



Office of the Attorney General
State of Texas

November 18, 1992

DAN MORALES
ATTORNEY GENERAL

Honorable Robert Eckels
Chairman
Committee on County Affairs
Texas House of Representatives
P. O. Box. 2910
Austin, Texas 78768-2910

Letter Opinion No. 92-76

Re: Whether Insurance Code article 21.48A, section 2(e) authorizes an insurance agent to collect a substitution fee from a lender if the lender sells a mortgage and requests from the insurance agent an endorsement reflecting the change (RQ-305)

Dear Chairman Eckels:

You have asked us to consider whether article 21.48A, section 2(e) of the Insurance Code¹ authorizes an insurance agent to collect a substitution fee from a lender if the lender sells the mortgage in the secondary mortgage market and requests from the insurance agent an endorsement reflecting the change. We do not believe that article 21.48A, section 2(e) of the Insurance Code applies to the situation about which you ask; we therefore conclude that section 2(e) does not authorize an insurance agent to collect a fee from a lender in the circumstances you describe.

Article 21.48A, section 2(e) of the Insurance Code provides as follows:

Upon the sale or transfer of its ownership interest in real or personal property, a lender is subject to the payment of a substitution fee as described in Section 2(a) of this article and the lender may not, directly or indirectly, charge the borrower for such substitution fee.

¹We note that the Seventy-second Legislature added two sections labelled 2(e) to article 21.48A of the Insurance Code. See Acts 1991, 72d Leg., ch. 327, § 2, at 1369-70; Acts 1991, 72d Leg., ch. 242, § 11.31, at 1068. The two enactments do not conflict; thus, we will construe each to operate within the limits of its own terms so as not to conflict with the other. Attorney General Opinion JM-914 (1988) at 7 (quoting 1A SUTHERLAND STATUTORY CONSTRUCTION § 23.17 (4th ed.)). Your question involves construction of section 2(e) as added by Acts 1991, 72d Leg., ch. 242, § 11.31, at 1068. For purposes of this letter, therefore, we will refer to that section as "2(e)."

Subsection (e) thus attempts to subject a lender to the payment of a "substitution fee" as section 2(a) describes such a fee. Section 2(a) provides as follows:

No Lender shall require a fee of over Ten Dollars (\$10.00) for the substitution by the Borrower of an insurance policy for another insurance policy still in effect, or require any fee for the furnishing by the Borrower of an insurance policy for an existing policy upon termination of the existing policy, when such insurance policy is provided through an insurance company duly licensed to do business in the State of Texas pursuant to the provisions of this Insurance Code.

We do not believe that subsection 2(e) applies to the situation about which you ask.² In our opinion, therefore, article 21.48A, section 2(e) does not authorize an insurance agent to collect a "substitution fee" from a lender if the lender sells a mortgage and requests from the insurance agent an endorsement reflecting the change.

S U M M A R Y

Article 21.48A, section 2(e) of the Insurance Code does not authorize an insurance agent to collect a fee from a lender if the lender sells a mortgage and requests from the insurance agent an endorsement reflecting the change.

Very truly yours,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

²In our opinion, the language of article 21.48A, section 2(e) of the Insurance Code is unclear as to which situations it applies, and as to which persons it authorizes to collect a fee from lenders. Additionally, the use of the term "substitution fee" is unclear to us, as subsection (e) appears to involve a different situation from that articulated in subsection (a). For these reasons, we believe that a court might find subsection (e) void for vagueness. See *Galveston, H. & S.A. Ry. Co. v. Duty*, 277 S.W. 1057, 1059 (Tex. Comm'n App. 1925, judgm't adopted) (statute that fails sufficiently to define duty statute seeks to impose or acts statute seeks to prohibit is wholly void); 67 TEX. JUR. 3D *Statutes* § 20, at 555 (1989).