

# The State of South Carolina



## Office of the Attorney General

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October 12, 1989

The Honorable John Courson  
Senator for District 20  
Post Office Box 142  
Gressette Senate Office Building  
Columbia, South Carolina 29202

Dear Senator Courson:

As you are aware, your letter to Attorney General Medlock of September 7, 1989, was referred to me for review and response. You attached to your letter a copy of Bulletin No. 84-1, issued by then Insurance Commissioner Rogers T. Smith on, or around, June 18, 1984. The Bulletin is entitled "Transaction of Business Through Licensed Agents."

You indicate in your letter that you have been asked to draft legislation which would permit insurance brokers to place business through licensed agents of insurers licensed in South Carolina and to permit agents which are not licensed by an insurer to service an account when that agent "brokers" business through a licensed agent of the insurer. You indicate further that you have been advised that such actions are already permitted by existing statutes. In an apparent effort to confirm the accuracy of the advice which you have received, you asked the following questions:

(1) Is a licensed broker, as defined in 1976 S. C. CODE, Sections 38-1-20 and 38-45-10, prohibited from placing business in an insurer licensed to do business in South Carolina even if the broker "places" the business through a licensed agent of the insurer?

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(2) If a licensed broker receives or delivers a policy of insurance, or performs any act prescribed in Section 38-43-10, CODE, is the broker prevented from doing so unless he is also a licensed agent of the insurer?

(3) If an agent, pursuant to Section 38-43-200(b), CODE, places business through a licensed agent of an insurer for which that agent holds no license, is it unlawful for that agent to service the account or perform any act prescribed in Section 38-43-10, CODE, in respect to his client's account?

At the outset, it must be noted that, pursuant to 1987 Act No. 155, the entire Insurance Code was recodified. In the recodification process, several of the statutory provisions which underlay the opinions expressed by Commissioner Smith in Bulletin No. 84-1, were given new numerical references. Therefore, when cited herein, the statutes will be referred to in accordance with their present numerical designations. With that in mind, we will attempt to answer your inquiries in the sequence in which they were asked.

(1) Sections 38-1-20(22) and 38-45-10, CODE, both define an "Insurance broker" (broker) as an "individual licensed by the Commissioner to represent citizens of this State for the placing of insurance in insurers licensed in this State or in any other state or country." In pertinent part, Section 38-43-60, CODE, requires that "all business done in this State by insurers....must be transacted by their regularly authorized agents residing in this State or through applications of the agents...." Consequently, if a broker is also a licensed agent for an insurer, licensed to do business in South Carolina, he may place business with that insurer. Under this circumstance, the broker's license is of little value. For, as was stated by Commissioner Smith, the practical value of a broker's license is to authorize the individual to place business in insurers which are not licensed to do business in South Carolina. (emphasis supplied).

In the circumstance where the broker is not a licensed agent for the particular insurer licensed to do business in South Carolina, he must place business with the insurer

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through an individual who is a licensed agent for the insurer. In any event, the answer to your inquiry is that a broker is not prohibited from placing business in an insurer licensed to do business in South Carolina if (1) the broker is also a licensed agent for the particular insurer; or, (2) the broker is not a licensed agent for the insurer, but places the business through an individual who is a licensed agent for the insurer.

- (2) Section 38-43-10 states that "a person who:
- (a) solicits insurance in behalf of an insurer,
  - (b) takes or transmits other than for himself an application for insurance or a policy of insurance to or from an insurer,
  - (c) advertises or otherwise gives notice that he will receive or transmit insurance applications or policies,
  - (d) receives or delivers a policy of insurance of an insurer,
  - (e) receives, collects, or transmits any premium of insurance, or
  - (f) performs any other act in the making of an insurance contract for or with an insurer, other than for himself,
- whether these acts are done by an employee of an insurer or at the instance or request of an insurer, must be a licensed agent of the insurer for which the act is done or the risk is taken unless provided otherwise in Section 38-43-20.

By the plain language of Section 38-43-10, a broker, who does not come within any of the exemptions set forth in Section 38-43-20, is prohibited from performing any of the acts described in Section 38-43-10, unless he is a licensed agent for the insurer for which the act is done or the risk is taken. In view of the fact that the provisions of Section 38-43-10 are clear and unambiguous, they must be taken to mean exactly what they say. Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (1971).

Again, you are correct in your observation that, where the individual is a licensed agent for an insurer licensed

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to do business in South Carolina, a broker's license serves no useful purpose with respect to the individual's ability to perform the acts described in Section 38-43-10.

(3) In pertinent part, Section 38-43-200(b), CODE, provides that "...agents licensed under this title may write insurance at the request of other licensed agents or licensed brokers or licensed nonresident brokers and allow the licensed agents...not exceeding one-half of the commissions which they receive on the business written." In Bulletin 84-1, Commissioner Smith stated that the above language permitted an agent, who placed business with an insurer through an individual who is a licensed agent for the insurer, to participate in the commissions payable by the insurer, even if such agent is not licensed for that insurer, so long as he is licensed to act as an agent for the type of insurance involved.

It seems apparent that Section 38-43-200 concerns only the ability of the agent, who is not licensed for the insurer, to participate in the commissions payable by the insurer. The statute does not, in any way, permit the agent to "service the brokered account" or perform any of the acts described in Section 38-43-10.

Section 38-43-10 clearly provides that an individual who performs any of the acts enumerated therein must be a licensed agent of the insurer for which the act is done (emphasis supplied). Accordingly, it would be unlawful for an agent, who is not licensed for the insurer with which the business was placed, to perform any of the acts enumerated in Section 38-43-10 with respect to the business placed with that insurer.

Adopting the phraseology which you used in your letter, it would be "unlawful" for the "unlicensed agent" to "service" the "brokered account". Section 38-43-200(b) would not, thereby, be rendered meaningless because it would still permit the "unlicensed agent" to participate in the commissions payable by the insurer.

In summary, we would respond to your questions as follows:

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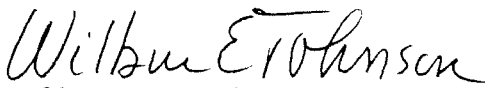
(1) A broker is not prohibited from placing business with an insurer licensed to do business in South Carolina if (1) the broker is also a licensed agent for the particular insurer; or, (2) the broker is not a licensed agent for the insurer, but places the business through an individual who is a licensed agent for the insurer.

(2) A broker, who does not come within any of the exemptions set forth in Section 38-43-20, is prohibited from performing any of the acts described in Section 38-43-10, unless he is a licensed agent for the insurer for which the act is done or the risk is taken.

(3) It would be unlawful for an agent, who is not licensed for the insurer with which business is placed, to perform any of the acts enumerated in Section 38-43-10 with respect to the business placed with that insurer.


I trust that you will find the foregoing to be responsive to your concerns. Please contact me if I may be of further assistance.


Very truly yours,

  
Wilbur E. Johnson  
Assistant Attorney General

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REVIEWED AND APPROVED BY:

  
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Opinions