



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**JOHN BEN SHEPPERD
ATTORNEY GENERAL**

November 12, 1954

Honorable Garland A. Smith, Chairman
Board of Insurance Commissioners
Life Division
International Life Building
Austin, Texas

Letter Opinion No. MS-161

Re: Whether Article 21.38,
Insurance Code of 1951,
authorizes a licensed
agent to procure insur-
ance from an unauthor-
ized company on the
ground that the partic-
ular type of insurance
was not written by an
authorized company.

Dear Mr. Smith:

Your request for an opinion reads as follows:

"We are concerned with a proposal from an agent who is regularly commissioned to represent one or more fire, casualty and surety companies licensed to do business in this State, and who also holds a license under the captioned Article, to solicit or sell a policy in a non-admitted company as outlined in attached letter and sample of proposed policy.

"There is no question but what the people to which this agent will offer this policy can secure fire and extended coverage insurance under standard policies authorized to be used by regularly licensed companies, but this agent is proposing to add additional coverages and placing a deductible on the policy, thereby making it possible for the owner to state that he cannot secure this type of policy, and the reason he cannot buy it is because we do not approve such policies, not because he cannot buy regular fire or fire and extended coverage insurance.

"In other words, is an agent holding a license under this Article permitted to attach a deductible or to include additional coverages when fire or fire

and extended coverage are included, and place insurance in non-admitted companies when insured could purchase fire and extended coverage in regularly licensed companies under standard forms but without the additional features?"

Article 21.38 of the Texas Insurance Code, 1951, reads, in part, as follows:

"Sec. 1. Purpose of Article.- The purpose of this article is to regulate the placing of policies or contracts, effecting direct insurance, with certain non-authorized insurers, and to subject certain unauthorized insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under insurance contracts. The Legislature declares that it is the subject of concern that the placing of such direct lines of insurance with unauthorized insurers is not properly regulated, and that many residents of this State hold policies of insurance issued by insurers not authorized to do business in this State, thus presenting to such residents the often insurmountable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such State interest, the Legislature herein provides a regulation as to the placing of such direct lines of insurance in such unauthorized companies, and the method of direct service and substituted service of process upon such insurers, and declares that in so doing it exercises its powers to protect its residents, and to define for the purpose of the Statute what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, Seventy-ninth Congress of the United States, Chapter 20, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

"Sec. 2. . . .

"(a) . . .

"(b) . . .

"(c) When any policy of insurance or certificate of insurance is procured under the authority of such license, there shall be executed by the insured an affidavit setting forth facts showing that such insured

was unable, after diligent effort, to procure from any licensed company or companies the full amount of insurance required to protect the property, liability or risk desired to be insured, and further showing that the amount of insurance procured from nonlicensed insurer or insurers is only the excess over the amount so procurable from licensed companies. Each such affidavit shall be filed with the Board along with the report required in subdivision (d) below.

"(d) . . ."

The question boils down to whether an agent under the authority of Article 21.38 can write policies for a nonlicensed insurance company on the ground that he cannot obtain coverage from a licensed company because under the Texas law such a policy or certain features of the policy are prohibited.

Section 1 of Article 21.38 is crystal clear in its purpose to protect residents of the State in the placing of insurance by licensed agents in unauthorized insurance companies, and Section 2(c) of said Article is likewise clear in providing under what conditions insurance may be placed in such unauthorized companies.

The Legislature has provided certain policy forms and rate requirements for Texas companies and foreign companies authorized to do business in this State. These requirements were enacted for the benefit and protection of the residents of the State.

The conditions set out in Section 2(c) for the procurement of insurance by a licensed agent are that the insured was unable after diligent effort to procure from any licensed company or companies the full amount of insurance required to protect the property, liability or risk desired to be insured, and further showing that the amount of insurance procured from any nonlicensed insurer or insurers is only the excess over the amount so procurable from licensed companies.

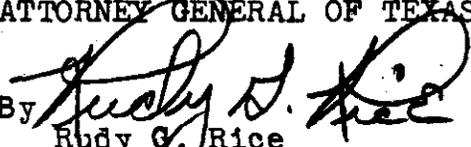
To construe Article 21.38 to mean that insurance may be taken out with a nonlicensed insurer merely because the insured cannot secure a certain type of policy from a licensed insurer, which it is prohibited from issuing under the Texas law, would defeat the purpose of Article 21.38 and other provisions of the Insurance Code.

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Therefore, you are advised that under Article 21.38 of the Insurance Code, the agent must procure from a licensed company or companies the full amount of insurance required to protect the property, liability or risk desired to be insured under the policies authorized under Texas law, and if he cannot, after diligent effort, procure the full amount of insurance required from a licensed company, he may then procure from a nonlicensed company only the excess over the amount so procurable from a licensed company.

Yours very truly,

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By 
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RGR/rt