The CFPB and the Business of Insurance: An Analysis of the Scope of CFPB's Authority Over Insurance Sales

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I. Introduction

In 2014, the Bureau of Consumer Financial Protection (CFPB) issued an enforcement order against a bank and its service provider for allegedly misleading sales of insurance.[1] That order was based on the CFPB's power to prohibit unfair, deceptive, or abusive acts or practices (UDAAP). This article argues that, contrary to the CFPB's position in that case, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)[2] restricts the CFPB's authority over the marketing and sale of insurance by banks[3] and insurance companies. The article also argues that CFPB's UDAAP authority should not be read to reach the sale of optional insurance products, which are not required in order for a consumer to obtain a financial product or service, by a bank or service provider. Finally, it concludes that the McCarran Ferguson Act[4] should prevent the CFPB from superseding any state laws or regulations governing insurance activities.

This article is divided into five parts. Part II. provides an overview. Part III. explains the general statutory restrictions on the CFPB's authority over the business of insurance and persons regulated by a state insurance regulator. Part IV. identifies the exceptions to those restrictions. Part V.

1. *See infra* this text Part V,

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

3. The analysis in this article with respect to banks applies equally to banks and non-banks supervised by the CFPB. Moreover, the Dodd-Frank Act's UDAAP provisions apply to financial institutions not subject to the CFPB's jurisdiction, including banks under $10 billion in assets, but are enforced by other regulators that may not have powers related to the business of insurance.

4. 15 U.S.C. §§ 1011 *et seq.* (2014).

presents arguments against application of the CFPB's authority to insurance marketing and sales by banks and their service providers, including insurance companies.[5] Part VI. is a conclusion.

II. Overview

The Dodd-Frank Act places two general restrictions on the CFPB's authority over the business of insurance. The Dodd-Frank Act excludes the business of insurance from the list of financial products and services subject to the CFPB's jurisdiction and it prohibits the CFPB from enforcing the provisions of the Dodd-Frank Act against any person regulated by a state insurance regulator.

There are, however, five statutory exceptions to these restrictions that grant the CFPB some authority over the business of insurance and persons regulated by a state insurance regulator. Those exceptions are as follows:

- The provision of a financial product or service. The CFPB may enforce compliance with federal consumer financial laws whenever a bank or an insurance company offers a financial product or service that is within the jurisdiction of the CFPB, such as credit or financial advisory services;

- an enumerated consumer law. The CFPB has the power to enforce enumerated consumer laws that specifically relate to the business of insurance, such as the federal Real Estate Settlement Procedures Act (RESPA) or the Truth in Lending Act, whether the activity is conducted by a bank or an insurance company;

- knowing or reckless violations of UDAAP. The CFPB may bring an enforcement action against an insurance company that knowingly or recklessly provides substantial assistance to a bank in connection with a financial product or service (as opposed to an insurance product or service) in violation of the UDAAP provision enacted as part of the Dodd-Frank Act;

- information requests. The CFPB may demand information from an insurance company in connection with the exercise of its rulemaking, investigative, subpoena, and hearing powers; and

- services of a service provider. The CFPB may bring an enforcement action against an insurance company that provides a material service to a bank in connection with a financial product or service (as opposed to an insurance product or service) offered by that bank if the service is offered in a manner that violates a federal consumer financial law, including UDAAP.

The CFPB's authority over service providers also could be interpreted to give the CFPB authority over insurance marketing and sales by an insurance company when the sale occurs in connection with a financial product or service offered by a bank. In fact, as noted below at Part V., in a recent enforcement action the CFPB appears to have concluded that its UDAAP powers reached the marketing and sale of GAP insurance offered in connection with vehicle loans by a service provider to a bank.

Regardless of that action, a good case can be made that the CFPB lacks authority over the marketing and sale of insurance products by a bank or service provider, including an insurance company, in most circumstances. This case is based on: (1) the definition of the business of insurance in the Dodd-Frank Act and federal court cases that have interpreted the business of insurance to include insurance marketing and sales activities (and therefore place the activities outside the jurisdiction of the CFPB); (2) federal court cases and Federal Reserve Board interpretations which require more than an incidental connection between the sale of optional insurance and the provision of a financial product or service in order for such sales to trigger the "in connection with" requirement associated with the CFPB's powers over service providers and the exercise of its UDAAP powers; and (3) the McCarran Ferguson Act's preservation of state supremacy in the regulation of insurance activities.

III. Statutory Restrictions on CFPB's Authority Over Insurance

A. The Business of Insurance is Expressly Excluded from the List of Financial Products and Services that are Within the Jurisdiction of the CFPB

The Dodd-Frank Act gives the CFPB power to regulate the offering and provision of consumer financial products or services.[6] For purposes of this authority, the term financial products or services is defined to include traditional financial activities and services, such as lending, leasing, and deposit taking.[7] The business of insurance, however, is expressly excluded from the list of financial products and services that are within the jurisdiction of the CFPB.[8]

5. For purposes of this article, the term "insurance companies" means insurance underwriters, brokers, and agencies, including agencies owned by or affiliated with a bank.

6. 12 U.S.C. § 5491(a) (2014).

7. The Dodd-Frank Act authorizes the CFPB to define, by regulation, "other" products or services to be "financial products or services" if those products or services are designed to evade compliance with federal consumer financial law or the product or service is permissible for a bank or a financial holding company and has, or likely will have, a material impact on consumers. *See* 12 U.S.C. § 5481(15)(A)(xi) (2014). Such "other" financial products and services could include insurance products and services because banks and financial holding companies may engage in certain insurance activities. For example, national banks have long been able to offer credit insurance and many state banks may sell insurance, and financial holding companies are authorized to underwrite or sell insurance. *See* 12 U.S.C. § 1843(k)(4)(B). However, the Dodd-Frank Act prohibits the CFPB from using its rule-writing authority to alter the definition of financial products and services to include the "business of insurance." *See* 12 U.S.C. § 5517(m) (2014).

8. 12 U.S.C. §§ 5481(15)(C)(i) & 5517(m) (2014).

The business of insurance is defined in the Dodd-Frank Act to mean:

> the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.[9]

This definition explicitly covers insurance underwriting activities. It also may reasonably be interpreted to include insurance marketing and sales activities. That argument is presented below at Part V.

B. The CFPB is Prohibited from Exercising Enforcement Authority Over a Person Regulated by a State Insurance Regulator

The Dodd-Frank Act also prohibits the CFPB from bringing enforcement actions against individuals and entities regulated by state insurance regulators. The Dodd-Frank Act states that the CFPB shall have no authority to exercise any power to enforce [the consumer protection provisions of the Dodd-Frank Act] with respect to a person regulated by a State insurance regulator.[10] For purposes of this prohibition, the Dodd-Frank Act defines a person regulated by a State insurance regulator to be any person that is engaged in the business of insurance and subject to regulation by any State insurance regulator, but only to the extent such person acts in such capacity.[11] A person is defined to include both individuals and entities.[12]

This prohibition, paired with an interpretation that the business of insurance includes sales and marketing activities, places most insurance activities beyond the jurisdiction of the CFPB. In other words, the CFPB lacks any authority over insurance underwriting and sales activities that occur without any connection to a financial product or service. Insurance sales activities that occur in connection with the provision of a financial product or service are separately addressed in Part IV. of this article.

IV. The Instances in Which CFPB May Exercise Some Authority Over the Business of Insurance and Persons Regulated by a State Insurance Regulator

While the Dodd-Frank Act generally bars the CFPB from exercising any authority over the business of insurance and persons regulated by a state insurance regulator, there are some exceptions. Those exceptions are described below.

A. The Offering of a Financial Product or Service that is Within the Jurisdiction of the CFPB

The Dodd-Frank Act gives the CFPB authority over companies engaged in the business of insurance to the extent such companies are engaged in the offering or provision of a consumer financial product or service.[13] As a result, the restrictions on the CFPB's authority over persons regulated by a state insurance regulator do not prevent the CFPB from enforcing compliance with federal consumer financial laws when such a person offers a financial product or service that is within the jurisdiction of the CFPB.

An example of an activity that would fall into this category is debt protection contract administration. Debt protection contracts are treated as part of an extension of credit and, as a result, are considered a financial product or service under the Dodd-Frank Act.[14] Therefore, a state-regulated insurer administering a debt protection contract on behalf of a bank, as is often the case, would be within the authority of the CFPB but only with respect to its debt protection contract administration activities. The insurer's other activities that constitute the business of insurance would be beyond the CFPB's authority.

Another example of an activity that would fall into this category is the provision of financial advice by a financial advisor that is a licensed insurance agent. Certain financial advisory services are defined as financial products and services under the Dodd-Frank Act.[15] Therefore, if an insurance agency is offering such services, those services would be subject to the CFPB's authority.[16] The insurance agency's other activities that constitute the business of insurance would be beyond the CFPB's authority.

A final example of an activity that would fall into this category is the provision of a loan by a life insurance company to a life insurance policyholder. Since lending is a financial product or service under the Dodd-Frank Act,[17] the provision of a loan by a life insurance company would be subject to the CFPB's authority, but other activities that constitute the business of insurance would be beyond the CFPB's authority.

B. Enforcement of Enumerated Consumer Laws

Even when a person regulated by a state insurance regulator is only engaging

9. 12 U.S.C. § 5481(3).

10. 12 U.S.C. § 5517(f)(1) (2014).

11. 12 U.S.C. § 5481(22).

12. *Id.* § 5481(19).

13. 12 U.S.C. § 5517(f)(2). However, the Dodd-Frank Act specifically prohibits the CFPB from exercising "any authorities that are granted a State insurance authority" under certain privacy provisions of the Gramm-Leach-Bliley Act (GLBA) against a person regulated by a state insurance regulator, even if the person is offering a consumer financial product or service. 12 U.S.C. § 5517(f)(3). The cited provisions of the GLBA give state insurance authorities the sole enforcement power related to privacy and disclosure of nonpublic personal information laws and regulations. 15 U.S.C. § 6805(a)(6) (2014). Therefore, the CFPB does not have any authority over persons regulated by a state insurance regulator with respect to privacy and the disclosure of nonpublic personal information, even if the persons are offering consumer financial products or services.

14. 12 U.S.C. § 5481(15)(A)(i).

15. *Id.* § 5481(15)(A)(viii).

16. Note that the CFPB's authority over financial advisory services does not extend to advice related to securities provided by a person subject to regulation by the SEC or a state securities regulator. *See* 12 U.S.C. § 5481(15)(A)(viii).

17. *Id.* § 5481(15)(A)(i).

in activities that constitute the business of insurance, the Dodd-Frank Act gives the CFPB authority to enforce any enumerated consumer law or any law for which regulatory authority was transferred to the CFPB.[18] Therefore, if a bank or insurance company is subject to a particular enumerated consumer law, the CFPB has the authority to enforce that law against the company even though the company may be excepted from the CFPB's jurisdiction as a person regulated by a state insurance regulator and even though the activity may be within the business of insurance.

Some enumerated consumer laws, such as the Real Estate Settlement Procedures Act (RESPA), have provisions that relate to the business of insurance and apply to banks, non-bank lenders and loan originators, and insurance companies. Those laws continue to apply despite the general restrictions on the CFPB's authority over persons regulated by a state insurance regulator and the business of insurance. RESPA, for example, prohibits any person from giving or receiving a fee or kickback as part of a real estate settlement, and the CFPB has brought multiple civil actions against insurance companies for violating this provision of RESPA.[19] Another example is lender-placed insurance, which is the subject of regulations issued by the CFPB pursuant to its authority under RESPA.[20]

Another enumerated consumer law that grants the CFPB limited authority over insurance marketing and sales activities is the Truth in Lending Act (TILA).[21] TILA mandates the disclosure of the terms and cost of consumer credit, including the cost of credit insurance that is sold along with a consumer loan.[22] Thus, even though credit insurance is regulated by state insurance authorities, its sale is subject to TILA disclosure requirements mandated and enforced by the CFPB.

C. Knowingly or Recklessly Providing Substantial Assistance in a UDAAP Violation

The Dodd-Frank Act makes it unlawful for any person to knowingly or recklessly provide substantial assistance to a covered person or a service provider in violation of the UDAAP provisions in the Dodd-Frank Act.[23] A covered person is a bank or nonbank subject to supervision by the CFPB, and, as discussed further below, a service provider is any entity that provides a material service to a covered person in connection with the provision of a financial product or service.[24] The Dodd-Frank Act further states that: "notwithstanding any provision of this title, the provider of such substantial assistance shall be deemed to be in violation of [the UDAAP provisions of the Dodd-Frank Act] to the same extent as the person to whom such assistance is provided."[25]

These provisions give the CFPB enforcement authority over individuals and entities that may not otherwise be subject to the jurisdiction of the agency, if such individuals or entities knowingly or recklessly assist in a UDAAP violation. CFPB may use this authority to reach an insurance company that provides knowing or reckless support to a covered person or a service provider in violation of the UDAAP provisions of the Act. However, as discussed in Part V. below, this authority may be interpreted to apply to an insurance company only to the extent that the company provides non-insurance services to a covered person or service provider.

D. Information Requests

The Dodd-Frank Act gives the CFPB the authority to request information from a person regulated by a state insurance regulator in connection with its rulemaking, investigative, subpoena, and hearing powers.[26] The CFPB also has entered memorandums of understanding with the National Association of Attorneys General[27] and the Conference of State Bank Supervisors[28] that contemplate the sharing of information and coordination of supervisory and enforcement activities. Thus, the CFPB could use its broad investigative and subpoena powers over insurance companies to gather information, analyze it, and share it with state attorneys general and bank supervisors (which, in some states, are also insurance regulators).

E. Violations of Federal Consumer Financial Laws, Including UDAAP, Committed by Service Providers

The Dodd-Frank Act grants the CFPB supervisory and enforcement authority over an insurance company that acts as a service provider to a bank.[29] The Dodd-Frank Act defines a service provider as "any person that provides a material service to a [bank] in connection with the offering or provision by such covered person of a consumer financial product or service."[30]

This authority clearly allows the CFPB to examine or bring an enforcement action against an insurance company that is providing a material *non-insurance* service

18. 12 U.S.C. § 5517(f)(2). *See also* 12 U.S.C. § 5481(12) (identifying 18 enumerated consumer laws).

19. *See* CFPB v. Republic Mortgage Insurance Company, Case No. 1:13-cv-24146 (U.S.D.C., S. D. Fla. Nov. 15, 2013); CFPB v. Genworth Mortgage Insurance Corporation, Case No. 1:13-cv-21183 (S.D. Fla. Apr. 5, 2013); CFPB v. Mortgage Guaranty Insurance Corporation, Case No. 1:13-cv-21187 (S.D. Fla. Apr. 5, 2013); CFPB v. Radian Guaranty Inc., Case No. 1:13-cv-21188 (S.D. Fla. Apr. 9, 2013); CFPB v. United Guaranty Corporation, Case No. 1:13-cv-21189 (S.D. Fla. Apr. 5, 2013); and CFPB v Borders & Borders, PLC; *et al*, Case No. 3:13-cv-01047 (U.S.D.C., W.D. KY, Oct. 24, 2013).

20. 12 C.F.R. § 1024.37 (2014).

21. 15 U.S.C. §§ 1601 *et seq.*

22. 15 U.S.C. § 1605(b).

23. 12 U.S.C. § 5536(a)(3) (2014).

24. 12 U.S.C. §§ 5481(6) & (26).

25. 12 U.S.C. § 5536(a)(3).

26. 12 U.S.C. § 5517(n)(2) (2014).

27. *Available at* http://www.csbs.org/regulatory/Cooperative-Agreements/Documents/CFPB%20CSBS%20MOU.pdf.

28. *Available at* http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-and-national-association-of-attorneys-general-presidential-initiative-working-group-release-joint-statement-of-principles/.

29. 12 U.S.C. §§ 5514(e), 5515(d), & 5516(e); 12 U.S.C. § 5517(n).

30. 12 U.S.C. § 5481(26) (this includes persons that participate "in designing, operating, or maintaining [a] consumer financial product or service.").

to a bank in connection with the offering of a financial product or service. Thus, for example, if an insurance company provides material assistance to a bank in the provision of a debt protection product, the insurance company could be examined by the CFPB for compliance with the same federal consumer financial laws as the bank, including UDAAP, and could be subject to an enforcement action should a violation of law occur because the debt protection product is a financial product or service and not within the business of insurance. Likewise, if an insurance company assists a bank in the provision of financial advisory services, that insurance company will be held to the same legal compliance standards as the bank with respect to those services and could be held accountable for any violations.

The Dodd-Frank Act also may be read to give the CFPB authority over an insurance company that provides a *material insurance* service to a bank in connection with the offering of a financial product or service. That reading, however, depends upon interpretations of the scope of the business of insurance and activities that occur in connection with the provision of a financial product or service that are inconsistent with the Dodd-Frank Act and judicial and regulatory interpretations of those terms. That argument is presented below at Part V.

V. CFPB's Questionable Authority Over Insurance Sales Activities

A. CFPB Enforcement Action

CFPB's authority may be read to reach any marketing activity conducted in connection with the provision of a financial product or service, even if the activity's purpose is to sell an insurance product. Indeed, last year the CFPB issued an enforcement action against a bank and its service provider for allegedly deceptive sales of GAP insurance by the bank's service provider.[31]

However, contrary to the CFPB's position in that case, the Dodd-Frank Act's restriction on the CFPB's authority over the business of insurance reasonably may be read to preclude the CFPB from exercising any authority, beyond the exceptions noted above at Part IV., over insurance marketing and sales activities by banks and insurance companies as service providers. This argument is based upon the definition of the business of insurance that appears in the Dodd-Frank Act and interpretations of that term by federal courts.

The argument also applies to the exercise of the CFPB's UDAAP authority over insurance marketing, and the sales and service provider authority over insurance companies, both of which require as a prerequisite that the wrongful activity be conducted "in connection with" the provision of a financial product or service. Based upon interpretations of that term by federal courts and regulators, the marketing and sale of optional insurance products by banks and service providers should not be considered to be "in connection with" an underlying financial product or service.

B. The Business of Insurance Includes Sales Activities

As noted above, the Dodd-Frank Act defines the term "business of insurance" to include: (1) the underwriting and reinsuring of risks; (2) acts necessary to such writing or reinsuring of risks that are conducted by an insurance company; and (3) activities relating to the writing of insurance or the reinsuring of risk conducted by an insurance company.[32] This definition may be interpreted to include insurance sales and marketing activities.

The sale of insurance is an activity that is both necessary to and related to underwriting. Something is necessary if it is essential or indispensable.[33] An insurance policy cannot transfer risk from the insured to an insurance company unless it is sold to the insured, so the sale of insurance is necessary to the transfer of the risk. Something is related to another thing if there is some connection between the two things.[34] The marketing and sale of insurance is related to underwriting because it establishes the link between an underwriter and a policyholder. Moreover, the statutory definition of the business of insurance in the Dodd-Frank Act specifically includes acts conducted by agents of an insurance underwriter, which typically include licensable insurance sales, solicitation and negotiation activities.

Even if there is some ambiguity in the scope of the Dodd-Frank Act's definition of the business of insurance, judicial interpretations of the term support the inclusion of insurance marketing and sales within the meaning of the term.

The term "business of insurance" appears in the McCarran Ferguson Act,[35] and, since the passage of the McCarran Ferguson Act in 1945, federal courts have had several occasions to address whether insurance sales and marketing activities are part of the business of insurance.[36] Most of these cases undercut the CFPB's assertion of authority over insurance sales practices.

In 1958, the Supreme Court held that advertising material used by an insurance company was part of the business of insurance subject to state regulation under the McCarran Ferguson Act.[37] In a 1969 case regarding the interplay of the McCarran Ferguson Act and federal securities laws, the Supreme Court, in dicta, stated that the selling and advertising of policies is part of the business of insurance.[38]

31. *In the Matter of* Dealers' Financial Services, LLC, No. 2013-CFPB-0004, June 25, 2013, *available at* http://files.consumerfinance.gov/f/201306_cfpb_consent-order-004.pdf.

32. 12 U.S.C. § 5481(3).

33. Webster's New World Dictionary (1994).

34. *Id.*

35. 15 U.S.C. §§ 1011 *et seq.* (2014). The McCarran Ferguson Act was passed to preserve state authority over the business of insurance and to give companies engaged in the business of insurance certain exemptions from federal antitrust laws.

36. Bragdon v. Abbott, 524 U.S. 624, 645 (1998) (When "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its…judicial interpretations as well.").

37. FTC v. National Casualty Co., 357 U.S. 560 (1958).

38. 393 U.S. 453 (1969).

In the early 1980s, the Supreme Court issued two further opinions on the meaning of the term "business of insurance." In the *Pireno*[39] and *Royal*[40] cases, the Supreme Court said that, for purposes of the anti-trust exemption in the McCarran Ferguson Act:

> Three criteria [are] relevant in determining whether a particular practice is part of the business of insurance: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself.[41]

Following the decisions in the *Pireno* and *Royal* cases, some commentators concluded that advertising and sales activities are not part of the business of insurance.[42] However, a significant number of recent cases across multiple federal circuits have found marketing and advertising activities to be within the definition of the business of insurance. A 1989 case from the United States Court of Appeals for the First Circuit found that the exemption offered to state-regulated insurance activities by the McCarran-Ferguson Act would be thin indeed if it were deemed to cover the content of policies, but not the marketing and pricing activities which necessarily accompany these policies.[43] A 1995 case from the Fourth Circuit held that the:

> marketing and performance of insurance policies undoubtedly falls within the business of insurance as that phrase was understood in Pireno and Royal Drug. How the terms of a policy are represented, and how they are ultimately performed, affect the spreading of risk, is integral to the policy relationship between insurer and insured, and is unique to the insurance industry.[44]

In 1998, the United States Court of Appeals for the Third Circuit held that:

> whatever the precise contours of the insurance business phrase may be, there is nothing more basically insurance than the sale of an insurance contract and the insurer's unique approach in trading, advertising, or valuing that product. We need not delve into a sophisticated three part analysis under Royal Drug or Pireno to reach this conclusion, but instead look to the defendants' conduct to ascertain whether it centers around the contract of insurance and the relationship between insurer and insured.[45]

Citing an earlier Second Circuit decision, the United States Court of Appeals for the Eleventh Circuit held in 2004 that an insurance company's methods of inducing people to become policyholders pertain to the company-policy holder relationship and thus constitute an integral part of "the business of insurance."[46] And, most recently, in 2010, the Third Circuit, reviewing its previous cases, held that authorizing agents to solicit individual or group policies was an activity that pertained either to risk-spreading or to the contract between the insurer and insured, and thus was part of the business of insurance.[47]

In sum, if insurance marketing and sales activities are part of the business of insurance, those activities fall outside the scope of the CFPB's authority, even if such activities are conducted by a bank or service provider.

C. Most Sales of Insurance by Banks Will Not Meet the in Connection with Requirement

1. Introduction

The CFPB's authority over service providers and to prohibit UDAAP both require as a prerequisite that some action take place in connection with the offering or provision of a consumer financial product or service. Some may read these authorities to reach any marketing activities, regardless of whether the CFPB has jurisdiction over the product itself. Under this interpretation, which ignores the business of insurance exception described above, it does not matter that an insurance marketing or sales activity is part of the business of insurance; rather, it is the manner in which an insurance marketing or sales activity is conducted in connection with a financial product or service that triggers the CFPB's UDAAP and service provider powers. In other words, all that matters is that the activity occur in connection with a transaction with a consumer for a consumer financial product or service.

Like the phrase "the business of insurance," the phrase "in connection with" has some history that can help illuminate its meaning in the Dodd-Frank Act. The phrase appears in federal securities laws and regulations, and, as a result, has been the subject of numerous judicial opinions. The phrase also appears in the Truth in Lending Act, which has been interpreted by the Federal Reserve Board. Those opinions and interpretations, while not

39. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

40. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979).

41. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

42. *See* T. Richard Kennedy, *The McCarran Act: A Limited "Business of Insurance" Antitrust Exemption Made Ever Narrower -- Three Recent Decisions*, 18 Forum 528 (1983) (stating that "insurance advertising is an activity that certainly does not involve underwriting or spreading of risk which *Royal Drug* postulates is an indispensable characteristic of insurance.").

43. Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1108 (1st Cir. R.I. 1989).

44. Ambrose v. Blue Cross & Blue Shield, 891 F. Supp. 1153, 1162 (E.D. Va. 1995).

45. Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 191 (3d Cir. Pa. 1998).

46. Gilchrist v. State Farm Mut. Auto. Ins. Co., 390 F.3d 1327, 1334 (11th Cir. Fla. 2004), citing Dexter v. Equitable Life Assur. Soc. of United States, 527 F.2d 233, 235 (2d Cir. 1975).

47. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 355 (N.J. 2010).

necessarily controlling, are instructive when interpreting the Dodd-Frank Act.

2. Securities Laws and Regulations

Section 10(b) of the Securities Act of 1933 states that it is:

> unlawful for any person, directly or indirectly, by the use of any means to use or employ, in connection with the purchase or sale of any security any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.[48]

Pursuant to this statutory authority, Securities and Exchange Commission (SEC) Rule 10b-5 provides that it is unlawful for any person, directly or indirectly to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[49]

The Securities Litigation Uniform Standards Act of 1998 (SLUSA) also provides that: "[n]o covered class action based on state law and alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security may be maintained in any State or Federal court by any private party.[50]

In cases involving both the Securities Act of 1933 and SLUSA, the U.S. Supreme Court has interpreted "in connection with" to mean that the alleged fraud or misrepresentation (the wrongdoing) must have coincided with the securities transaction.[51] Several federal circuit courts have subsequently elaborated on these Supreme Court opinions. The United States Court of Appeals for the Sixth Circuit has said that the securities sales must depend upon the wrongdoing;[52] the United States Court of Appeals for the Seventh Circuit has said that the securities transaction must be related to the wrongdoing;[53] the United States Court of Appeals for the Eleventh Circuit has said that the securities transaction must be induced by or dependent upon the alleged wrongdoing;[54] the United States Court of Appeals for the Ninth Circuit has said that the securities transaction must be more than tangentially related to the wrongdoing;[55] the United States Court of Appeals for the Second Circuit has said that the securities transaction should necessarily involve or rest upon the wrongdoing[56] and that "some causal connection between the [wrongdoing] and the purchase or sale of a security [must exist,] such that the plaintiff must have suffered an injury as a result of deceptive practices touching the purchase or sale of securities,"[57] and finally the United States Court of Appeals for the Fifth Circuit recently expressed support for the interpretations provided by the Second, Ninth, and Eleventh Circuits.[58]

These cases are factually distinct from most insurance sales transactions conducted by banks. In these cases, the alleged wrongdoing occurred prior to the securities transaction and thus affected its outcome (for example, a decision to buy, hold, or sell a security). Insurance, on the other hand, is often made available by banks to purchasers or holders of a financial product or service as an optional, complementary financial product.[59]

Banks can offer insurance to their customers directly, to the extent they are licensed insurance agencies and employ licensed agents, or by making referrals to an affiliated or non-affiliated third party agency through a joint-marketing arrangement. The marketing of insurance can occur at the time a financial product or service is being purchased, or at any time thereafter. Sometimes the insurance offered is related to the underlying financial product or service, such as homeowners insurance offered to a consumer that has a residential mortgage. Sometimes, the offering is unrelated to the financial product or service, such as life insurance offered to checking account holders. Except in limited cases where insurance is required as a condition of a loan, the consumer's decision to purchase the insurance is independent of the decision to purchase or hold a financial product or service. In fact, many consumers decline to purchase the insurance if it is not a condition of the loan.

3. Truth in Lending Act

The Truth in Lending Act (TILA) mandates disclosure of the finance charge, in an attempt to identify the complete cost of consumer credit, without regard to charges that are payable in a comparable cash transaction.[60] But TILA treats certain insurance products differently: it requires premiums for credit insurance, and certain other property insurance that is written in connection with a consumer credit transaction, to be included in the finance charge.

48. 15 U.S.C. § 78j(b) (2014) (emphasis added).

49. 17 C.F.R. § 240.10b-5 (2014) (emphasis added).

50. 15 U.S.C. § 78bb(f)(1)(A) (emphasis added).

51. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shadi Dabit, 547 U.S.71, 85 (2006) and Securities and Exchange Commission v. Charles Zandford, 535 U.S. 813 (2002).

52. Siepel v. Bank of Am., N.A., 526 F.3d 1122 (8th Cir. 2008).

53. Gavin v. AT&T Corp., 464 F3d 634 (7th Cir. 2006).

54. Instituto de Prevision Militar v. Merrill Lynch, 546 F. 3d 1340 (11th Cir. 2008).

55. Madden v. Cowen & Co., 576 F. 3d 957 (9th Cir. 2009).

56. Romano v. Kazacos, 609 F. 3d 512 (2nd Cir. 2010).

57. Gubitosi v. Zegeye, 28 F. Supp.2d 298, 303 - 304 (E.D. Pa. 1998).

58. Roland v. Green, 675 F.3d 503 (5th Cir. 2012).

59. The Gramm-Leach-Bliley Act permits financial holding companies to conduct activities that are "financial in nature," which includes "acting as principal, agent, or broker" for the purposes of insuring, guaranteeing, or indemnifying against harm, damage, illness, disability or death, or providing annuities. 12 U.S.C. § 1843(k)(4)(A) (2014).

60. 15 U.S.C. §§ 1601 *et seq.* (2014). *See also* Regulation Z, 12 CFR § 1026.4(a) (2014) ("The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.").

However, TILA excludes credit insurance premiums from the finance charge if the coverage is not a factor in the approval by the creditor of the extension of credit and that fact is disclosed in writing.[61] It also excludes property insurance premiums from the finance charge if the lender discloses that the consumer can purchase the insurance from a provider of his or her choice.[62] Key to the statutory exclusion of insurance premiums from the finance charge for the underlying credit, in both cases, is that the consumer not be required to purchase the insurance (either generally or from a specific company) to obtain the credit. Regulations issued by the Federal Reserve Board recognize that voluntarily purchased insurance products are typically treated differently than products that are required in order to obtain credit.[63]

Under previous iterations of the Federal Reserve Board's Regulation Z, charges for credit insurance were deemed not to be finance charges if the consumer requested coverage after an open-end credit account was opened or after a closed-end credit transaction was consummated because the coverage was deemed not to be written in connection with the credit transaction.[64] However, in 2009 the Federal Reserve Board modified Regulation Z to implement a broader interpretation of what is written "in connection with" a credit transaction and required creditors to provide disclosures, and obtain evidence of consent, on sales of credit insurance during the life of an open-end account.[65] While this change expressed an attempt to expand the scope of transactions to which Regulation Z and TILA applies, the Federal Reserve Board preserved the vital distinction between optional and required products and the impact that distinction has on the true cost of credit in other circumstances.

Thus, if the securities cases and Federal Reserve Board interpretations are a proper guide to the meaning of the phrase "in connection with," all optional insurance sales by banks[66] will not meet that standard because the sales have no impact on the underlying financial product or service being offered or provided by the bank. An insurance offering is further removed from an underlying financial product or service when it is offered after a consumer has decided to purchase the financial product or service. As a result, the CFPB should not assert its authority over optional sales of insurance by a bank or by a service provider as being in connection with a transaction for a financial product or service.

D. Application of the McCarran-Ferguson Act

While the judicial cases discussed above provide insight into how a court might interpret the CFPB's authority over insurance sales by banks and their service providers, the CFPB also is bound by the McCarran Ferguson Act, which states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act specifically relates to the business of insurance."[67] Since all states have laws and regulations governing the sale of insurance by insurance companies, which include banks and their service providers, the CFPB's regulatory and enforcement powers could only supersede those laws if the Dodd-Frank Act specifically relates to the business of insurance.

Clearly, that is not the case. The Dodd-Frank Act's only mention of insurance with respect to the CFPB is to place general limitations on the agency's authority over the business of insurance and activities regulated by a state insurance regulator, subject to certain specific exceptions noted above at Part IV. Therefore, Congress did not intend for Title X of the Dodd-Frank Act to be construed in a way that would invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.

If the CFPB were to issue its own interpretation of its statutory authority over service providers, its interpretation would normally be entitled to deference from the courts.[68] In such a case, however, the McCarran Ferguson Act would likely bar the CFPB from reaching insurance sales by banks and service providers because its authorities do not specifically relate to the business of insurance.

VI. Conclusion

The Dodd-Frank Act generally restricts the CFPB's authority over the business of insurance and persons

61. 15 U.S.C. § 1605(b)(1). The consumer must also consent to purchase the product in writing after receiving a cost disclosure.

62. 15 U.S.C. § 1605(c). The consumer must also be provided a written disclosure of the price if the insurance is purchased through the creditor.

63. The Federal Reserve Board noted in the preamble to an amendment to Regulation Z, which implements TILA, that although it "does not interpret Regulation Z to automatically exclude all 'voluntary' charges from the finance charge…[as] a practical matter, most voluntary fees are excluded from the finance charge under the separate exclusion for charges that are payable in a comparable cash transaction, such as fees for optional maintenance agreements or fees paid to process motor vehicle registrations." 61 Fed. Reg. 49237, 49239 (Sept. 19, 1996). The Official Staff Interpretations further clarify that credit insurance "must be voluntary in order for the premium or charges to be excluded from the finance charge….If the insurance….is required, the premiums must be included in the finance charge, whether the insurance…is purchased from the creditor or from a third party. [And finally, that if] the premium for [other] insurance is not imposed by the creditor as an incident to or a condition of credit" it is not required to be included as part of the finance charge. 12 CFR § 226, Supp I., P 226.4(d) (2014).

64. 74 Fed. Reg. 5244, 5255 - 5256 (Jan. 29, 2009).

65. *Id*. This expansion of Regulation Z does not appear to be consistent with provisions in TILA that permit exclusion from the finance charge if "coverage of the debtor by the insurance is *not a factor in the approval by the creditor of the extension of credit,*" since the sale of credit insurance to the holder of an existing open-end credit account would have occurred *after* approval of the extension of credit and could not have been a "factor in the approval." *See* 15 U.S.C. § 1605(b)(1) (emphasis added.).

66. An insurance product is optional when it is not required to purchase another financial product or service. For example, when a bank automobile loan customer is solicited to purchase credit insurance, and has the option to purchase or decline to purchase the credit insurance, without any effect on the underlying automobile loan, the product is optional. On the other hand, an insurance product is not optional when it is required as a condition of the underlying financial product or service. For example, if a particular title insurance policy must be purchased as a condition of a mortgage, the title insurance is not optional.

67. 15 U.S.C. § 1012(b).

68. *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984): "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

regulated by a state insurance regulator. There are, however, some exceptions to these restrictions. The CFPB clearly has authority over insurance companies in those instances in which they are directly involved in the provision of a financial product or service, are otherwise subject to an enumerated consumer law enforced by the CFPB, or provide a material non-insurance service to a bank or non-bank supervised by the CFPB.

On the other hand, a good case can be made that the CFPB lacks authority over insurance sales because those activities fall within the scope of the Dodd-Frank Act's restrictions on the CFPB's authority over the business of insurance. In addition, it may reasonably be argued that optional insurance sales by banks and service providers are outside the jurisdiction of the CFPB because such sales are not conducted "in connection with" the provision of a financial product or service. Finally, the McCarran Ferguson Act prevents the CFPB from superseding state-issued insurance laws and regulations.