

IV. OCC Interpretive Ruling and Relevant Cases

A. Interpretive Ruling

Twelve C.F.R. § 7.1001 provides,

Pursuant to 12 U.S.C. 92, a national bank may act as an agent for any fire, life, or other insurance company in any place the population of which does not exceed 5,000 inhabitants. This provision is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000, even though the principal office of such bank is located in a community whose population exceeds 5,000. **NOTE:** 12 C.F.R. § 7.1001 (formerly 12 C.F.R. § 7.7100). As part of its regulation review project, the OCC recently renumbered and made nonsubstantive stylistic edits to the interpretive ruling. See 61 Fed. Reg. 4849 (1996).

The OCC interpreted the reach of section 92 more broadly in 1963 by permitting a branch office of a bank to act as agent for insurance companies if the branch was located in a community with a population of less than 5,000, even if the main office of the bank was located elsewhere. See 12 C.F.R. § 7.1001. As one court noted: “now, heavily capitalized corporations with faraway headquarters could share [section 92's] benefits, including those deriving from technological innovations undreamed of in the early years of this century.” **NOTE:** *Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993) (“*USNB Oregon*”). A challenge to the 1963 OCC ruling was rejected on the grounds of *laches*. **NOTE:** *National Ass’n. of Life Underwriters v. Clarke*, 736 F. Supp. 1162, 1165 (D.D.C. 1990), *rev’d on other grounds sub nom. Independent Ins. Agents v. Clarke*, 955 F.2d 731 (D.C. Cir.), *reh’g en banc denied*, 965 F.2d 1077 (D.C. Cir. 1992), *rev’d and remanded sub nom. United States Nat’l Bank v. Independent Ins. Agents*, 124 L. Ed. 2d 402 (U.S. 1993), *aff’d on remand, Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

B. Cases

The Supreme Court recently offered further support for construing section 92 as authority for national banks to sell insurance without being subject to unique disabilities or restrictions. **NOTE:** See *Barnett Bank of Marion County, N.A. v. Nelson*, 134 L. Ed. 2d 237 (1996) (“*Barnett*”). The Court held that section 92 pre-empts a state statute that otherwise would prevent a national bank from selling insurance in a small town. **NOTE:** See *id.* at 242.) *Barnett Bank* had bought a state-licensed insurance agency to conduct its insurance sales through a small town bank branch. The Florida State Insurance Commissioner challenged *Barnett*’s insurance activities under Florida’s anti-affiliation statute and *Barnett* brought an action for declaratory judgment claiming that section 92

pre-empted the restrictive state statute. The Court examined the language of section 92 and found that section 92 suggests “a broad, not limited permission” for national banks to act as the agent for insurance sales. **NOTE:** *Id.* at 244.)

Two Courts of Appeal have followed a fundamentally similar approach in establishing that section 92 does not place any geographic restrictions on the customers to whom a bank or branch may sell insurance pursuant to section 92. **NOTE:** See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995) (“*Bennett*”); *Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993) (“*USNB Oregon*”). Under these decisions, while the bank or branch must be “located” in the “place of 5,000,” potential or existing insurance customers may be located anywhere. **NOTE:** See *id.*)

In *Bennett*, the court held that section 92 “permits small town banks to act as insurance agents without regard to the location of customers.” **NOTE:** *Id.* at 632) NBD Bank, a large bank with operations in several states, also operated a branch in Corydon, Indiana, a place of less than 5,000 inhabitants. Relying on the OCC’s interpretive ruling that section 92 authority extends to bank branches, NBD believed the Corydon branch could sell insurance to residents throughout the state of Indiana. NBD filed an action for declaratory relief in response to the Indiana Commissioner of Insurance’s issuance of a geographically limited license restricting the bank’s insurance sales to the inhabitants of Corydon.

The Seventh Circuit considered the question of “to whom” the bank branch could sell insurance. The court reasoned that section 92 identifies insurance as a line of business that banks may engage in and, hence, the court compared the location of insurance customers to customers of other lines of business engaged in by banks. **NOTE:** See *id.* at 631. The court inquired “[w]hat of their other lines of business? May banks take deposits from persons located outside of their home bases? Make loans to residents of other cities and states? If the answer is “yes,” then the absence of any customer limitations in § 92 implies equal freedom; but if banks may do deposit-and-loan business only close to home, then the absence of a reference to customers in § 92 implies that banks are similarly confined when acting as insurance agents.” *Id.*) The court found that banks long have transacted business across state lines and local borders for other activities, such as taking deposits and making loans. **NOTE:** See *id.* The court noted that today “banks in New York join with banks in Texas to make syndicated loans secured by real estate in Alaska; banks in Illinois issue letters of credit to Portuguese corporations in order to facilitate shipments between Brazil and Japan; banks in Arizona issue credit cards to residents of Maine; the citizens of North Dakota can put their assets in trusts managed by banks in Florida and write checks on banks in Hawaii” *Id.* In determining where a bank is “located,” the court reviewed the language of 12 U.S.C. § 85 permitting a national bank to charge any rate of interest that is proper under state law where the bank is located. For purposes of section 85, the Supreme Court has held that a bank is “located” where its physical facilities are found.

See *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). Thus, explained the *Bennett* court, under *Marquette*, a Nebraska bank charging 18% interest made its loans “in” Nebraska to residents of Minnesota, which capped interest rates at 12%, even though neither the borrower nor the merchant ever visited Nebraska. See *Bennett*, 67 F.3d at 632.) On this basis, the court concluded “[i]f national banks have been able to engage in interstate transactions ever since 1864, when they were created, then transactions with customers living outside the bank’s home town are the background against which we must understand § 92.” **NOTE: See *id.* at 632. Further, the court recognized section 92’s delegation of regulatory power to the Comptroller which entitles the Comptroller to fill gaps and resolve ambiguities concerning the meaning of the statute. See *id.* Moreover, the court recognized that Congress in 1916 may not have anticipated all the questions that might come up concerning the statute. For this reason, “Congress frequently delegates power, as it did in § 92.” *Id.* The court did not reach the question of precisely “where” the “place of 5,000” bank’s or branch’s insurance agent activities must occur.)**

Similarly, the court in *USNB Oregon* upheld the Comptroller’s view that “section 92 imposes no geographic limit on the insurance market so that, as long as [the bank or branch] is located in a small town, a bank is free to solicit and serve insurance customers everywhere.” **NOTE: *USNB Oregon*, 997 F.2d at 958. The court did not address how the bank or branch should solicit and serve insurance customers and thereby did not address whether the bank or branch must conduct certain insurance agent activities in the “place of 5,000.”) The United States National Bank of Oregon (“USNB Oregon”), a subsidiary of the multi-million dollar holding company U.S. Bancorp, proposed to sell insurance under the authority of section 92 from its branch in Banks, Oregon, population 489. The Comptroller approved USNB Oregon’s plan and provided that the small town branch could sell insurance to existing and potential customers located anywhere. Trade associations filed suit arguing that the Comptroller had exceeded his statutory authority.**

The D.C. Circuit in *USNB Oregon* looked at the congressional intent behind section 92 by examining the language of the statute and the legislative history, and found “no specific congressional intent to restrict the geographic reach of the insurance sales authorized by section 92.” **NOTE: *Id.* at 961. The court reviewed the Comptroller’s interpretation under the principles of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), looking at the issue of unambiguous congressional intent and reasonable agency interpretation.) While the court recognized that the changed business environment in the modern world has led to events probably unforeseen by the 1916 drafters, the court stated “it is not our job to divine how legislators would have responded to hypotheticals.” **NOTE: *USNB Oregon*, 997 F.2d at 961. The court continued “particularly where the question is as unknowable as the reaction of 1916 legislators to a world of microchips, communication satellites, fax machines, direct mail and telephone solicitation, and all the other technologies and techniques that now enable a nationwide business to be conducted from any hamlet.” *Id.*) The court also found no basis for overturning****

the Comptroller's permissible construction of the statute. Accordingly, the court concluded that Congress expressly permitted banks in a "place of 5,000" to sell insurance and the Comptroller has found that Congress did not impose a geographic limit on the insurance business they are allowed to conduct. **NOTE: See *id.***

As stated in *Bennett*, the background against which we must understand section 92 is banks engaging in transactions with customers living outside of the bank's home town. **NOTE: See *Bennett*, 67 F.3d at 632.** So long as the bank or branch is located in the "place of 5,000," insurance customers may be outside of the "place" and, similarly, insurance-related activities with potential or existing customers may occur outside of the "place." Under the same analysis as in *Bennett*, in order for banks to make loans or encourage deposits from customers in faraway locations, bank representatives may need to travel to or conduct activities from those locations. **NOTE: 753-4n2** Likewise, to solicit and serve insurance customers everywhere, as acknowledged in *USNB Oregon*, **NOTE: *USNB Oregon*, 997 F.2d at 958.** a bank agency in the "place of 5,000" may need to engage in insurance activities occurring away from the "place." **NOTE: 753-4n1**

Bennett and *USNB Oregon* support the proposition that in a modern world of fax machines, third-party marketing strategists, and advanced telecommunications, all activities related to insurance sales do not have to be conducted from one location, or for that matter, conducted from a location physically close in proximity to the home base of the operations. **NOTE: See *Bennett*, 67 F.3d at 633 ("[u]nanticipated developments frustrate many a drafter"); *USNB Oregon*, 997 F.2d at 961 ("technological innovations undreamed of in the early years of this century").** The *USNB Oregon* decision indirectly sanctioned geographically dispersed insurance activities by upholding the Comptroller's conclusion that section 92 "did not impose a geographic limit on the insurance business [small town banks] are allowed to conduct." **NOTE: See *Barnett*, 134 L. Ed. 2d at 244.** Section 92's broad permissive language on banks' insurance agent activities, as cited in *Barnett*, also supports a flexible reading of where insurance sales activities may occur so long as the location of the bank or branch is in the "place of 5,000." **NOTE: See *Barnett*, 134 L. Ed. 2d at 244.**

In sum, the literal language of the statute, its apparent purpose, and all the highest level decided cases support the same proposition: Section 92 authorizes national bank insurance agencies located in a "place of 5,000" to solicit and sell insurance however any other insurance agent (that is not a bank or affiliated with a bank) can solicit and sell insurance. It also does not address (or restrict) supporting activities that do not constitute elements of the solicitation and sale process.