

Texas Department of Banking

Catherine A. Ghiglieri
Commissioner

OCT 06 1993
Opinion
October 4, 1993

The Honorable Dan Morales
Attorney General of the State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Attn: Opinion Committee

MBJ
FILE #

MC-22625-93

I.D.#

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RQ-620

RE: Power of State Banks to Sell Insurance and Annuities

Dear General Morales:

I respectfully request an opinion of your Office regarding resolution of the conflict between certain powers possessed by state and national banks to sell insurance (including annuities) and the insurance agent licensing provisions of the Texas Insurance Code that effectively prohibit the exercise of those powers.

National Bank Powers

National banks have the power to sell insurance and annuities in certain circumstances. A national bank in a community of under 5,000 inhabitants has the authority to sell insurance pursuant to 12 U.S.C. § 92. This in effect preempts state prohibitions on banks selling insurance but does not appear to preempt state agent licensing statutes that do not otherwise prohibit banks from selling insurance. The Office of the Comptroller of the Currency ("OCC") has by interpretive letter permitted a small town branch of a large national bank in Oregon to sell insurance to the national bank's customers no matter where they are located. The OCC is in effect evading the import of a Fifth Circuit Court of Appeals decision strictly enforcing the small town limitation in response to an attempt by OCC to allow national banks to sell insurance without regard to the size of their community, *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968). The OCC has stated that it disagrees with the *Saxon* decision. On July 16, 1993, the District of Columbia Court of Appeals held that the OCC's position was valid, *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). An appeal is anticipated.

The OCC has also opined that annuities are merely a form of investment product and can be sold by national banks pursuant to their "incidental" powers granted in 12 U.S.C. § 24(7). On August 26, 1993, the Fifth Circuit Court of Appeals reversed a district court decision upholding

the OCC's position, *Variable Annuity Life Insurance Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993). In doing so, the Fifth Circuit held that annuities were "insurance" and national banks were therefore subject to the small town limitation of 12 U.S.C. § 92 with regard to sales of annuities. The Fifth Circuit further explicitly affirmed the *Saxon* decision and criticized the OCC for refusing to follow it. An appeal is anticipated.

State Bank Powers

Article XVI, § 16(c), of the Texas Constitution provides as follows:

A state bank created by virtue of the power granted by this section, notwithstanding any other provision of this section, has the same rights and privileges that are or may be granted to national banks of the United States domiciled in this State.

By virtue of the Texas Constitution, state banks have the power to engage in the sale of insurance and annuities to the same extent as national banks. We wish to preserve the competitive parity of state banks with national banks. Our general policy based on the Texas Constitution should be to permit state banks to engage in sales of insurance and annuities, provided we are comfortable that the state bank has adequate expertise on hand and appropriate policies and procedures in place to conduct these activities consistent with safety and soundness considerations. However, conflicting state insurance laws present obstacles.

National banks (and perhaps one or more aggressive state banks) in Texas will likely take the position that *IIAA v. Ludwig* authorizes state wide sales of insurance and annuities so long as the sale originates in a small town branch. If the opinion is appealed and upheld, we would authorize that same power for state banks. However, based on our reading of *VALIC v. Clarke*, the Fifth Circuit Court of Appeals would not follow *IIAA v. Ludwig*, and therefore would in some manner limit insurance and annuity sales by national banks to the local small community.

In any event, it is our view that any state law provision that effectively prohibits a bank from selling insurance, at least in a community of under 5,000, is preempted by 12 U.S.C. § 92. While corporate agent licensing provisions of the Texas Insurance Code do not explicitly ban banks from licensure, the requirement that a corporate agent be a Texas corporation organized or existing under the Texas Business Corporation Act effectively acts as a ban, as banks are not so organized; *e.g.* TEX. INS. CODE ANN. art. 21.07, § 2(d)(1); art. 21.07-1, § 4(e)(1); art. 21.07-3, § 4(d)(1); and art. 21.14, § 3(c)(1). A further serious impediment that would face a strong preemption argument is the requirement that all officers, directors, shareholders (including a parent corporation) of the prospective corporation licensee also be licensed agents, *e.g.*, TEX. INS. CODE ANN. art. 21.07, § 2(d)(2); art. 21.07-1, § 4(e)(2); art. 21.07-3, § 4(d)(2); and art. 21.14, § 3(c)(2).

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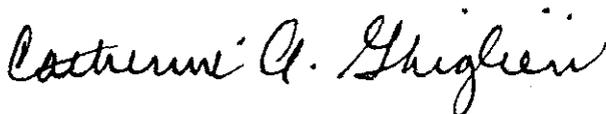
An argument could be made that, because the Texas Business Corporation Act governs state banks to the extent not inconsistent with the Texas Banking Code, state banks are not disqualified from licensure. TEX. BUS. CORP. ACT ANN. art. 9.14(A); TEX. REV. CIV. STAT. ANN. art. 1302-1.03; *but see Robertson v. State ex rel. Clement*, 406 S.W.2d 90 (Tex. Civ. App. - Fort Worth 1966, writ ref'd n.r.e.). While a state bank could become licensed under such an interpretation, provided all of its officers, directors, and shareholders were licensed, the question of the status of national banks remains. To the extent national banks enjoy the benefits of preemption of licensing statutes, state-chartered banks enjoy it as well by virtue of Article XVI, § 16(c) of the Texas Constitution.

A bank can currently receive an assignment of all commissions generated on the sale of credit life or credit accident and health insurance sold to debtors of the bank by a licensed agent that is an employee, officer, director, or shareholder of the bank, TEX. INS. CODE ANN. art. 21.07, § 18. A bank can also be licensed as an agent to sell crop insurance, TEX. INS. CODE ANN. art. 21.14-2. However, a bank cannot currently be licensed in Texas to sell annuities, a product of intense interest, or any other type of insurance. This prohibition cannot stand in the face of 12 U.S.C. § 92, at least with respect to banks located in communities of under 5,000 inhabitants.

The narrow question is whether state banks or branches of state banks located in communities of under 5,000 inhabitants are empowered to sell insurance. If so, what insurance agent licensing requirements under the Texas Insurance Code may fairly be imposed on state and national banks? We believe that a licensing requirement which cannot be imposed on national banks can similarly not be imposed on state banks, TEX. CONST. art. XVI, § 16(c).

Please contact our General Counsel, Everette Jobe, if you have any questions.

Sincerely,



Catherine A. Ghiglieri
Commissioner

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cc: Edna Ramón Butts, Commissioner of Insurance
Texas Bankers Association
Independent Bankers Association of Texas