



# Texas Department of Insurance

333 Guadalupe Street P.O. Box 149104 Austin, Texas 78714-9104  
512/463-6169

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July 17, 1996

The Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

**RA-9104**

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Opinion Committee

Re: Request for opinion regarding whether 12 U.S.C. §24 Seventh, preempts portions of Texas insurance licensing laws which prevent or significantly interfere with a national bank's authority to act as agent in the sale of annuities.

Dear Attorney General Morales:

Pursuant to TEX. GOV'T CODE §402.42, the Texas Department of Insurance seeks the opinion of the Attorney General regarding whether 12 U.S.C. §24 Seventh preempts application to national banks of portions of Articles 21.07 §2(d) and 21.07-1 §4(e) and any other Texas Insurance Code licensing provisions which prevent or significantly interfere with national banks' authority to act as agent in the sale of annuities.

In Texas, annuities are regulated under the Insurance Code. They may be issued only by licensed companies and marketed only through properly licensed agents. TEX. INS. CODE, Arts. 3.01, 3.75 and 21.07-1. There is no Texas law that specifically prohibits banks from acting as agents in the sale of annuities. However, the above cited provisions effectively prohibit a bank from selling annuities by requiring that a corporate agent be organized under the Texas Business Corporation Act, the Texas Professional Corporation Act or the Texas Limited Liability Company Act and that each officer, director and shareholder of the corporation be individually licensed as an agent. Article 21.07-1 §4. The Code also prohibits payment of commissions to or acceptance of commissions by unlicensed persons or entities. Article 21.07-1 §3.

Section 24 of the National Bank Act is the federal law that details the powers of national banks. The seventh subdivision of that article, known as the "incidental powers clause", states that banks may exercise, "subject to law, all such incidental powers as shall be necessary to carry on the business of banking. . . ." The Office of the Comptroller of the Currency (OCC), which is the regulator of national banks, has determined that a bank's incidental powers include the sale of annuities and the United States Supreme Court has upheld the OCC's determination. *Nationsbank*

of *North Carolina v. Variable Annuity Life Insurance Co*, 115 S.Ct. 810 (1995) ("VALIC").<sup>1</sup> The VALIC decision did not mention the issue of preemption of state laws regulating the sale of annuities.

Both the Texas Department of Banking and this agency agree that even if Section 24 Seventh of the National Bank Act were held to preempt state laws that prevent banks from selling annuities, most of the state regulatory scheme governing the issuance and marketing of annuities would remain in force. An activity cannot escape state regulation simply because it is conducted by a national bank. The United States Supreme Court has recently reiterated the continuing role of states in insurance regulation, even when a portion of the state regulatory scheme may be preempted. In *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S.Ct. 1103 (1996), the Court ruled that Section 92 of the National Bank Act, which specifically permits national banks located and doing business in towns of under 5000 to act as insurance agents, preempts state laws which prevent such activity. The Court explained, however, that its holding does not "deprive the States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers". *Barnett*, at 1108.

The preemption message in *Barnett* is very clear and the commissioner of insurance has acted accordingly to maintain state regulatory authority consistent with the federal law powers of national banks.<sup>2</sup> This agency believes that the question of annuities sales by banks is not clear because a bank's federal law power to sell annuities is not derived from Section 92 which is the only section of the National Bank Act that the Supreme Court held preempts state law. Banks' authority to sell annuities is derived from Section 24 (which neither mentions insurance nor restricts sales to banks located in towns of under 5000). Banking regulators believe that VALIC's holding that national banks have the authority under their incidental powers to sell annuities is sufficient to preempt state law that would prevent banks from selling annuities. They base their argument on both VALIC and the Supreme Court's reasoning in *Barnett*.

This agency believes, however, that it is not clear whether Section 24 has any preemptive effect over state laws regulating the sale of annuities. Because annuities are regulated as insurance in Texas, any preemption argument must be analyzed under the McCarran-Ferguson Act, a federal statute that provides that the business of insurance will be regulated by the states and protects state insurance laws from inadvertent preemption by federal law. 15 U.S.C. §1012.

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<sup>1</sup> Under the Texas Constitution, state banks are afforded all powers of national banks. *Texas Constitution*, Article XVI, §16(c). Therefore, any power which a national bank may exercise in spite of state law to the contrary, may also be exercised by state banks.

<sup>2</sup> Following the *Barnett* decision, the Department of Insurance, after consultation with banking regulators, insurance agent and bankers' associations and consumer interests and after holding a public meeting to hear comment from all interested parties, has issued a bulletin outlining interim guidelines for the sale of insurance by banks as authorized under Section 92.

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Very recently, the Seventh Circuit Court of Appeals ruled that the Illinois Insurance Commissioner's authority to regulate the sale of annuities products is not preempted by the National Bank Act. *American Deposit Corp. and Blackfeet Nat'l Bank v. Schacht*, (No. 95-2462, 7th Cir., May 13, 1996). In that case, the court analyzed the product offered, considered the Supreme Court's holdings in *VALIC* and *Barnett* and held that, "Illinois may regulate the sale of the Retirement CD, despite the fact that selling the Retirement CD may be a practice that the National Banking Act expressly authorizes." *Schacht*, *id.*

Based on our reading of *VALIC* and in view of the 7th Circuit's reasoning in *Schacht*, we believe that strong arguments exist that while banks have the authority under the National Bank Act to sell annuities, state laws to the contrary are not preempted.

As Insurance Commissioner, I must continue to enforce all provisions the Insurance Code pertaining to the sale of annuities unless they are clearly preempted by federal law. Therefore, on behalf of the Texas Department of Insurance, I am seeking the opinion of the Attorney General in this matter. The question is solely whether Texas law that prevents or significantly interferes with a national bank's authority to sell annuity products is preempted by Section 24 Seventh of the National Bank Act.

We appreciate your prompt attention to this matter. We will be happy to provide you with a list of the many parties who have expressed their interest in this issue to the Department. Given the important nature of this issue, an expedited response is respectfully requested.

Sincerely,



ES Elton Bomer  
Commissioner of Insurance

EB/RAR/tr