Agent Associations Distort the Bank Insurance Issue

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BY MICHAEL D. WHITE AND KATHLEEN W. COLLINS

We have all been warned never to watch sausage or legislation being made. Having observed the agent association lobby trying to kill post-Barnett banking reform legislation, we are convinced a tour of a sausage factory would be less stomach-turning.

After complaining for months that Barnett needed to be "codified" or that the Leach Omnibus Bill and then "Leach Lite" needed insurance provisions pleasing to agent associations and, therefore, "insurance neutral," the agent association operatives invented yet another roadblock to halt and turn back bank insurance powers. They implied that banks sell insurance without being licensed by state insurance regulators. To remedy this imagined situation that doesn't exist, they concocted Section 704 and inserted it into the September 10th version of Rep. Leach's banking bill.

Thanks largely to the efforts of the FIIA and state bank trade associations (see "Highlights of the 1996 Battle in Congress over Bank Insurance Powers"), Section 704 never made it into law. But the agent associations promise it will reappear in sequel legislative efforts in Congress, and they claim they have a commitment from some top Republican leaders to pass it in the next Congress.

Beware the "Olive Branch" of Agent Associations

The agent associations are crafty adversaries. The very day they were making one last major push to get Section 704 in the BIF/SAIF bill, their lead legal litigator was addressing another bank association and charming an audience of bank insurance professionals who should know better. She claimed that "insurance agents are not trying to roll back bank insurance powers.... [I]nsurance agents and banks will work together.... [We see] great value in affiliations between small banks and agents."

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One banker who heard this siren song was lulled into commenting: "She sounded quite reasonable. I don't understand what the hub-bub about licensing is all about." Here's what the "hub-bub" is all about. The demand for federal legislation requiring national banks to acquire state insurance licenses is a red herring. National banks already are licensed by insurance departments in states where they sell insurance. The noise about licensing is a straw man designed to divert attention from the rest of the proposal's deliberately obtuse language constructed to open the door for agent groups to litigate away banks' insurance selling powers.

In the wake of the U.S. Supreme Court's unanimous decisions in VALIC and Barnett, agent associations need this kind of new legislation to allow continued protectionist litigation and subvert federal preemption. This is no secret. Following these Supreme Court decisions, agent associations publicly declared they would actively pursue legislation to roll back bank insurance powers (e.g., see National Underwriter, January 23, 1995, pages 1, 42).

Without the obscure language of its subsection (b), Section 704 is senseless, since banks selling insurance already abide by state insurance licensing laws.

National Banks that Sell Annuities and Insurance Already Have State Insurance Licenses

No national or state-chartered bank sells insurance without a state insurance license. Every FIIA bank member and every bank client of FIIA insurance company members possess the requisite state insurance licenses to sell insurance. Furthermore, the Office of the Comptroller of the Currency (OCC) in its Advisory Letter (AL 96-8) reminds national banks their agent-employees should comply with state licensing laws. And they do.

Taken in its entirety, the bank insurance industry has created tens of thousands of jobs for licensed agents who sell insurance products in state-licensed U.S. depository institutions.

Agent associations have, in fact, acknowledged that banks sell insurance with appropriate licenses. In a letter and attachment sent to Congress on April 4, 1995, the Independent Insurance Agents of America (IIAA) and six other insurance trade groups were compelled to acknowledge that "as far as we are aware, banks are currently abiding by state insurance law."

The Problem is Some State Insurance Departments Won't Grant Licenses to Banks

The ultimate irony of the agent groups' demands is that litigation over banks in insurance has involved either (1) the refusal of state insurance departments to grant banks the insurance licenses they seek, or (2) agent associations' opposition to the issuance of licenses to banks by state insurance departments. Recently recalcitrant states (most of whose cases have now been successfully litigated by the banking industry) include Connecticut, Florida, Indiana, Kentucky, Louisiana, Mississippi, Ohio and Massachusetts. These cases include Shawmut (Fleet) Bank v. Googins, Barnett Bank v. Nelson, NBD Bank v. Bennett, Stephens v. Owensboro National Bank, First Advantage Insurance v. Green, Deposit Guaranty National Bank v. Dale and Independent Insurance Agents v. Fabe, and Ohio Association of Life Underwriters v. Duryee.

In September, and since Barnett, the Massachusetts Division of Insurance and Attorney General chose to ignore the authority of the U.S. Supreme Court and denied BankBoston's insurance application. Massachusetts refuses to acknowledge that Barnett has made its anti-affiliation statute void. Like other banks that have been forced to fight state insurance departments for their insurance licenses, BankBoston is now litigating to obtain its federally granted right.

The irony of agent groups' demands is that litigation over banks in insurance has involved either refusal of insurance departments to grant banks licenses or agent associations' opposition to issuance of such licenses.

We don't need a federal law requiring national banks to get state insurance licenses. And we don't need a federal law requiring states to grant them. We already have the latter in Section 92 of the National Bank Act, upheld unanimously by the U.S. Supreme Court. We do, however, need state insurance departments that act according to the law of the land, not caprice, and grant the banks their insurance licenses.

Licensing is a Sham Issue Designed to Divert Attention from Section 704(b)'s Language

It is stretching credulity to believe that the IIAA believes that federal legislation is urgently needed to require national banks to obtain insurance licenses. It is not difficult to believe, however, that the IIAA desperately wants sub-section (b) of Section 704, innocuously titled a "Rule of Construction." This rule amended Section 24 of the National Bank Act—the so-called "powers" section of that statute. A Comptroller's interpretation of Section 24 culminated in the Supreme Court's VALIC decision, which held that national banks may sell variable and fixed-rate annuities. The "Rule of Construction" provides that "No provision of this section shall be construed as affecting the applicability or non-applicability of other Federal laws or state laws to the insurance activities of national banks."

The language in this rule is purposely vague and ambiguous relative to the applicability/nonapplicability of any laws to national bank insurance activities. Section 704(b) is designed to reinvigorate arguments which the Supreme Court rejected in Barnett and VALIC. It could be read to alter the OCC's authority to authorize additional activities "incidental" to banking and undercut the OCC's ability to assert federal statutory preemption (now firmly established by the Supreme Court in Barnett) of restrictive, anti-competitive state insurance laws. Because it is deliberately ambiguous, Section 704(b) threatens the ability of both national and state-chartered banks to sell annuities and insurance in an open and competitive marketplace.

The language of Section 704(b) provides a method to undermine key Supreme Court decisions, which banks are using to overturn state anti-affiliation laws and combat efforts—like those made in Rhode Island—to prevent or significantly interfere with a national bank's ability to sell insurance. Section 704 would permit state insurance regulators to issue blanket rules that apply to all agents and are, therefore, "non-discriminatory," but it would not prevent them from significantly interfering with the ability of

national banks to engage in insurance activities. For instance, a state could impose an across-the-board anti-affiliation statute designed to prevent all insurance agents from affiliating with bank-owned agencies. Since the affiliation ban would apply to all agents, it could be deemed "nondiscriminatory" and at the same time prevent national banks from engaging in their statutory authority to sell insurance.

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The Game Agent Associations Most Like to Play: Monopoly

When IIAA's lobbyists crafted Section 704, they were trying to reclaim their old monopoly. New and confusing federal legislation would allow them to claim that Congress had changed federal insurance law after Barnett and VALIC. Banks would have to contend with the "Rule of Construction" and its interrelationship with the McCarran-Ferguson Act instead of turning to the straightforward, recent and unanimous Supreme Court precedents. Banks would have to relitigate restrictive state law anew, which is what the agent associations want since this could extend their monopoly shelf-life in anti-affiliation states and elsewhere.

Agent associations continue to try to protect themselves from competition. They are relentless in their state-by-state efforts to curtail bank insurance powers. If you believe the agent association "spin" that they "are not trying to roll back bank insurance powers," read their formerly secret "model bill" (which FIIA first uncovered and publicized). Just examine the new Rhode Island law which is a 95 percent replica of that "model bill" and take a gander at agent association proposals in Illinois, Maine, Massachusetts, New Hampshire, New Mexico and Pennsylvania. If they can't obtain federal legislation to curtail bank insurance powers, agent associations are determined to obtain de facto national legislation by implementation of their "model bill" on a state-by-state basis.

Of course, all that Congress initially thought it was considering in Section 704 was the issue of state insurance licensing for national banks. The way agent associations positioned the subject, listeners often thought banks must be operating without insurance licenses and, therefore, violating state insurance laws. Of course, this is not true, but until FIIA explained the provision in its series of September letters to Congress, many Members did not understand the complications caused by the "Rule of Construction," and some Members still don't understand. No congressional hearings were held, and no debate occurred on the pros and cons of banks selling insurance. Yet squelching competition by eliminating or restricting bank insurance powers is at the heart of all the insurance provisions the agent associations have sought to introduce into federal legislation.

Open Minds, Open Markets

Banks have excellent records of integrity and success in bank insurance sales. Many banks have sold insurance for a century, and insurance powers have existed at the state level for years in dozens of states, including those states that grandfathered bank insurance agencies after succumbing to agent association pressure in the 1970s to change their law and adopt anti-affiliation statutes. Banks selling insurance have not generated problems of safety and soundness. In 1988 at the annual convention of the American Council for Life Insurance (ACLI), then-chairman of the FDIC, William Seidman, noted "In 8,000 banks we regulate, we have not seen one instance where banks were put at risk because of insurance activities."

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Nor does the parade of horrors advanced by the agent association lobby (e. g., coercive tying) exist. Study after study—including academic, consumer and government studies—confirms the observation of H. Robert Heller, former

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Governor of the Federal Reserve System, that ". . . there is no competitive or risk-related rationale to justify further restrictions on the conduct of insurance agency activities by banking organizations."

The battle over bank insurance powers has been a ceaseless struggle requiring constant vigilance, strength and a willingness to engage. The agent associations will continue their same arguments and tactics: corralling federal and state legislators, distorting the facts, scaring people and writing "model legislation." Look out. The "Rule of Construction," "model bills" and other amendments to legislation are just a few of their Trojan horses. Stay alert. Keep the gates closed. Don't accept any wooden horses. Defend the walls…and pass the sausage, please.

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