RECENT CASES

BANK HOLDING COMPANIES AND "THE BUSINESS OF INSURANCE:" INTERPRETATIONS OF MCCARRAN-FERGUSON IN *Owensboro-National Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), AND *Barnett Bank v. Gallagher*, 43 F.3d 631 (11th Cir. 1995).

Over sixty years ago, Congress constructed rigid barriers in the financial services sector to separate commercial banks, investment banks, and insurance companies.[1] Now an era of deregulation is sweeping the financial services landscape, breaking down bureaucratic walls and prompting serious conflicts between commercial banks and insurance companies.[2] Federal banking regulators have thrown their weight behind the efforts of banks to enter the insurance business, sparking an insurance industry backlash.[3]

Under 12 U.S.C. § 92, national banks located in towns with a population not exceeding five thousand may participate in the insurance agency business.[4] The Office of the Comptroller of the Currency ("OCC"), the lead regulator for nationally chartered banks, has issued interpretive rulings over the past few years that expand bank insurance powers under this and other statutory provisions.[5] One interpretive ruling allows national banks meeting the requirements of section 92 to sell insurance products outside towns not exceeding five thousand inhabitants, so long as the bank selling the product is located in such a town.[6] Although the ruling's legality is in dispute,[7] the insurance industry none-

1. The McFadden Act prevented banks from branching across state lines and erected other barriers to interstate banking. *See* McFadden Act, 44 Stat. 1224 (1927) (codified in scattered sections of 12 U.S.C.). The Glass-Steagall Act, passed in 1933, separates the commercial banking and securities industries. *See* Glass-Steagall Act, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.).

2. *See* Paul Starobin, *Wired*, 27 NAT'L J. 535 (1995).

3. In 1993 Senate hearings, official representatives of the three major federal commercial bank regulators all expressed support for expanded bank insurance powers. Insurance industry lobbyists expressed considerable hostility. *See Interstate Banking and Insurance Activities of National Banks: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 480 (1993).

4. *See* 12 U.S.C. § 92 (Supp. 1993).

5. For example, the OCC recently determined that banks could sell annuity products without geographic restriction under the National Bank Act's grant of powers "incidental to the business of banking." 12 U.S.C. § 24(7) (1988). The Supreme Court upheld the OCC position in Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995).

6. *See* OCC Inter. Ltr. 366 (1986), *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 85,536.

7. *See* Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993) (holding that a small town branch of a national bank could sell insurance to customers

theless perceives the slow expansion of bank insurance powers to be a threat to its future prosperity.

Two recent circuit court cases deal with the latest standoff between banks and insurers over the scope of bank powers. In *Owensboro National Bank v. Stephens*[8] and *Barnett Bank v. Gallagher*,[9] the Sixth and Eleventh Circuits both considered the validity of state "antiaffiliation" statutes.[10] Such statutes prohibit subsidiaries or affiliates of bank holding companies from obtaining a state license to engage in insurance agency activities.[11] In *Owensboro*, the Sixth Circuit held that 12 U.S.C. § 92 preempted a Kentucky antiaffiliation statute.[12] In *Barnett Bank*, in contrast, the Eleventh Circuit found that section 2(b) of the McCarran-Ferguson Act[13] saved a similar Florida statute from federal preemption.[14]

The facts of the two cases are similar. Owensboro and Barnett Bank both are national banks owned by bank holding companies.[15] Both operated or maintained a branch in a town whose population did not exceed five thousand inhabitants.[16] When Owensboro applied for a license to act as an insurance agent, the Kentucky Insurance Commissioner denied the request and scheduled a public hearing on the matter.[17] In *Barnett Bank*, the bank purchased an insurance agency company located in the town and the Florida Insurance Commission issued an order to cease insurance agency activities against the newly acquired company.[18]

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living outside the town, even to customers living in towns with more than 5000 inhabitants); NBD Bank, N.A. v. Bennett, 874 F. Supp. 927 (S.D. Ind. 1994) (limiting national bank insurance powers to sales solely within towns not exceeding 5000 persons in which the bank maintains a branch), *rev'd*, 67 F.3d 629 (7th Cir. 1995).

8. 44 F.3d 388 (6th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3069 (U.S. July 13, 1995) (No. 95-74).

9. 43 F.3d 631 (11th Cir. 1995), *cert. granted*, 116 S. Ct. 39 (1995).

10. *See also* First Advantage Ins. v. Green, 652 So. 2d 562 (La. Ct. App. 1995) (holding that the McCarran-Ferguson Act saved an antiaffiliation statute from a preemption challenge under 12 U.S.C. § 92).

11. *See* Brian W. Smith, Diane E. Ambler & Charles M. Horn, *Annuities Ruling Boosts Business Opportunities, But Uncertainty Lingers*, 14 Banking Pol'y Rep. (Aspen) No. 8, at 1 (Apr. 17, 1995); Richard M. Whiting, *Key Issues Unresolved as Banks, Insurance Firms Keep Fighting Over Turf*, 14 Banking Pol'y Rep. (Aspen) No. 10, at 1 (May 15, 1995).

12. *See* KY. REV. STAT. ANN. § 287.030(4) (Michie/Bobbs-Merrill 1988).

13. 15 U.S.C. § 1012(b) (1988).

14. *See* FLA. STAT. ch. 626.988 (1993).

15. *See Barnett Bank*, 43 F.3d at 632; *Owensboro*, 44 F.3d at 392.

16. *See Barnett Bank*, 43 F.3d at 632; *Owensboro*, 44 F.3d at 389.

17. *See Owensboro*, 44 F.3d at 389.

18. *See Barnett Bank*, 43 F.3d at 633.

The banks each brought suit in district court, asking the court to require the commissioner to adhere to the provisions of 12 U.S.C. § 92. Owensboro succeeded in its motion for summary judgment and the commissioner appealed.[19] Barnett Bank, on the other hand, did not obtain relief from the district court, and appealed.[20] The respective circuit courts in the two cases both affirmed the lower court rulings, resulting in a circuit split.[21]

In each case, the respective court concerned itself primarily with the interpretation of the McCarran-Ferguson Act (the "Act"). Congress passed McCarran-Ferguson in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*,[22] which held that the business of insurance constituted interstate commerce. The law stated that state regulation of insurance shall remain unimpaired absent specific Congressional action to the contrary.[23] State laws with "the purpose of regulating the business of insurance" therefore cannot be preempted by conflicting federal law unless such law "specifically relates to the business of insurance."[24] McCarran-Ferguson also provided an exemption to federal antitrust law, which lasted until 1948. Even after that date, insurers could secure exemption so long as the States enacted their own bona fide regulatory schemes.[25]

The two main questions addressed in *Owensboro* and *Barnett Bank* concerned whether the antiaffiliation statutes are laws enacted "for the purpose of regulating the business of insurance" and whether 12 U.S.C. § 92 constituted an act which "specifically relates to the business of insurance."[26] The second question is easier to answer. Primarily a banking statute, 12 U.S.C. § 92 is not open to interpretation as a law specifically relating to the business of insurance. Rather, the statute, passed in 1916 to secure an extra source of revenue for small town banks,[27] is aimed at specifying one of many bank powers.

19. *See Owensboro*, 44 F.3d at 389-90.
20. *See Barnett Bank*, 43 F.3d at 633.
21. *See Barnett Bank*, 43 F.3d at 632; *Owensboro*, 44 F.3d at 389.
22. 322 U.S. 533 (1944).
23. *See* 15 U.S.C. § 1011 (1988).
24. 15 U.S.C. § 1012(b) (1988).
25. *See* 15 U.S.C. §§ 1012-1013(b) (1988).
26. 15 U.S.C. § 1012(b) (1988). Another issue presented is whether 12 U.S.C. § 92 ordinarily preempts the state law. The argument against preemption relies on interpreting 12 U.S.C. § 92 to allow banks to enter the insurance industry subject to contrary state law and regulation. As the *Owensboro* court observed, this interpretation simply is not supported by the plain meaning of the statute. *See Owensboro*, 44 F.3d at 390-91.
27. *See Owensboro*, 44 F.3d at 391.

It is not surprising that none of the judges at either the district or circuit court level in either case accepted the argument that 12 U.S.C. § 92 specifically relates to insurance. In the circuit court cases, each opinion cited the Supreme Court's decision in *United States Department of Treasury v. Fabe*,[28] which held that conflicting federal statutes must satisfy a "clear statement" rule: state laws are not preempted "unless a federal statute specifically requires otherwise."[29] Such a clear statement is not present in 12 U.S.C. § 92, which fails to evince even a shred of intent to trump state insurance licensing authority.

At the heart of the two cases is the first question: whether the antiaffiliation statutes are state laws with the purpose of regulating insurance and thus entitled to the "reverse preemption" rule of McCarran-Ferguson.[30] Unfortunately, the answer to this central question is complicated by the murky history of the Supreme Court's attempts to pin down the meaning and scope of McCarran-Ferguson.

In *SEC v. National Securities*,[31] the Securities and Exchange Commission ("SEC") sought to enjoin a merger between two insurance companies despite the fact that the State Insurance Commissioner already had granted permission to merge. Justice Marshall, writing for the majority, ruled that the SEC's authority to protect shareholders differed from the Commissioner's authority to protect policyholders and thus no preemption occurred. Nevertheless, Justice Marshall also provided a rather expansive definition of "the business of insurance" in interpreting McCarran-Ferguson. Because later cases rely on the *National Securities* definition, Justice Marshall's words merit close examination:

> Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforce-

28. 113 S. Ct. 2202 (1993).

29. *Id.* at 2211.

30. In *Owensboro*, the issue is complicated by the fact that the statute, unlike its Florida companion in *Barnett Bank*, appears in the statute book in the section pertaining to banks and trusts. The Supreme Court's position in *Fabe*, however, indicates that such matters of form are not determinative. The essential question is the "primary purpose of the statute." *Fabe*, 113 S. Ct. at 2210; *see also* SEC v. National Securities, 393 U.S. 453, 460 (1969) ("But mere matters of form need not detain us."). Because the effect of the Kentucky and Florida statutes is virtually identical, this rule indicates the need to take a consistent approach to the two laws with regard to McCarran-Ferguson.

31. 393 U.S. 453 (1969).

> ment—these were the core of "the business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.[32]

According to Justice Marshall, the "core" of the "business of insurance" is the insurer-policyholder relationship, particularly the nature, characteristics, and scope of the insurance contract. In addition, other activities "must be placed in the same class:" namely, those activities of insurance companies that relate "closely to their status as reliable insurers."[33]

In *Group Life & Health Insurance Co. v. Royal Drug Co.*[34] and *Union Labor Life Insurance Co. v. Pireno*,[35] the Court relied on *National Securities* in announcing a three prong test to determine what constitutes "the business of insurance." In *Royal Drug*, an insurer signed purchasing agreements with pharmacies. Policyholders could be reimbursed almost entirely for drugs obtained from participating pharmacies, but received only partial reimbursement for purchases from nonparticipants.[36] The Court held that the purchasing agreements did not fall within "the business of insurance" and that the federal antitrust laws applied.[37] Similarly, in *Pireno*, the Court held that an insurer's peer review committee, which advised the company as to whether particular chiropractic treatments were necessary and reasonable, also did not receive McCarran-Ferguson protection.[38]

For a business practice to qualify for the McCarran-Ferguson antitrust exemption according to the so-called "*Pireno* test," one must decide "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is part of an integral relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry."[39] Though the *Pireno* test captures those activities that Justice Marshall considered to be at "the core

32. *Id.* at 460.
33. *Id.*
34. 440 U.S. 205 (1979).
35. 458 U.S. 119 (1982).
36. *See Royal Drug*, 440 U.S. at 209.
37. *See id.* at 214.
38. *See Pireno*, 450 U.S. at 134.
39. *Id.* at 129.

of the business of insurance," it ignores those secondary activities outside the core that Justice Marshall placed "in the same class."[40] On the contrary, Justice Brennan implies in *Pireno* that the insurance contract itself is the proper source of inquiry because "[t]he transfer of risk from insured to insurer is effected by means of the contract between the two parties . . . and that transfer is complete at the time that the contract is entered."[41]

As applied to antitrust cases, the *Pireno* formulation does not necessarily create serious problems. As Justice Brennan observed, exemptions from federal antitrust laws should be construed narrowly,[42] implying that a narrow definition for the business of insurance is required. The rate setting activities that the antitrust exemption aims to protect meet even the narrow *Pireno* criteria,[43] so Congressional intent is not thwarted by the application of those criteria to insurance antitrust cases.

Yet the *Pireno* Court did not explicitly limit its holding to antitrust cases and created potential problems in the sphere of general state regulations. For example, consider a hypothetical state statute that regulates insurance companies' borrowing activities. A statute limiting an insurer's ability to borrow clearly meets the *National Securities* test: it deals precisely and directly with a company's reliability as an insurer. Yet such a statute likely would fail the three *Pireno* criteria.[44] The loan agreement between the insurer and the bank, like the purchasing agreement in *Royal Drug*, may affect the insurer's ability to pay claims. Both agreements, however, are outside the direct contractual relationship between insurer and policyholder.

In *Fabe*, the Court attempted to resolve the tension between the broad *National Securities* conception of "the business of insurance" and the narrow *Pireno* criteria by endorsing a multiclausal interpretation of McCarran-Ferguson. This approach had been advanced previously by several commentators.[45] Justice Black-

40. *National Securities*, 393 U.S. at 460.

41. *Id.* at 130.

42. *See id.* at 126 (citing Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 733 (1973)).

43. Rate setting is an integral part of the policy relationship, is limited to entities in the insurance industry, and helps define the scope of risk spread.

44. Although the bank assumes the risk of the insurer's possible bankruptcy by lending, this assumption does not have "the effect of transferring or spreading a *policyholder's* risk." *Pireno*, 451 U.S. at 129.

45. *See* Davis J. Howard, *Uncle Sam versus the Insurance Commissioners: A Multi-Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act*, 25 WILLAMETTE L. REV. 1 (1989); Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of*

mun, writing for the *Fabe* majority, contended that the plain English language meaning of section 2(b) of McCarran-Ferguson requires that one take a different interpretive approach depending on whether the case concerned antitrust questions or general regulatory concerns.[46] Clause 2 of section 2(b), which deals with federal antitrust laws, simply exempts the "business of insurance." As antitrust preemption cases, *Royal Drug* and *Pireno* gave an appropriately narrow definition to this phrase. In contrast, laws "enacted for the purpose of regulating the business of insurance" are not preempted.[47] According to Justice Blackmun, this "broad category . . . consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."[48] The latter definition, as applicable to general state insurance regulations, goes far beyond sole coverage of the insurance contract itself.

Unfortunately, Justice Blackmun's desire to parry Justice Kennedy's dissenting arguments obscured the thrust of his own argument.[49] The key to Justice Blackmun's distinction between clauses 1 and 2 is the distinction between *public action* on the one hand and *private activity* on the other. Clause 1 makes state law and the purpose of such law the proper source of inquiry. Clause 2 grants a limited antitrust exemption "to the business of insurance:" it exempts certain private actions and activities of insurance companies from antitrust scrutiny.

The public law-private activity distinction at the heart of Justice Blackmun's opinion is strongly supported by McCarran-Ferguson's legislative history. Considerable debate occurred in both the House and Senate concerning the precise scope of the anti-

1945: Reconceiving the Federal Role of Insurance Regulation, 68 N.Y.U. L. REV. 13 (1993); Robert P. Rothman, Note, *The Definition of "Business of Insurance" Under the McCarran-Ferguson Act after* Royal Drug, 80 COLUM. L. REV. 1475 (1980). *But see* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (applying *Pireno* criteria to a nonantitrust case concerning the preemptive effect of ERISA on state insurance law); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (same).

46. *See* United States Dep't of Treasury v. Fabe, 113 S. Ct. 2202, 2209-10 (1993).

47. 15 U.S.C. § 1012(b) (1988).

48. *Fabe*, 113 S. Ct. at 2210.

49. Justice Kennedy, observing that the three word phrase "business of insurance" appears three times in section 2(b), argued that interpreting the term differently in clauses 1 and 2 would violate a "basic rule of statutory construction." *Id.* at 2215 (Kennedy, J., dissenting). Justice Blackmun responded by arguing that ignoring the modifying words in clause 1 would violate another "maxim of statutory construction." *Fabe*, 113 S. Ct. at 2210. This rather unedifying spectacle of two Justices engaging in the fruitless rock, paper, scissors of so-called maxims of statutory construction distracts from Justice Blackmun's real point: that the grammatical meaning of the phrase "[a] law enacted for the purpose of regulating the business of insurance" differs from the phrase "the business of insurance."

trust exemption: the general idea was to protect rate setting arrangements that allowed companies to pool loss experience.[50] McCarran-Ferguson's main purpose, however, was to maintain a state-based system of insurance regulation, subject only to Congressional action.[51] It seems rational to provide a broader scope of protection for state laws than for the more controversial collusive activities of private insurers.[52] Indeed, this is precisely what the statute does, exempting the broad category of state laws with the "purpose of regulating the business of insurance" from general federal preemption, but protecting only the narrow "business of insurance" from federal antitrust enforcement.

Few of the above issues are raised directly by the *Barnett Bank* court, which unanimously affirmed the district court ruling that the Florida antiaffiliation statute was not preempted. The circuit court cited trial testimony that large bank involvement in local insurance markets breaks down the "arms length" relationship with customers and generates potentially deleterious "tying" arrangements to justify its determination that the antiaffiliation statute protects policyholders.[53] Explicitly relying upon *Fabe*, the *Barnett Bank* court asserted that the state statute is protected to the extent that it furthers policyholder interests; the *Pireno* factors are conspicuous in the decision by their absence.[54]

50. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979) (holding that the Act intends to protect "intraindustry" arrangements); 92 CONG. REC. 480-81 (1945) (statement of Senator Ferguson) ("[State] law relating to regulation, for instance the setting of rates, or the fixing of the terms of a contract for insurance, which might under some definitions of monopoly be monopolistic, will be permitted under the pending bill"); 92 CONG. REC. 1444 (1945) (statement of Senator O'Mahoney) ("[A] rating bureau, formerly agreement among insurance companies under the supervision and regulation of the State, would be permitted"); *see also* Macey & Miller, *supra* note 45, at 47-55 (discussing justifications for limited antitrust exemption for insurance).

51. *See* 15 U.S.C. § 1011 (1988); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946) ("Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."); *see also* Macey & Miller, *supra* note 45, at 25 (construing the Act's intention as restoring state regulatory power).

52. This conclusion also is warranted by McCarran-Ferguson's legislative history. In its original form, the Act contained a preface with flowery language concerning state rights, but the bill's actual enactment portion referred only to the antitrust exemption. *See Insurance: Hearing on S. 1362 Before a Subcomm. of the Senate Comm. on the Judiciary*, 78th Cong., 1st Sess. (1943). The addition of the general regulatory provisions occurred later. *See, e.g.*, 92 CONG. REC. 478-79 (1945) (statement of Senator Ferguson) (noting urgency of passing bill because "some insurance companies had given notice to their States that they would not pay the tax levied in those States"). Because the drafting of § 1012(b)'s two clauses occurred at different points in time in response to different concerns, it seems logical to conclude that the scope of the two clauses might differ.

53. *Barnett Bank*, 43 F.3d at 636.

54. *See id.*

Something more closely resembling judicial fireworks is packed into *Owensboro.* The majority opinion engages in a spirited defense of the *Pireno* factors against the authority of *Fabe.* Reanimating Justice Kennedy's *Fabe* dissent and fusing it uneasily with Justice Blackmun's opinion, the court stated that *Pireno* and *Fabe* can be reconciled in nonantitrust cases.[55] Whereas *Fabe* defines clause 1 of 15 U.S.C. § 1012(b), *Pireno* further defines the subphrase "business of insurance" with its three criteria. The marriage of the two definitions yields the following formula: "Thus, to have been 'enacted . . . for the purpose of regulating the business of insurance,' [the Kentucky anti-affiliation statute] must possess the aim of regulating activities that meet the *Pireno* criteria."[56]

As the *Owensboro* court stated further, antiaffiliation statutes, by prohibiting certain activities of banks, constitute "regulation of the person" rather than the *Pireno*-required "regulation of the activity."[57] Because excluding bank holding companies from obtaining insurance licenses fails to meet the *Pireno*-inspired definition of "business of insurance," a statute that promotes this activity cannot be a law with the aim of regulating the business of insurance.[58]

The disequilibrium one may encounter when reading *Owensboro* seems to have been shared by the dissent. "[R]espectfully disagree[ing]"[59] with the majority's use of *Pireno,* the dissent cites *Fabe* extensively in support of the view that the Supreme Court "explicitly distinguished the first clause of § 2(b) from the second clause."[60] Specifically, the Supreme Court intended clause 1 to apply "to a broader category of laws:"[61] statutes "enacted to protect or regulate the business of insurance."[62]

The dissent's brief primer on statutory construction is necessitated by the majority's decision not to explore fully Justice Blackmun's opinion in *Fabe.* The key to that decision was the distinction between focusing on public law in clause 1 cases and private activity in clause 2 cases. By requiring general state regu-

55. *See Owensboro,* 44 F.3d at 391-92.
56. *Id.* at 392.
57. *Id.*
58. *See id.*
59. *Owensboro,* 44 F.3d at 392 (Batchelder, J., dissenting).
60. *Id.*
61. *Id.* at 395.
62. *Id.* at 396.

latory statutes to regulate the activity, the majority implicitly dismissed *Fabe*'s contention that statutes need only have the end, intention, or aim of adjusting, managing, or controlling the business of insurance. As the dissent observed, the latter criterion can be met by statutes that regulate persons as well as those that regulate activity.[63]

Indeed, the *Owensboro* decision seems rather odd when compared to *Fabe.* In *Fabe,* the statute in question concerned the priority to be granted to persons seeking to collect funds from bankrupt insurers; a law which could be seen as more concerned with the debtor-creditor relationship than the insurer-policyholder connection.[64]

Antiaffiliation statutes, in contrast, rely upon one of the most core insurance regulatory powers, the power to license insurers.[65] If the prohibition of a certain class of persons from obtaining insurance licenses does not qualify as the regulation of the business of insurance, it is not clear what would qualify.

Moreover, the apparent purpose served by the antiaffiliation statutes is consistent with the concept of core regulatory powers. In both *Owensboro* and *Barnett Bank,* the insurance commissioners argued that the contested statutes helped defeat tying arrangements in which banks make mortgage loans conditional on the purchase of insurance.[66] Such tying arrangements, by inducing people to buy policies they ordinarily would not purchase, strongly implicates the insurer-policyholder relationship.[67] A law with the purpose of preventing such arrangements from arising

63. *See id.* ("[I]t is sufficient for the Kentucky legislature to indirectly govern the relationship between an insurance company and future policyholders by enacting a statute such as section 287 to regulate those persons the state wishes to exclude from the insurance industry").

64. Indeed, this is precisely the dissent's argument. *See* United States Dep't of Treasury v. Fabe, 113 S. Ct. 2202, 2214 (Kennedy, J., dissenting) (1993) ("[T]he majority too easily dismisses the fact that the policyholder has become a creditor and the insurer a debtor by reason of the insurance company's demise").

65. *See* Robertson v. California, 328 U.S. 440 (1946) ("It would be idle to require the licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it . . ."); 92 CONG. REC. 482 (enumerating the issuing of licenses as a regulatory power that McCarran-Ferguson intended to cover).

66. *See Barnett Bank,* 43 F.3d at 636; *Owensboro,* 44 F.3d at 397.

67. Of course, because antiaffiliation statutes typically only prohibit bank holding companies from owning or operating local insurance companies, scope remains for tying activities by purely local banks operating in the insurance business. Presumably, however, such purely local tying arrangements are easier for state regulators to police than cases involving bank holding companies where company policies and strategies are determined at distant, out-of-state headquarters.

seems to fall squarely within the *National Securities* definition of "business of insurance."[68]

This is not to say the *Owensboro* majority heedlessly misinterpreted McCarran-Ferguson. Most likely, the *Owensboro* court's contortions through the needle's eye of *Fabe* spring from a noble motive: the desire to escape the unfortunate consequences of McCarran-Ferguson. As the United States seeks to bring its financial services industry to an internationally competitive level, insurance lobbyists exploit McCarran-Ferguson's loopholes to erect a fortress of impenetrable state regulations around their commercial demesne.

The serious policy issues raised in *Owensboro* and *Barnett Bank* explain an odd phenomena in all the McCarran-Ferguson cases: the blurring of typical ideological categories. Judge Batchelder, known for strong conservative views, relied heavily upon *Fabe* and *National Securities* in her *Owensboro* dissent, citing opinions written by Justice Blackmun and Justice Marshall, respectively. In *Fabe,* Chief Justice Rehnquist and Justice O'Connor joined Justices Blackmun, White, and Stevens in the majority. Meanwhile, Justices Kennedy, Scalia, Souter, and Thomas argued in the dissent for a maximal interpretation of *Pireno,* an opinion written by Justice Brennan.

The source of confusion is apparent in *Owensboro* and *Barnett Bank.* The exercise of bank insurance powers amounts to the elimination of rather serious competitive restrictions on the provision of financial services. On the other hand, narrowing state regulatory power over insurance would result in a serious relegation of state power to federal authority.

Examined from the opposite point of view, state authority to regulate insurance by keeping big banks out of the insurance business can be seen as a necessary check on exploitative, greedy banking conglomerates. But striking down state antiaffiliation statutes through a narrow interpretation of McCarran-Ferguson would be a victory of federal power over the States.

68. *See* Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233 (2d Cir. 1975) (blocking federal antitrust action against mortgage loan insurance tying arrangements on the grounds that regulation of such arrangements fell to the State under McCarran-Ferguson). Although *Dexter* was decided before *Royal Drug,* the Court's analysis of tying as "pertain[ing] to the company-policyholder relationship" indicates that knowledge of the *Pireno* test would not have altered the decision. *Dexter,* 527 F.2d at 235. *But see* United Services Auto. Ass'n v. Muir, 792 F.2d 356, 364 (3d Cir. 1986) (holding that an antiaffiliation statute fails the *Pireno* test because "affiliation between insurers and banks has no integral connection to the relationship between insured and insurer").

However unfortunate the policy consequences, the fact remains that McCarran-Ferguson is the law of the land. Valiant judicial efforts on behalf of the challenging banks likely are doomed to fail in the face of *Fabe,* which points strongly in the opposite direction.

The eventual conclusion to the McCarran-Ferguson problem may take place in Congress. The Supreme Court has granted certiorari in *Barnett Bank.* If the Court embraces the *Barnett Bank* decision, Congress could rescue the banks by specifically preempting state antiaffiliation statutes. Though it would further the new Congress's goal of sweeping away stale, encumbering regulations, such an action would be an affront to another closely held canon of the Gingrich "revolution:" regulatory federalism. The complex problem of bank insurance powers may exist for quite a while longer.

Jason M. Koral

TILTING THE TABLE: COLLECTIVE BARGAINING AFTER *National Basketball Ass'n v. Williams,* 45 F.3d 684 (2d Cir. 1995).

Though the 1995-96 NBA season is scheduled to go on as planned, relations among the National Basketball Association (NBA), the twenty-nine teams ("Teams"), and the National Basketball Players Association ("Players") will continue to deteriorate. The Teams and Players traditionally resolve their differences at the bargaining table, but a recent decision in the United States Court of Appeals has tilted the table too far in the Teams' favor. In *National Basketball Ass'n v. Williams,*[1] the Second Circuit examined the scope of the NBA Teams' immunity from the antitrust laws while engaged in collective bargaining relations with the Players. The *Williams* court expanded upon earlier notions of the exemption and held that antitrust immunity extended beyond the Collective Bargaining Agreement's ("CBA") formal expiration date to cover NBA practices during the entire life of the collective bargaining relationship.[2] The Second Cir-

1. 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed,* 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137).

2. *See id.* at 688; *see also* Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (holding that an antitrust exemption exists during a CBA); Brown v. Professional Football, Inc., 782 F. Supp. 125 (D.D.C. 1991) (holding that the antitrust exemption ends upon expiration of the CBA), *rev'd,* 50 F.3d 1041 (D.C. Cir. 1995); Powell v. National Football League, 690 F. Supp. 812 (D. Minn. 1988) (holding that the antitrust exemption

cuit's decision followed the Eighth Circuit's *Powell v. National Football League*[3] decision, which held that federal labor policies are preeminent when the parties have entered into a collective bargaining relationship.[4] Though the *Williams* and *Powell* courts may have been correct to recognize the impracticality of limiting antitrust protection to the CBA's formal expiration date, both decisions are overbroad. *Williams* represents an ambitious interpretation of the exemption's scope and may cripple the collective bargaining process in the future.

The NBA and its twenty-nine Teams have participated in CBAs with the Players since 1967. The most recent CBA expired on June 23, 1994, one day after the last playoff game of the 1993-94 NBA season.[5] Disputes over three provisions in the expired CBA, which the Players demanded be eliminated from any new agreement, stalled negotiations for the new CBA.

The disputed provisions included the College Draft, the Right of First Refusal, and the Salary Cap. The College Draft, held after the conclusion of the NBA season, is the annual selection process by which each Team makes two selections from the fifty-four prospective Players in the College Draft, or instead uses its draft picks in trades with other Teams. The process attempts to promote team parity by permitting Teams with poor records to select through the Draft before Teams with better records. As prospective Players are selected by a specific Team, they are limited to negotiations with that Team alone; Players not chosen may negotiate with any of the Teams. Penalties exist for violations of these rules.

Another disputed provision, the Right of First Refusal,[6] permits a Team to retain a Player with less than four seasons of experience or who has not yet completed two full contracts. The Team may match any offer made by another Team, restricting the Player's mobility for the initial part of his NBA career.

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ends at impasse), *rev'd*, 930 F.2d 1293 (8th Cir. 1989) (holding that the nonstatutory exemption extends beyond formal expiration of CBA, for as long as collective bargaining relations exist), *cert. denied*, 498 U.S. 1040 (1991); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987) (holding that the nonstatutory exemption extends beyond formal expiration of CBA, pending National Labor Relations Board review).

3. 930 F.2d 1293 (8th Cir. 1989).

4. *See id.* at 1303.

5. *See Williams*, 45 F.3d at 686.

6. For a more detailed discussion of the Right of First Refusal, see National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1073 (S.D.N.Y. 1994).

Last, the Players contested the Salary Cap,[7] introduced in 1983, which is part of a complicated revenue sharing arrangement. The Salary Cap operates as a ceiling and floor on the total amount a Team may spend on its Players' salaries.

Unwilling to give up these provisions, the Teams sought a judicial declaration that continued implementation of the disputed terms would not be open to challenge as violations of federal antitrust law.[8] The Players filed counterclaims alleging that the antitrust laws applied after the formal expiration of the CBA, and that continued imposition of the disputed provisions constituted an unreasonable restraint of trade as prohibited by the Sherman Antitrust Act.[9] The Players argued that the antitrust exemption was no longer effective because the CBA had expired and negotiations had reached an impasse—the terms imposed by the NBA no longer had the consent of the Players' union.

The district court, after a one-day trial and no pretrial discovery, held that the antitrust exemption extended beyond the CBA's formal expiration. The Second Circuit affirmed the district court's position that immunity "exists as long as a collective bargaining relationship exists."[10] In support of its holding, the Second Circuit made the sweeping statement that "the Players' position . . . collides head on with the labor laws' endorsement of multiemployer collective bargaining."[11] The *Williams* court declined to determine whether the disputed provisions would pass muster if the antitrust laws applied.

The antitrust immunity involved in the instant case, known as the nonstatutory labor exemption,[12] is a judicially created doctrine that shields multiemployer bargainers, like the NBA Teams, from antitrust liability while engaged in a legitimate CBA. This doctrine evolved from the statutory labor exemption, created by the Clayton Act in 1914 and the Norris-LaGuardia Act in 1932 to protect certain labor union activities.[13] The nonstatutory exemption, established to protect potentially trade-restraining actions

7. For a more detailed discussion of the Salary Cap, see *id.*

8. *See id.* at 1069.

9. *See id.* at 1071.

10. *Id.* at 1078.

11. *Williams*, 45 F.3d at 688.

12. *See* Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (creating the nonstatutory exemption).

13. *See* Clayton Act, § 20, 38 Stat. 730, 738 (1914) (codified at 29 U.S.C. § 52 (1988)); Norris-LaGuardia Act, 47 Stat. 70-73 (1932) (codified at 29 U.S.C. §§ 104(b), 104(c), 113(b) (1988)).

by employers in the labor context was upheld in *Conell Construction Co. v. Plumbers & Steamfitters Local No. 100.*[14] The *Conell* Court held that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that *some union-employer agreements* be accorded a limited non-statutory exemption from antitrust sanctions."[15]

The central issue in *Williams* was not whether a nonstatutory labor exemption *exists* in the multiemployer-labor union context, which seems to have been the focus of the *Williams* court's inquiry, but whether and to what extent such an exemption applies *after* the formal expiration of a CBA. The Second Circuit observed, "Congress never intended that the antitrust laws prohibit multiemployer bargaining with a common union."[16] The Players, however, did not make the blanket claim that *all* multiemployer bargaining is subject to the antitrust laws. To the contrary, the Players conceded that prior to the CBA's expiration, the NBA and the Players each enjoyed antitrust immunity.[17]

The *Williams* court admitted that there was a lack of relevant legal authority on the specific issue,[18] and instead relied on the Supreme Court's *Buffalo Linen*[19] decision to find "some kind of general understanding about the legality of multiemployer bargaining."[20] One reason proffered for expanding the exemption for the Teams was to strengthen their bargaining position and allow employers to counter a union's "whipsaw" tactics.[21] However, the *Williams* court never suggested that the Players were involved in any tactic which would justify the Teams' need for expanded immunity from the antitrust laws. The *Williams* court cited several cases in which the Supreme Court held that a nonstatutory exemption from the antitrust laws exists for multiemployers in a collective bargaining agreement with a consenting labor union.[22] However, this recitation of authority did not ad-

14. 421 U.S. 616 (1975).
15. *Id.* at 622 (emphasis added).
16. *Williams*, 45 F.3d at 689.
17. *See Williams*, 857 F. Supp. at 1074; *see also* Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (holding that the antitrust exemption exists during a CBA).
18. *See Williams*, 45 F.3d at 688.
19. NLRB v. Truck Drivers Local No. 449, 353 U.S. 87, 95 (1957) ("*Buffalo Linen*").
20. *Williams*, 45 F.3d at 690.
21. *See Buffalo Linen*, 353 U.S. at 93-94 (discussing coercive union strike tactics); *see also* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 409-10 (1982) (same).
22. *See Bonanno Linen*, 454 U.S. 404; *Buffalo Linen*, 353 U.S. 87; United States v. Hutcheson, 312 U.S. 219 (1941); Anderson v. Shipowners' Ass'n, 272 U.S. 359 (1926).

dress the very practical issue which the Teams and Players faced: when, if ever, does the nonstatutory exemption end? The Second Circuit described the Players' demand to make an antitrust challenge to the Teams' practices as an attempt to declare multiemployer organizations illegal, and as contradictory to historical precedent.[23] Yet neither party disputed that the federal labor laws favor collective bargaining, and both parties agreed that some type of antitrust exemption exists for employers engaged in such bargaining. The *Williams* court seemed reluctant to recognize that neither the Supreme Court nor Congress has spoken to this precise issue, though the *Williams* district court stated that "no Supreme Court decision has addressed whether a dispute between collective bargaining parties [is] immune from antitrust liability."[24]

Although misdirected and overbroad, the Second Circuit's *Williams* decision nevertheless has expanded the scope of the nonstatutory labor exemption for the NBA, as *Powell* has done for the National Football League ("NFL"). Prior to *Williams*, federal courts followed one of three possible standards to determine the limit of antitrust immunity in the professional sports context: at the CBA's formal expiration; at bargaining impasse; or at termination of the bargaining relationship.[25] The *Williams* court employed the third standard, stating the NBA Teams have "[a]ntitrust immunity so long as a collective bargaining relationship exists."[26] Since *Williams*, the NFL owners, employing the *Williams* logic, have successfully appealed and obtained a reversal of their suit.[27]

The *Williams* decision, along with the corresponding *Powell* and *Brown* decisions, is open to criticism on several grounds. First, this general rule has overstated the scope of antitrust immunity, such that the bargaining table which has been referred to as "a level playing field," is now clearly tilted in the Teams' favor. Second, the court has removed any incentive for the NBA Teams to take a flexible negotiating position. As the district court stated, "the NBA's continued implementation of the college draft, right of first refusal and salary cap does not violate the antitrust laws as

23. *See Williams*, 45 F.3d at 689-90.
24. *Williams*, 857 F. Supp. at 1077.
25. *See* Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989); Powell v. National Football League, 690 F. Supp. 812 (D. Minn. 1988).
26. *Williams*, 857 F. Supp. 1069.
27. *See* Brown v. Professional Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995).

long as it is implemented as a part of a continuing collective bargaining relationship."[28] Third, labor unions may be reluctant to enter into CBAs in the future, for fear that what appears to be an agreement of a fixed duration may become one which only decertification can terminate. Last, although the union retains its option to strike as a method of bargaining for better terms, its position is weaker now than before because it may not resort to the treble damage remedy available under antitrust law. It is reasonable to assert that disputes between parties to a CBA should be resolved by the federal labor law apparatus, but the National Labor Relations Act (NLRA) does not trump antitrust law altogether, nor does it carry with it the threat of treble damages.

Williams dictates that even after the CBA has expired and bargaining impasse has been reached, antitrust immunity continues in tandem with the bargaining "relationship." Under *Williams*, the NBA may continue to impose restraints on Player mobility and salary without challenge even after the CBA expires and negotiations fail. Once a labor union consents to a collective bargaining agreement, it is held hostage by the agreement's terms unless and until the union decertifies. The *Powell* dissent argued that the rule established in *Powell*, and later in *Williams*, would discourage collective bargaining, and "the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights."[29] An implied requirement that labor unions decertify to bring antitrust challenges trivializes the decertification process, and threatens to transform it into a mere formality. In addition, the prospect of union decertification itself creates greater tensions within the Players' union's ranks.[30] The *Williams* court's sweeping standard of antitrust immunity seems likely to subvert the entire collective bargaining process.

However, the *Williams* and *Powell* courts were correct in rejecting the respective Players' argument that immunity from the antitrust laws automatically ended with the formal expiration of the CBA. Such a result clearly would be inconsistent with

28. *Williams*, 857 F. Supp. at 1079.

29. *See Powell*, 930 F.2d at 1306 (Heaney, J., dissenting).

30. This tension was exemplified by the recent failed attempt to decertify the Players' union (National Basketball Players Association). Though many of the Players wished to decertify to bring antitrust claims against the NBA and its Teams, the requisite number of Players could not agree on this course of action.

Supreme Court precedent, because the Teams are required, after the CBA expires, to bargain in good faith, and maintain the status quo until impasse is reached.[31] Clearly, Congress did not intend to subject employers to antitrust liability for fulfilling their obligations under labor law.[32]

Practical considerations also militate against such an interpretation. Prior to impasse, the Teams must bargain over mandatory provisions and are barred from implementing a lock out or other post-impasse negotiating tool. Thus the Teams would face an undesirable situation if their exemption from antitrust liability ended with the CBA. If the College Draft and other disputed provisions could be construed as restraints on the labor market, hence antitrust violations, the NBA Teams might be forced to capitulate to Player demands to escape treble damage liability.

Though it is clear why the CBA expiration was rejected as the limit of antitrust immunity, it is unclear why the *Williams* court rejected the "impasse standard" advocated by the *Powell* district court. The impasse standard presents a compromise position between those advocated by the parties. Although the determination of the end of the antitrust exemption for multiemployers seems arbitrary, it has important ramifications for the complex workings of antitrust and labor laws, as well as for collective bargaining.

Both the *Williams* district court and the Second Circuit agreed that the parties ought to pursue dispute resolution through collective bargaining, the "time honored manner of labor dispute resolution."[33] However, both courts failed to recognize that the rule they espoused would impair the collective bargaining process. The *Williams* and *Powell* courts stated that the loser at the bargaining table should not be allowed to invoke the threat of the antitrust laws to obtain better terms.[34] This rationale ignores the very real threat of litigation in many negotiating scenarios. Here, the expectations of the parties entering the CBA is that fixing a duration for the agreement means that the agreement and its terms will terminate on a predetermined date. This new rule has changed those expectations midstream, removing a critical incentive for the Teams to modify their position.

31. *See* National Labor Relations Bd. v. Katz, 369 U.S. 736, 742-43 (1962).
32. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987).
33. *Williams*, 857 F. Supp. at 1079; *see also Williams*, 45 F.3d at 691 (expressing the same sentiment).
34. *See id.* at 1071.

The possibility of eventual exposure to antitrust laws traditionally has been one of the bargaining tools that the Players bring to the table. When parties bargain, each side makes concessions in some terms in exchange for other favorable terms. The Teams benefit from the antitrust exemption when they enter a CBA with the Players, thus this exemption is like consideration which the Players offer in the hopes of obtaining favorable terms for themselves. Presently, however, by entering a CBA the Players forfeit any future antitrust challenges. As the *Powell* dissent stated, "it was not the union that failed to win a concession, but the employer who gained victory in the first instance by obtaining the antitrust exemption through union consent."[35]

The NBA Teams, like the NFL Teams following the *Powell* ruling, have been granted virtually unlimited immunity from any antitrust review of the provisions contained in their most recent CBAs. This may result in the Teams' inflexibility at the bargaining table and reluctance to surrender provisions not challengeable under antitrust law, barring union decertification. Chief Judge Lay and Judge McMillian dissented from the denial of a rehearing en banc in *Powell*:

> [T]he panel majority reasons that, notwithstanding impasse, as long as the restraint was at one time contained within a terminated agreement it retains immunity as the "product" of collective bargaining. Surely this cannot be the law. If the exemption does not end at impasse, when does it end? The majority's view does not accommodate labor policy, it instead offers an employer's Shangri-la of everlasting immunity from the antitrust laws.[36]

With lowered prospects of altering a CBA even after it expires, labor unions may be reluctant to enter them at all, fearing a *Williams*, *Powell*, or *Brown* result. The *Brown* dissent stated that the broad nonstatutory labor exemption "creates new incentives, none of them helpful to the bargaining process."[37] In particular, the dissent noted the creation of "[n]ew incentives for employees not to engage in collective bargaining . . . run[ning] directly con-

35. Powell v. National Football League, 930 F.2d 1293, 1310 (Lay, C.J., dissenting from denial of rehearing en banc).

36. *Id.* at 1309.

37. Brown v. Professional Football, Inc., 50 F.3d 1041, 1065 (D.C. Cir. 1995) (Wald, J., dissenting).

trary to the overarching purpose of the labor laws to encourage bona fide collective bargaining."[38]

Union decertifications may now be compelled by the rule set forth in both *Williams* and *Powell*, to allow the Players to challenge the restraints imposed by the Teams. In *Brown*, the D.C. Circuit, citing *Williams* and *Powell*, reversed the lower court's decision, granting the NFL Teams immunity from antitrust laws "as long as the collective bargaining relationship exists."[39] The *Brown* court stated that the Players, as part of a union, cannot avail themselves of the antitrust laws: "[i]f employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions."[40] The courts practically are encouraging union decertification, a result which is likely to facilitate further thwarting of the labor laws and the collective bargaining process.

The fears addressed here, and supported by the *Powell* dissent,[41] which predict unwelcome effects from the expansive rule promulgated by these courts, may already be destroying labor unions and the collective bargaining process. Following the *Powell* decision, the NFL Players petitioned to decertify their union. In a similar move, a group of NBA Players made an unsuccessful attempt to decertify the National Basketball Players Association soon after the *Williams* holding. This expansive rule, which purported to support the "time honored" tradition of collective bargaining, instead has had the perverse effects of causing many Players either to forego or attempt to forego union protection altogether, and of breaking down the relations between the Players and professional sports leagues in the United States.

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38. *Id.* at 1065.
39. *Brown*, 50 F.3d at 1057.
40. *Id.*
41. Powell v. National Football League, 930 F.2d 1293, 1307 (8th Cir. 1989).