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DISTRICT COURT  
DISTRICT OF MASS

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

MASSACHUSETTS BANKERS )  
ASSOCIATION, INC.; BANKNORTH, )  
NATIONAL ASSOCIATION; CAPE COD )  
BANK AND TRUST COMPANY, )  
NATIONAL ASSOCIATION; CITIZENS- )  
UNION SAVINGS BANK; EASTERN )  
BANK; FIRST FEDERAL SAVINGS )  
BANK OF AMERICA; THE SAVINGS )  
BANK; STONEHAM SAVINGS BANK; )  
and WORONOCO SAVINGS BANK, )

Plaintiffs, )

v. )

JULIANNE M. BOWLER, in her official )  
capacity as Commissioner of Insurance of )  
the Commonwealth of Massachusetts; )  
STEVEN L. ANTONAKES, in his official )  
capacity as Commissioner of Banks of the )  
Commonwealth of Massachusetts, )

Defendants. )

CIVIL ACTION  
No. 03-CV-11522-RWZ

**AMICUS CURIAE MEMORANDUM OF THE  
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS  
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT ON COUNT I OF THE AMENDED COMPLAINT**

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March 11, 2004

## INTRODUCTION

Pursuant to Local Rule 7.1(b)(3), the National Association of Insurance Commissioners (NAIC) submits this Memorandum in support of defendants, the Commissioner of Insurance and the Commissioner of Banks of the Commonwealth of Massachusetts, and urges the Court to grant summary judgment on Count I of the Amended Complaint.

The complaint seeks a declaratory judgment and injunction to prevent the application of certain state consumer protection laws to national banks, federal savings associations and Massachusetts-chartered depository institutions. The complaint relies on a March 18, 2002 letter to the Massachusetts Bankers Association (Preemption Letter),<sup>1</sup> in which the OCC opined that federal law preempted three provisions of the Massachusetts Consumer Protection Act Relative to the Sale of Insurance by Banks and corresponding regulations.<sup>2</sup>

The practical effect of the declaratory judgment sought would reach beyond the issue of whether certain provisions of Massachusetts law survive a preemption challenge under federal law. The Preemption Letter, as well as an earlier OCC preemption opinion relative to West Virginia law,<sup>3</sup> serves notice to every other state that its laws may be preempted—in contravention of the plain language of the federal statute upon which preemption is purportedly based. Weakening the standard for preemption of state law threatens the ability of state regulators and legislators to protect insurance consumers. Because of the implication of

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<sup>1</sup> Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency (“OCC”), to Kevin F. Kiley, Executive Vice President, Massachusetts Bankers Association, Inc. (Mar. 18, 2002).

<sup>2</sup> See Mass. Gen. Laws ch. 167F, §§ 2A, 2A(b)(4)(ii), 2A(b)(4)(iii) (1998); Mass. Regs. Code tit. 211, §§ 142.05(3), 142.06 (1998).

<sup>3</sup> Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, to Sandra Murphy, Esq. on behalf of West Virginia Bankers Association (Sept. 24, 2001).

preemption to consumers, regulators, insurers and national banks, it is in the public's interest to affirm the Congressional standard for preemption as written.

### **INTEREST OF AMICUS CURIAE**

The NAIC is comprised of the chief insurance regulators in the 50 states, the District of Columbia, and four United States territories. Each member is committed to the protection of insurance consumers within his or her jurisdiction. The NAIC acts to support regulators in achieving fundamental objectives relating to insurance regulation, of which consumer protection is paramount. The NAIC's interest in this litigation concerns the standard applied by this Court in determining whether certain provisions of Massachusetts law are preempted. The NAIC believes that endorsement of the OCC's low threshold for preemption of state insurance laws would set a dangerous precedent and contravene the intent of Congress in enacting § 104(d)(2)(A)<sup>4</sup> of the Gramm-Leach-Bliley Act (GLBA).<sup>5</sup> Because of the potential for erosion of state insurance regulators' power to protect insurance consumers, the NAIC supports the defendants' Motion for Summary Judgment before this Court.

As detailed below, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997) ensures that the business of insurance is regulated by the states, unless Congress specifically provides otherwise. While GLBA removed previously existing barriers among the businesses of insurance, banking, and securities, it also provided that current regulatory structures are largely preserved. A fundamental principle of GLBA is "functional regulation," under which all insurance activities are regulated by state insurance commissioners whether carried out by

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<sup>4</sup> 15 U.S.C. § 6701(d)(2)(A) (Supp. 2001). For familiarity of reference, when referring to a section of the Gramm-Leach-Bliley Act (GLBA), this Brief refers to sections of GLBA by their section numbers within that legislation as opposed to where codified within the United States Code.

insurers or banks. Specifically regarding insurance regulation, GLBA reinforced the applicability of the McCarran-Ferguson Act subject to certain preemption rules, one of which is at issue presently.

Section 104(d)(2)(A) of GLBA addresses state laws relating to insurance sales, solicitation and cross-marketing activities by national banks and provides for the preemption of these laws in limited circumstances. The NAIC has a vested interest in the meaning that courts assign to the GLBA § 104(d)(2)(A) preemption standard because it relates directly to the regulatory power of state insurance officials. This interest is heightened when a federal agency espouses a flawed legal standard for preemption in an opinion letter.

Further, as stated previously, the OCC issued an earlier preemption letter concerning provisions of West Virginia law governing bank insurance sales activities.<sup>6</sup> The OCC's letters and the resulting litigation could develop a preemption record that could have great impact on state insurance regulation. The NAIC has an interest in arresting this emerging pattern.<sup>7</sup> By advancing a preemption threshold lower than what Congress intended, the plaintiffs threaten state insurance regulators' authority pursuant to state statute as well as the plain meaning of § 104(d)(2)(A). To maintain the statutory presumption of state insurance regulation, the NAIC supports the defendants in urging the Court to grant summary judgment in their favor on Count I.

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<sup>5</sup> Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

<sup>6</sup> The West Virginia opinion letter was the subject of litigation in the United States Court of Appeals for the Fourth Circuit. The NAIC notes that it filed a substantially similar amicus brief in support of plaintiffs in that case. In an unpublished decision without a majority opinion, a Fourth Circuit panel dismissed the petitions of the State of West Virginia and the Independent Insurance Agents of America under GLBA section 304. Cline v. Hawke, No. 02-2100 (4th Cir. Nov. 19, 2002), 2002 WL 31557392, cert. denied sub nom., Independent Ins. Agents and Brokers of America v. Hawke, 124 S.Ct. 63 (May 6, 2003).

<sup>7</sup> The NAIC is aware of at least two additional preemption requests concerning Puerto Rico and Rhode Island law.

## ARGUMENT

The plaintiffs rely on the OCC's Preemption Letter, which erroneously interprets § 104(d)(2)(A) of GLBA to call for the preemption of the state laws in question with regard to insurance sales, solicitation, and cross-marketing activities by national banks. In § 104(d)(2)(A) of GLBA, Congress codified the landmark "prevent or significantly interfere" standard articulated by the Supreme Court's decision in Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 33 (1996). If accepted by this Court, the standard that the plaintiffs advance would undermine the functional regulation framework that Congress established in GLBA and set a dangerous precedent under which state laws could be preempted in a manner wholly unintended by Congress.

### **I. GLBA ESTABLISHED A FRAMEWORK OF FUNCTIONAL REGULATION OF FINANCIAL SERVICES ACTIVITIES, UNDER WHICH STATES CONTINUE TO REGULATE THE BUSINESS OF INSURANCE**

To appreciate the extent to which the OCC's construction of the preemption standard contravenes Congressional intent underlying GLBA, it is important to understand the regulatory framework that GLBA endorsed. The central regulatory principle set forth in GLBA is "functional regulation." In short, functional regulation means that bank regulators will regulate banking activities, securities regulators will regulate securities-related activities, and insurance regulators will regulate insurance activities. Section 301<sup>8</sup> states that "[t]he insurance activities of any person (*including a national bank . . .*) shall be functionally regulated by the States, subject to section 104" (emphasis added). Section 104,<sup>9</sup> "Operation of State Law," establishes a strong

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<sup>8</sup> 15 U.S.C. § 6711 (Supp. 2001).

<sup>9</sup> 15 U.S.C. § 6701 (Supp. 2001).

presumption in favor of state insurance regulation, both in its structure and its content. Specifically, § 104(a)<sup>10</sup> re-affirms the principles of the McCarran-Ferguson Act by stating that McCarran-Ferguson “remains the law of the United States.”

The McCarran-Ferguson Act provides for state-based regulation of insurance activities. First, “Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” 15 U.S.C. § 1011 (1997). Further, “[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.” 15 U.S.C. § 1012(a) (1997).

The NAIC believes that, in enacting GLBA, Congress intended to preserve strong state-based regulatory structures. When it enacted GLBA, Congress expressly preserved the state regulation of the business of insurance. In fact, § 104(a) explicitly reiterates the McCarran-Ferguson Act’s grant of authority to the states to regulate insurance in the absence of specific Congressional direction to the contrary. Thus, the landscape surrounding GLBA provisions relating to preemption of state laws is Congress’ manifest intent that states regulate insurance activities, regardless of who conducts the business of insurance.

**II. THE RULE ESTABLISHED BY CONGRESS CONCERNING PREEMPTION OF STATE LAWS RELATING TO INSURANCE SALES, SOLICITATION, AND CROSS-MARKETING ACTIVITIES BY NATIONAL BANKS IS “PREVENT OR SIGNIFICANTLY INTERFERE.”**

- A. In enacting GLBA, Congress codified “prevent or significantly interfere” as the preemption standard.**

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<sup>10</sup> 15 U.S.C. § 6701(a) (Supp. 2001).

Courts examine the preemptive effect of state law upon national bank activities using ordinary preemption principles, under which a court's "sole task is to ascertain the intent of Congress" with respect to preemption. California Fed. Sav. & Loan v. Guerra, 479 U.S. 272, 280 (1987). That intent is clear in this case. In GLBA, Congress codified an explicit preemption standard derived from the Supreme Court's decision in Barnett Bank, and explained exactly what that standard meant in plain language. Consistent with the language of Barnett Bank, Congress set the preemption standard with respect to certain state laws at "prevent or significantly interfere." Section 104(d)(2)(A) states:

In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

Where Congress codifies a standard, courts must respect the unambiguous statutory language. In interpreting statutes, courts "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Further, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Id. Section 104(d)(2)(A) reveals Congress' intent to codify the Barnett Bank standard. In the absence of an ambiguity, the preemption standard is established in the statutory language without looking any further than the words "prevent or significantly interfere."

The reference to the Barnett Bank decision in GLBA reinforces, rather than alters, the plain language of "prevent or significantly interfere." To the contrary, the OCC interprets the Barnett Bank reference to alter the plain language of the "prevent or significantly interfere"

preemption standard Congress declared.<sup>11</sup> The structure of § 104(d)(2)(A) establishes that the reference to Barnett Bank does not weaken this preemption standard.

The dominant portion of § 104(d)(2)(A) is the clause stating that “no State may . . . prevent or significantly interfere with” a national bank’s ability to engage in any insurance sales, solicitation, or cross-marketing activities. The “in accordance with” phrase at the beginning of § 104(d)(2)(A) is descriptive of and subordinate to this principal clause. The “prevent or significantly interfere” clause sets the standard, and the subordinate phrase demonstrates Congress’ intent to attribute the standard to the Barnett Bank decision, which first applied the “prevent or significantly interfere” standard as applied to insurance regulation. Barnett Bank should not be read to ignore its most significant result.

Based on the Preemption Letter, the plaintiffs would invert the proper reading of the § 104(d)(2)(A) preemption rule, making the “prevent or significantly interfere” clause subordinate to the “in accordance with” phrase. Apparently the OCC reads Barnett Bank for the proposition that state laws are preempted where they “stand as an obstacle” to the achievement of Congress’ objectives.<sup>12</sup> It is true that any form of regulation is an obstacle; however, the Preemption Letter’s attempt to substitute “stand as an obstacle” for the statutory standard disregards Congress’ express intent. By referencing Barnett Bank in § 104(d)(2)(A), Congress declares its legislative intent to codify the words “prevent or significantly interfere” as well as its interpretation that Barnett Bank stands for “prevent or significantly interfere.”

To the extent that there could be any ambiguity concerning “prevent or significantly interfere,” Congress settles the matter. By referring to the decision that originated this

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<sup>11</sup> See Preemption Letter at 8.

<sup>12</sup> Preemption Letter at 5-6.

preemption standard, Congress indicates not only its understanding of what Barnett Bank signifies, but, more importantly, its intent as to the standard governing the preemption of state laws about insurance sales, solicitation, and cross-marketing activities of national banks. When faced with cases applying the Supremacy Clause to GLBA issues, courts properly maintain Congress' expressed intent by enforcing the "prevent or significantly interfere" standard.

**B. The "prevent or significantly interfere" standard is consistent with "the standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank."**

**1. The Barnett Bank standard directs courts to determine the intent of Congress with respect to the preemption of state laws in GLBA, which establishes a strong presumption in favor of state law under the "prevent or significantly interfere" test.**

Barnett Bank, like all Supremacy Clause cases, seeks to resolve only one issue. "This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." Barnett Bank, 517 U.S. at 30 (citations omitted). In Barnett Bank, this was a fairly laborious task, because the federal statute in question, the National Bank Act, does not specifically address how to resolve a perceived conflict between the statute and a state law. Instead, it merely "suggests a broad, not a limited, permission" to sell insurance. Id. at 32.

The question in the present case is thus whether Congress intended "to set aside the laws of a State." Id. at 30. In Barnett Bank, the federal statute lacked specific guidance for courts about Congress' preemptive intent. By contrast, in enacting GLBA (specifically § 104(d)(2)(A)), Congress made explicit the degree to which it "intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State." Id. Unlike the National Bank Act analysis in Barnett Bank, where statutory vagueness necessitated a full and thorough

judicial interpretation of Congress' preemptive intent, GLBA resolves this issue with a simple standard: Does the state law in question "prevent or significantly interfere" with the ability of a national bank to engage in the enumerated insurance activities?

The Preemption Letter seeks to recast the standard through a misapplication of Barnett Bank's reference to the case of Hines v. Davidowitz, 312 U.S. 52, 67 (1941), which asked whether state law may stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>13</sup> The Hines "stand as an obstacle" test should not be used by the courts as a means of diluting the "prevent or significantly interfere" preemption rule established by GLBA. Rather, the Hines formula is simply a restatement of a court's mission in applying the Supremacy Clause—to evaluate Congress' intent with respect to preemption.

Lacking explicit statutory guidance in the National Bank Act about Congress' preemptive intent, the Barnett Bank Court construed that intent and found the state law in question to be an "obstacle" to Congress' purposes and objectives regarding preemption. Unlike the National Bank Act in Barnett Bank, Congress spelled out its "full purposes and objectives" regarding preemption in § 104(d)(2)(A) and other sections of GLBA. These purposes and objectives include: the explicit reaffirmation of the McCarran-Ferguson Act, which establishes state supremacy in insurance regulation; the codification of the concept of "functional regulation" of the financial services marketplace; and, to effectuate this regime, a strong presumption of the validity of state regulation under the "prevent or significantly interfere" preemption standard.

Thus, the "preemption standards set forth in . . . Barnett Bank" required by § 104(d)(2)(A) become clear. Based on its advocating the "stand as an obstacle" test, the only "purpose and objective" the Preemption Letter appears to validate is the right of banks to sell

insurance. As shown when Barnett Bank and GLBA are read in harmony, the relevant test is not whether state law “stands as an obstacle” to the bank’s ability to sell insurance; rather, it is whether the state law “stands as an obstacle” to Congress’ intent with respect to preemption or preservation of state law. This intent is explicitly expressed in GLBA—state regulation prevails unless it is so burdensome that it “prevents or significantly interferes” with a bank’s ability to sell insurance.

Congress understood Barnett Bank to have established a “prevent or significantly interfere” standard, and it explicitly codified this standard, thus giving clarity to Supremacy Clause analyses in cases that had been otherwise unclear in National Bank Act cases before Barnett Bank. Understood in this context, Barnett Bank’s discussion of Hines should not be viewed as a tool for abrogating the plain language of GLBA.

**2. “Prevent or significantly interfere” is the singular rule of Barnett Bank.**

In advancing Hines as the preemption standard from Barnett Bank, the Preemption Letter would discard “prevent or significantly interfere” out of § 104(d)(2)(A). The statutory standard, however, is plainly “prevent or significantly interfere.” In Barnett Bank, the Supreme Court reviewed the development of preemption law under the National Bank Act and articulated one standard. The key portion of Barnett Bank plainly establishes this standard as a high bar for preemption:

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to *forbid, or to impair significantly*, the exercise of a power that Congress explicitly granted. To say this is not to deprive 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.

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<sup>13</sup> See Barnett Bank, 517 U.S. at 31; Preemption Letter at 5 (citations omitted).

Barnett Bank, 517 U.S. at 33 (emphasis added, citations omitted).

In this passage, the Supreme Court uses almost exact synonyms in stating the preemption standard two times in this passage: “forbid, or to impair significantly” and “prevent or significantly interfere.” These phrases distinctly craft the basis of a high preemption standard. Each contains a word that means complete proscription of an activity; and each contains an alternative phrase in which a word meaning “impede” is modified by “significantly.” This repetition emphasizes the magnitude of the standard.

Nevertheless, the OCC posits that Barnett Bank “shows that the analysis cannot be encapsulated by any one phrase.” Preemption Letter at 7-8. To the contrary, encapsulating a preemption standard in one phrase is exactly what Congress accomplished in § 104(d)(2)(A). Ignoring the intent underlying the “prevent or significantly interfere” standard is contrary to the heart of the paragraph excerpted above. The Supreme Court, speaking in sweeping terms about what the previous cases signified, articulated the “prevent or significantly interfere” standard. That the Court would accept a case for review and would clarify a disputed area of the law by establishing a simple, clear standard is, of course, a key function of a court of final jurisdiction.

**3. “Prevent or significantly interfere” was widely understood to be the rule in Barnett Bank before Congress definitively codified this standard in GLBA.**

A review of the language used in preemption cases before and after Barnett Bank makes clear that Barnett Bank was not just another case, nor was “prevent or significantly interfere” just another formulation of the preemption standard. The lower courts recognized that Barnett Bank was a seminal case. *See, e.g., Valley Nat’l Bank v. Lavecchia*, 59 F. Supp. 2d 432, 436 (D.N.J. 1999) (“The Barnett court held that Section 92 is not subject to limitation by a state statute that would prevent or significantly interfere with the national bank’s exercise of its powers.”); New

York Bankers Ass'n, Inc. v. Levin, 999 F. Supp. 716, 718 (W.D.N.Y. 1998) (“The [Barnett Bank] Court held that although a State may regulate national banks doing business within a State’s jurisdiction, a state may not ‘prevent or significantly interfere with the national bank’s exercise of its [federally conferred] powers.’”).

Furthermore, a review of the scholarly literature also shows that “prevent or significantly interfere” was commonly understood to be the rule established in Barnett Bank. *See, e.g.*, Jeffrey H. Thomas, Barnett Bank Brings the Business of Insurance to the Attention of Congress, 20 U. Ark. Little Rock L.J. 129, 140 (1997) (“Accordingly, national banks may sell insurance pursuant to Section 92 subject to Comptroller regulation and state regulation as long as the state regulation ‘does not prevent or significantly interfere with the national bank’s exercise of its powers.’” (footnote omitted)); Linda Birkin Tigges, Functional Regulation of Bank Insurance Activities: The Time Has Come, 2 N.C. Banking Inst. 455, 466 (1998) (“The OCC acknowledges that the Court in Barnett indicated that their decision did not ‘deprive [s]tates of the power to regulate national banks where . . . doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.’” (footnote omitted)).

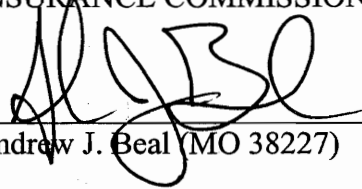
Thus, when Congress established that the preemption standard would be “prevent or significantly interfere,” it was consistent for it to add the words “[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank” as further illustration of the standard. Because the standard of Barnett Bank was commonly understood to be “prevent or significantly interfere,” the “in accordance with” language was used to refer to a widely recognized standard.

**CONCLUSION**

For the foregoing reasons, the court should grant the defendants' Motion for Summary Judgment and affirm the "prevent or significantly interfere" standard Congress established in GLBA.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
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**CERTIFICATE OF SERVICE**

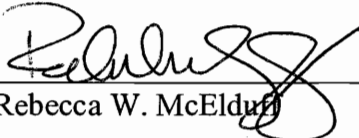
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular U.S. mail this 11th day of March, 2004.

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