decide, it will take many years to reach a resolution. Leaving the matter to the courts could result in fragmented and contradictory laws and rights. To resolve this quagmire of questions and contradictions, as stated by Judge Goldberg in *Variable Annuity Life Insurance Co.*, "Banks should look to Congress, not the Comptroller . . . or the courts."[199]

199. Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295, 1303 (5th Cir. 1993), *rev'd sub nom.* Nationsbank v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995).