

OPINION
76-5

April 20, 1976 (OPINION)

Mr. G. W. Ellwein, Commissioner

Department of Banking and Financial Institutions

State Capitol

Bismarck, ND 58505

Dear Mr. Ellwein:

This is in response to your letter of April 5, 1976, in which you advised that a state-chartered bank in North Dakota had recently requested permission to amend its articles of incorporation to include the power to engage in the sale of insurance, and requested answers to the following questions:

- (1) May a state-chartered bank in North Dakota engage in the business of selling insurance?
- (2) May the directors/officers/stockholders of a state-chartered bank in North Dakota form a business entity separate from the bank for the purpose of engaging in the business of selling insurance within the bank?
- (3) May an officer or other salaried employee of a state-chartered bank in North Dakota serve as a licensed insurance agent within the bank and assign his commissions or profits to the bank?

Before launching into a detailed analysis of legislative and judicial pronouncements on the subject, it will be worthwhile to look at various general textual statements:

"It is the general rule that banking corporations have no power to carry on any business other than that of banking. The solvency of these institutions is generally guarded by special provisions and limitations in the statutes authorizing their corporation and has always been the object of sedulous care, both on the part of the legislature and the courts. The language employed in the statutes defines their powers and duties, and generally excludes, by necessary implication, a capacity to carry on any business other than that of banking and the adoption of any methods for the prosecution of such business other than those specifically prescribed by the statute. Thus, a banking corporation has no power to purchase the plans and properties of manufacturing corporations, and option contracts providing for the sale of such properties to a bank are void. Nor may an incorporated bank engage in an independent business enterprise such as lumbering, or the operation of a street or interurban railroad." 10 Am. Jur.2d., Banks, Section 285.

". . . Like other corporations, banks and trust companies have only such powers as are expressly conferred on them by their charters and by statute, or such as may fairly be implied from those expressly given and which are necessary to carry on their business. It appears to be the policy of the law that banks are not allowed to exercise functions not strictly authorized by law. . . . The test of a bank's power to take an action involving a risk is not the presence of the risk or its absence, unless it is so inordinate as to be speculative enterprise, but whether the risk is incidental to the fulfillment of a banking function . . ." 10 Am. Jur.2d., Banks, Section 270.

" . . . the police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe. . . ." 1 Michie, Banks and Banking, Chapter 1, Section 3 (1973).

There is no specific statutory authorization for state-chartered banks in North Dakota to engage in the business of selling insurance. Section 6-03-02(8), North Dakota Century Code, however, provides that a bank may "exercise . . ., all such incidental powers as shall be necessary to carry on the business of banking." Thus, the question becomes whether or not "all such incidental powers as shall be necessary to carry on the business of banking" is sufficiently broad as to encompass the sale of insurance.

Divide County v. Baird, 55 N.W. 45, 212 N.W. 236 (1927), held, at 212 N.W. 236-237:

"A bank, of course, has such powers as are expressly given it; these are express powers. In addition, it may exercise certain powers which are incidental to those expressly given. The range of such powers is generally stated in the statute and is limited by fairly well-defined principles. Only such incidental powers exist as are 'necessary to carry on the business of banking' (Section 5150, subdivision 7, C.L. 1913); that is, such as are incidental to the powers expressly enumerated. (citations omitted)

"Clearly, this kind of corporation . . . is wholly the creature of statute, and it does business by legislative grace. . . ."

In Farmers' State Bank v. Richter, 48 N.D. 1233, 189 N.W. 242 (1922), it was held that a bank could properly purchase stock in an electric company where the purchase was not as an investment but in order to secure electric power in the bank. In Jarski v. Farmers' and Merchants' Bank of Hankinson, 53 N.D. 470, 206 N.W. 773 (1925), it was held that a bank could not purchase farm real estate.

In Britton v. Elk Valley Bank of Larimore, 54 N.D. 858, 211 N.W. 810 (1926), the North Dakota Supreme Court was faced with the question of whether or not a bank could become the custodian of a will and held that becoming custodian of a will is not within charter, implied, or incidental powers of a state banking corporation. In construing C.L. 1913, Section 5150(7), which is now codified in Section 6-02-02(8), N.D.C.C., the Court stated, at 211 N.W. 811:

"What are the functions of a bank as defined by this statute? The unbroken trend of our legislation has been to require of state banks a strict adherence to these lines of business falling unquestionably within well-established banking activities. There is contemplated only the exercise of those powers expressly given or which are implied because necessarily incident to the carrying on of such business. In constructing our banking system the Legislative Assembly has followed the strict but wholesome safeguards of the National Banking Act." (emphasis added)

On the specific question before it, the Court held, at 211 N.W.2d. 212:

"Becoming custodian of a will is not within either the granted or implied powers of a North Dakota state banking corporation, the act of accepting the same by the bank for custody and safekeeping is beyond its charter powers, and, in the absence of consideration or benefit to the bank, forms no basis for the recovery of damages either by reason of contract or under the penalty of the statute . . . In North Dakota we search in vain for a specific statutory authorization to a bank to perform such business as it is charged in the complaint defendant attempted, nor can it reasonably be contended such transactions are necessary or incidental to the exercise of its granted powers. No element of banking prescribed by the statute is involved in such service."

As an aid in construing the "incidental powers" language of Section 6-03-02(8), N.D.C.C., one can look to 2A Sutherland Statutory Construction Section 52.02 (4th Ed. 1973), wherein are found the following statements:

"When a legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated. The reason usually given for this rule is that in adopting the statute the legislature is presumed to have adopted the construction which had been put on the statute by the courts of the state of its origin.

". . . It is a presumption 'which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted, and the presence or lack of other indicia of intention.'

"The general rule also applies to make judicial and administrative interpretation of federal statutes useful in construing state statutes copied from federal acts."

In this regard, note should be taken of *First National Bank of Corunna, Michigan v. Michigan City Bank*, 8 N.D. 608, 80 N.W. 766 (1899), where the Court, in passing upon the borrowing power of a cashier of a state bank, noted that Chapter 23 of the laws of 1890

(which included the "incidental powers" language now contained in Section 6-03-02(8), N.D.C.C.) was copied from the National Banking Act, and stated, at 80 N.W. 768:

". . . The question of the borrowing power of a banking corporation under this section, and the lawful manner of its exercise, was squarely before the supreme court of the United States in the case of Bank v. Armstrong, 152 U.S. 436, 14 Sup. Ct. 572, decided in 1893; and it was then held that the borrowing of money was so much out of the course of legitimate banking that those making a loan to a bank must see to it that the officer assuming to act had special authority to act. . . . In view of the close relationship of our statute under which defendant exists with the national banking act from which it is admitted the act of 1890 is copied, these decisions are, we think, decisive, as to the authority of a cashier of a state bank organized under this law to borrow money; and we have no hesitation in adopting their interpretation, which appeals to us both sound and salutary." (emphasis added)

It is important to note that the Court adopted the interpretation placed on the National Bank Act by the U.S. Supreme Court, even though that decision was rendered three years after the statutory language involved had been adopted by the North Dakota Legislature.

While the reason behind the presumption stated in Sutherland, supra, fails if applied to decisions subsequent to adoption, it would seem that subsequent decisions should be given at least respectful consideration, especially in view of the fact that the North Dakota Supreme Court has adopted subsequent decisions without hesitation. For this reason, in construing the "incidental powers" language of Section 6-03-02(8), N.D.C.C., it is helpful to consider decisions of federal courts construing the provisions of the National Bank Act from which our language was copied.

Kimen v. Atlas Exchange National Bank of Chicago, 92 F. 2d. 615 (C.C.A. III. 1937), cert. den. 58 S. Ct. 746, 303 U.S. 650, 82 L. Ed. 1110, held that incidental powers of national banks can avail neither to create powers which expressly or by reasonable implications are withheld nor to enlarge powers granted, since incidental powers are inferred and exist only to carry into effect such powers as are granted.

In McCoy v. Adams, 29 F. Supp. 815 (D.C. Pa. 1939), it was held that a national bank is given in addition to specific powers, incidental powers necessary to carry on banking business, and hence assumption of an obligation which can be reasonably construed as necessary to serve or preserve the business, is within the powers of a national bank and is not ultra vires.

In holding that operation of a full-scale travel agency by a national bank is not an exercise of incidental powers referred to in the National Bank Act, the court in Arnold Tours, Inc. v. Camp, 472 F. 2d. 427 (1 Cir. 1972) held that the word "necessary" was not used in the statute to connote that which is indispensable and went on to hold, at 472 F. 2d. 432, that:

". . . a national bank's activity is authorized as an incidental power, 'necessary to carry on the business of banking,' within the meaning of 12 USC Section 24, Seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act. If this connection between an incidental activity and an express power does not exist, the activity is not authorized as an incidental power."

On the specific question of whether a bank is authorized to engage in the sale of insurance as an incidental power, *Saxon v. Georgia Association of Independent Insurance Agents, Inc.*, 399 F. 2d. 1010 (5 Cir. 1968) is particularly instructive.

That suit was brought to have Comptroller's 1963 Ruling No. 7110, declaring that as an incidental power national banks are authorized to act as agents in the issuance of insurance, declared unlawful and to enjoin defendant banks' insurance agent and agency activities in Georgia cities of over 5000 population.

Two provisions of the National Bank Act were involved, Section 24(7), enacted in 1864, granting national banks "all such incidental powers as shall be necessary to carry on the business of banking"; and Section 92, enacted in 1916, providing that national banks located in places with populations not exceeding 5000 inhabitants may act as insurance agents.

Although the court had before it Section 92 (to which there is no similar statute in North Dakota) in addition to Section 24(7) and was, therefore, able to apply the *expressio unius est exclusio alterius* rule in holding that national banks have no power to act as insurance agents in cities of over 5000 population, nevertheless the court's language relating to the construction of Section 24(7) prior to 1916 is instructive:

"Pertinent to consideration of these statutory provisions, we take note of the fact that prior to the 1916 enactment of Section 92 it seems to have been universally understood that no national banks possessed any power to act as insurance agents. Section 24(7) was contained in the original National Bank Act of 1864. Between that time and 1916 when Section 92 was enacted, the various administrative agencies charged by law with the administration of the Bank Act consistently ruled that national banks had no power to act as insurance agencies." 399 F. 2d. 1013.

"The Massachusetts Supreme Court in *Dresser v. Traders' National Bank*, 165 Mass. 120, 42 N.E. 567 (1896), held *ultra vires* a contract whereby a national bank agreed to act as a subagent for an insurance agent. It is to be noted that this case arose before enactment of Section 92 of the National Bank Act and the Court rendered its decision considering the 'incidental' and 'necessary' powers of Section 24." 399 F. 2d. 1014.

"It thus appears to be clear from the contemporaneous legislative history of Section 92 that Congress agreed with and

acquiesced in the then Comptroller's ruling that 'National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies', . . ." 399 F. 2d. 1016.

We also take note of Section 6-03-38, N.D.C.C., which provides, among other things, as follows:

"No bank, except as otherwise authorized in this title, shall employ its money or other assets as principal, directly or indirectly, in trade or commerce, . . . except that it shall be lawful for a bank . . . to invest in stocks of subsidiary corporations, when the activities of such corporations are incidental to banking activities. . . . Any officer, director, or employee of any bank who shall invest or use its funds contrary to the provisions of this title shall be guilty of a class A misdemeanor."

It would seem that the sale of insurance is trade or commerce, in which no bank's money or other assets may be employed, either directly or indirectly, except as otherwise authorized in Title 6, N.D.C.C., and that a bank can invest in stocks of a subsidiary corporation only if the subsidiary corporation's activities are incidental to banking activities.

It might be argued that insurance on property in which a bank has a security interest as collateral for a loan it has extended is important to protect the bank's security and, therefore, the selling of insurance is an incidental power necessary to carry on the business of banking. Such power, however, is not necessary. A bank can require that a borrower secure insurance to protect the bank's interest in any property in which the bank has a security interest. The power of a bank to sell insurance would not give it any greater assurance of protection of its security interest in any collateral. The bank could not require a borrower to purchase insurance from the bank, for Section 26-30-14, N.D.C.C., provides:

1. No person, firm or corporation engaged . . . in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property and no trustee, director, officer, agent, or other employee of any such person, firm or corporation shall require, as a condition precedent, concurrent, or subsequent to the sale or financing the purchase of such property or to lending money upon the security of a mortgage thereon, . . . that the person, firm or corporation purchasing such property or for whom such purchase is to be financed or to whom the money is to be loaned . . . negotiate any policy of insurance or renewal thereof covering such property through a particular insurance company, agent, solicitor or broker."

Thus, a bank's interest in security protection can be secured by requiring that a borrower secure insurance, but, even if the bank had the power to sell insurance it could not require a borrower to secure insurance through the bank. Any convenience obtained by a bank in selling insurance could as easily be obtained by renting space in the

bank building to a reputable insurance agent who is entirely unconnected with the bank.

Absent a statute authorizing banks in North Dakota to engage in the business of selling insurance, and in view of the administrative and judicial construction placed upon the "incidental powers" language in Section 24(7), the very language copied by the North Dakota legislature, prior to the adoption of Section 92 in 1916; the fact that Congress, in enacting Section 92, apparently construed the "incidental powers" language of Section 24 as not providing national banks with authority to act as insurance agents; the fact that in First National Bank of Corunna, Mich. v. Michigan City Bank, supra, the North Dakota Supreme Court adopted the construction placed upon Section 24(7) by the U.S. Supreme Court in 1893, which was subsequent to adoption of the language in Section 24(7) by the legislature of North Dakota; the fact that textual statements on the subject seem to indicate that banks generally have no power to carry on any business other than banking and are not allowed to exercise functions not strictly authorized by law; the gloss placed upon banking powers statutes by the North Dakota Supreme Court in such cases as Divide County v. Baird, supra; Farmers' and Merchants' State Bank of Hankinson, supra; First National Bank of Corunna, Mich. v. Michigan City Bank, supra, and Britton v. Elk Valley Bank of Larimore, supra; the prohibition of Section 6-03-38, N.D.C.C., against a bank employing its money or other assets, directly or indirectly, in trade or commerce, except as otherwise authorized; and the construction placed upon Section 24(7) and 92 of the National Bank Act by the court in Saxon v. Georgia Association of Independent Insurance Agents, Inc., supra, it appears that state-chartered banks in North Dakota are not authorized by the "incidental powers" language of Section 6-03-02(8), N.D.C.C., to engage in the business of selling insurance. Since such authority is not provided in any other statute in Title 6, N.D.C.C., your question number one must be answered in the negative and, therefore, a state-chartered bank in North Dakota may not amend its articles of incorporation to include the power to engage in the sale of insurance.

With respect to question two, we have found no prohibition against the directors/officers/stockholders of a state-chartered bank in North Dakota forming a business entity, separate from the bank, for the purpose of engaging in the business of selling insurance within the bank. Presumably the Banking Board could, pursuant to Section 6-01-04, N.D.C.C., make a rule or regulation which would prohibit the selling of insurance in the bank proper but no such rule or regulation of the Board has been drawn to our attention. We do not, however, believe the Board could prohibit the directors/officers/stockholders from forming a business entity, separate from the bank, for the purpose of engaging in the business of selling insurance away from the bank premises.

With respect to your third question, we are again unaware of any prohibition against an officer or other salaried employee of a state-chartered bank serving as a licensed insurance agent within the bank and assigning his commissions or profit to the bank. We also believe that the Banking Board could, pursuant to Section 6-01-04 of the N.D.C.C., make a rule or regulation which would prohibit such activity but not such rule or regulation has been drawn to our

attention.

Sincerely,

ALLEN I. OLSON

Attorney General