

## OPINION NO. 72-057

## Syllabus:

An Ohio domestic insurance company is not prohibited by Section 3905.44, Revised Code, from writing surplus lines insurance in other states in which it has not been authorized to do business, if the laws of such states similar to Sections 3905.30 through 3905.35, Revised Code, permit the writing of surplus lines insurance by an unauthorized company. (Opinion No. 878, Opinions of the Attorney General for 1964, disapproved to the extent indicated.)

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To: Kenneth E. DeShetler, Superintendent of Insurance, Department of Insurance, Columbus, Ohio

By: William J. Brown, Attorney General, July 21, 1972

Your request for my opinion reads as follows:

"Pursuant to Section 3905.30 of the Ohio Revised Code, Ohio licensed surplus line brokers currently . . . negotiate for and obtain insurance, other than life insurance, on property or persons in this state in insurers not authorized to transact business in this state . . . provided such broker complies with Sections 3905.30 through 3905.35 of the Ohio Revised Code and with Rule IN-5-01 entitled 'Surplus Lines Insurance.'

"Section 3905.44 of the Ohio Revised Code provides in part as follows:

"'No domestic insurance company, qualified under the laws of this state, shall do business in any other state or territory of the United States without being first legally admitted and authorized so to do under the laws of such state or territory.'

"Many other states have laws similar to Sections 3905.30 through 3905.35 which would allow Ohio domestic insurance companies other than life to write surplus lines insurance in such other states on the same basis that this state allows foreign and alien insurers to write surplus lines insurance in this state, provided that such Ohio companies are not prohibited by Section 3905.44 from doing so. Thus, if an Ohio domestic insurance company writes surplus lines insurance pursuant to laws of other states similar to Sections 3905.30 through 3905.35, is such company violating Section 3905.44?"

As I understand it, "surplus lines insurance, becomes important when no company, authorized to do business within the State of Ohio, will afford certain specialized coverage

because of the high risks involved. In such cases, Ohio, like most of the other states, permits coverage to be obtained from foreign companies which have not been licensed to do business within Ohio, the theory being that public policy favors insurability even at a higher rate. The negotiation of such business is carefully regulated by Chapter 3905, Revised Code, which requires that it be handled by a multiple line agent specially licensed by your Department as a surplus line broker, and which imposes upon such licensed broker the duty to provide the Department with information from which it can be determined that the foreign company affording coverage is in sound condition. The guiding policy considerations have been set forth in the preliminary paragraph to your Department's Rule IN-5-01, which reads as follows:

"The rule implements Sections 3905.30-3905.35, inclusive, of the Revised Code, concerning surplus lines insurance. It provides standards for the public policy favoring insurability even at an excess premium rate. Surplus lines brokers are hereby provided with adequate guidelines for the proper conduct of business. So that the public may be afforded sufficient protection, the Superintendent of Insurance is vested hereunder with discretionary authority to determine which insurers, both foreign and alien, are financially strong and stable enough to offer surplus lines coverage through insurance brokers in the State of Ohio."

Section 3905.30, Revised Code, provides that the Superintendent of Insurance may issue a surplus line broker's license to a citizen who has resided in the State for two years and has passed the multiple line agent's test. The Section further provides as follows:

"Such license, which shall be known as a surplus line broker's license, shall permit the person named therein to negotiate for and obtain insurance, other than life insurance, on property or persons in this state in insurers not authorized to transact business in this state."

Section 3905.31, Revised Code, prohibits any person not so licensed under Section 3905.30, supra, from taking any action concerning any policy of an insurance company not authorized to do business in Ohio. And Section 3905.33, Revised Code, makes provision for the reports to be filed with your Department by the licensed surplus line broker as to the soundness of the foreign company with which he negotiates a surplus line policy. The pertinent part of Section 3905.33, supra, reads as follows:

"Every person named in a license issued under section 3905.30 of the Revised Code, who binds, issues, renews, or delivers any insurance permitted by such license, shall in every case file, within fifteen days from the time such insurance is bound, issued, renewed, or delivered,

whichever occurs first, with the superintendent of insurance his own affidavit that such insurance policy cannot, after due diligence, be procured from an insurer authorized to do business in this state. At the same time, such person shall also file with the superintendent such information concerning the assets and liabilities, management, operations, business, and affairs of such insurer as the superintendent may reasonably require. \* \* \*

"\* \* \* At the same time of filing the affidavit required by this section, the insured shall sign an affidavit acknowledging that the insurance policy is to be placed with a company or insurer not authorized to do business in this state. The superintendent of insurance may make and publish reasonable rules and regulations, pursuant to sections 119.01 to 119.13, inclusive, of the Revised Code, consistent with this section and the basis for his determination hereunder."

Most other states have similar statutes which would permit Ohio insurance companies, not authorized to do business in those states, to write insurance in such states through surplus line brokers properly licensed there. You ask whether Ohio companies are foreclosed from such activities by Section 3905.44, Revised Code, which provides as follows:

"No domestic insurance company, qualified under the laws of this state, shall do business in any other state or territory of the United States without being first legally admitted and authorized so to do under the laws of such state or territory. For violation of this section by any such insurance company, the superintendent of insurance may revoke the license or authority of such company doing business in this state and may require such company to pay the taxes upon such unlawfully written business to the state or territory in which it was written, as provided by the laws of such state or territory. 'Do business' as used in this section does not include the maintenance or servicing of policies or contracts of insurance or annuity which have been lawfully written."

You have provided copies of correspondence from the Department's files which reveal that as far back as 1961 the statement was made that "this Department has historically held that this particular provision of law [Section 3905.44, supra] strictly prohibits an Ohio domiciled company from engaging in surplus line or mail order activities". Although a long-standing administrative construction of a statute is entitled to weight, and has been followed where the statute is ambiguous (see, for example, my Opinion No. 72-025, Opinions of the Attorney General for 1972), I feel that the Department has improperly construed Section 3905.44, supra.

That Section prohibits domestic companies from "doing business" in any other state unless "admitted and authorized so to do \* \* \*". In determining what this language means, let me refer once again to insurance practice and regulation. If an Ohio citizen desires certain specialized coverage that is unobtainable from any company "admitted and authorized" to do business in this State, he can obtain it, within the law, from a company not "admitted and authorized" to do business in this State. Of course, the negotiation of such business is carefully regulated by Chapter 3905, supra, which requires that the company furnishing the insurance be financially strong and stable; and the transaction must be handled by a local multiple line agent who is specially licensed by the Department of Insurance as a "surplus line broker". This specially licensed broker has a duty to furnish the Department information from which it can determine if the foreign company is in sound condition. Thus, the Department of Insurance of the state where the insurance company is domiciled regulates the company according to its laws and regulations; and the Ohio Department of Insurance, under Sections 3905.30 to 3905.35, Revised Code, concerning surplus lines insurance, also regulates such an insurance transaction. These Sections are set up to afford the public adequate protection. The surplus lines brokers are given adequate guidelines for the proper conduct of their business, and the Superintendent of Insurance is vested with discretionary authority to allow only those companies which are strong and stable to offer their insurance in the State of Ohio. All of this "surplus line insurance" business is accomplished in the State, highly regulated by the State, but by companies not "admitted and authorized" to do business in the State of Ohio. See 30 O. Jur. 2d 52, Section 12. In theory then, it could be said that these companies, not "admitted and authorized" to do business in this State, are not doing business within this State as the term is used in Section 3905.44, supra. Hence, Section 3905.44, supra, does not apply to companies writing surplus lines insurance.

In theory also, we have always thought that public policy favors insurability in these high risk situations, even at a higher rate, and even where such insurance can only be obtained from a company not licensed to do business within Ohio. It is consistent with our insurance statutes to allow a properly regulated domestic insurance company to offer the same service to a citizen of another state as it could offer to an Ohio citizen, where the laws of that state are similar to ours and authorize surplus line insurance transactions. In Opinion No. 878, Opinions of the Attorney General for 1964, my predecessor advises that the term, "doing business", in Section 3905.44, supra, should be given a broad construction. The syllabus reads as follows:

"The term 'do business' as found in Section 3905.44, Revised Code, includes the solicitation of, advertising in connection with solicitation of, sale of, acceptance of and applications for insurance policies (but does not include maintenance or servicing of

policies or contracts of insurance or annuity which have been lawfully written) and the Director of the Department of Insurance has the power to regulate these activities."

An implication is that surplus lines practice, since it involves the "acceptance of and applications for insurance policies", is "doing business" within the state. Since this implication conflicts with that of Section 3905.30, supra, its validity is doubtful. An examination of the reasoning in Opinion No. 878, supra, reveals an incorrect construction of the statutes in question. My predecessor surveys a number of Sections in Title 39, supra, and construes them together with Section 3905.44, supra. However, he fails to take account of distinctions between them which are important for purposes of the present discussion. He cites Sections 3905.01, 3905.16, 3905.21 and 3905.23, Revised Code, all of which refer to the licensing of insurance agents, and applies their language to the meaning of the term "do business", in Section 3905.44, supra, which refers to insurance companies. As I previously indicated, a broker (agent) needs an Ohio license to sell surplus lines insurance, but a company needs no Ohio authorization to write it. In addition, Sections 3905.16, 3905.21, and 3905.23, supra, apply to life insurance, which cannot be surplus lines insurance (see Section 3905.30, supra). Section 3905.23, supra, expressly prohibits any agent from writing life insurance on behalf of a company not authorized to transact business in this State as follows:

"No officer, manager, owner, agent, or representative of any corporation, association, or firm, or other person, shall offer within this state, in person or by advertisement, poster, letter, circular, or otherwise, sell, procure, or obtain policies, contracts, agreements, or applications for life insurance or annuities providing fixed, variable, or fixed and variable benefits, or contractual payments, or any form of health and accident insurance, for or on behalf of any life insurance corporation, association, or organization, or mutual protective or mutual benefit association or organization, not authorized to transact business within this state, or on behalf of any spurious, fictitious, nonexistent, dissolved, inactive, liquidated or liquidating, or bankrupt life insurance corporation, association, or organization, or mutual protective or mutual benefit association or organization. Whoever violates this section shall have his agent's license or licenses revoked by the superintendent of insurance." (Emphasis added.)

This section contrasts directly with Section 3905.30, supra, which provides that surplus lines insurance may be written on behalf of insurers not authorized to transact business in this State. Clearly, the Sections which require all life insurance companies to be authorized to write insurance, do not apply to companies writing surplus lines insurance.

My predecessor goes on in Opinion No. 878, supra, to cite Section 3905.43, Revised Code, which concerns or speaks of advertising, and, therefore, is not relevant to this

discussion. He cites Sections 3309.01, 3909.11, and 3911.01, Revised Code, all of which concern life insurance.

Finally, he states:

"Section 3905.42, Revised Code, further indicates that an unauthorized corporation may not engage in the insurance business or enter contracts of insurance directly or indirectly."

Section 3905.42, supra, reads as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss, or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

This Section requires that an insurance company be authorized in order to do business, directly or indirectly, in this State. Since insurers need not be authorized in order to write surplus lines insurance on property in this State, such practice is not doing business for purposes of this Section, or for purposes of Section 3905.44, supra, since it must be construed together with this Section.

I conclude that Opinion No. 878, supra, misconstrues the relevant Code Sections, at least for purposes of this discussion. Insofar as it implies that the writing of surplus lines insurance is "doing business" for purposes of Section 3905.44, supra, I disapprove it.

My conclusion that writing surplus lines insurance is not "doing business" for purposes of Section 3905.44, supra, is reinforced by dictum in State, ex rel., v. Safford, 117 Ohio St. 576 (1927). At page 578, the court states as follows:

"\* \* \* Section 644-2 limits the issuance of a foreign broker's license in this state to a natural person resident of another state to do in his own state an insurance business on Ohio property. That is to say, a broker may write no business and transact no insurance business within the borders of the state of Ohio." (Emphasis added.)

Section 644-2, General Code, is the forerunner of Section 3905.03; Revised Code, which authorizes the licensing of foreign brokers, who are nonresidents of this State. This Section authorizes such brokers, inter alia,

"\* \* \* [t]o place insurance other than life insurance in this state, \* \* \* with any insurer not authorized to do business in this state so long as such insurance is placed through a person duly licensed under section 3905.30 of the Revised Code. \* \* \*"

The Safford case, supra, indicates that such foreign broker is not doing business in this State. If he is not, logically the foreign insurance company which acts through him is not. And if the company negotiates directly with the resident surplus lines broker, instead of through a foreign broker, then by analogy it is not doing business in the State either, under the Safford dictum, supra.

My conclusion that Section 3905.44, supra, does not apply to surplus lines insurance, is reinforced by a consideration of the second sentence of that Section, which reads as follows:

"For violation of this section by any such insurance company, the superintendent of insurance may revoke the license or authority of such company doing business in this state and may require such company to pay the taxes upon such unlawfully written business to the state or territory in which it was written, as provided by the laws of such state or territory."

Surplus lines insurance written in other states can comply with the laws of those states, and, if it does, it is neither "unlawfully written" nor subject to unpaid taxes. This sentence reveals only a legislative intent to control domestic insurance corporations which operate illegally in other states. Ohio has a clear interest in preventing such companies from using it as a base for their nefarious operations. But I can see no purpose to be served by preventing Ohio corporations from writing surplus lines insurance in states in which it is legal. It is presumably subject to a full battery of controls in the state where it is written, under statutes resembling Ohio's Sections 3905.30 through 3905.35, supra. In Opinion No. 878, supra, my predecessor states as follows:

"\* \* \* The statutes regulating the insurance business, being remedial, must be liberally construed to conserve the legislative purpose and to prevent and correct evils growing out of the insurance business, St. ex rel. v. Conn., 115 Ohio St., 607, 608."

The legislature has expressed its approval of surplus lines insurance for Ohio citizens, as have most other states for their citizens, and has subjected it to controls, as have they. Hence, any doubt as to the construction of Section 3905.44, supra, should be resolved in favor of permitting Ohio companies to write such insurance - and there is little room for doubt.

In specific answer to your question it is my opinion, and you are so advised, that an Ohio domestic insurance company is not prohibited by Section 3905.44, Revised Code,

from writing surplus lines insurance in other states in which it has not been authorized to do business, if the laws of such states similar to Section 3905.30 through 3905.35, Revised Code, permit the writing of surplus lines insurance by an unauthorized company. (Opinion No. 878, Opinions of the Attorney General for 1964, disapproved to the extent indicated.)