



STATE OF KANSAS

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December 16, 1976

ATTORNEY GENERAL OPINION NO. 76-370

The Honorable Ben Foster
State Representative
920 Olive W. Garvey Building
200 West Douglas
Wichita, Kansas 67202

Re: Banks--Bank-holding Companies--Interstate Commerce

Synopsis: In the event a Kansas corporation acquired controlling interest in a multi-bank holding company in another state, the corporation would not be in violation of K.S.A. 9-505a, either by reason of being a Kansas corporation or by reason of maintaining its principal office in Kansas for the purpose of holding directors' and shareholders' meetings and generally managing and controlling the bank holding company would conduct its operations solely in another state or states. If a Kansas corporation were to reincorporate in another state, and become a bank holding company there, and transacted banking business in that state, the corporation would not be in violation of K.S.A. 9-505a by reason of maintaining its principal office in Kansas for the purpose of holding directors' and stockholders' meetings and generally managing and controlling the bank holding company which would conduct its operations solely in another state.

* * *

Dear Representative Foster:

You inquire concerning the application of K.S.A. 9-505(a) to a proposed transaction by First Kansas Financial, Inc.

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This corporation was initially incorporated under the laws of the State of Kansas in 1962 under the name of "National Mortgage Corporation, Inc." In 1963, its name was changed to Namco Mortgage Company, Inc., and in 1967, the name was changed once again to "First Home Investment Corporation of Kansas, Inc." Subsequently, it was placed in corporate reorganizational proceedings under chapter X of the federal bankruptcy act, as amended. Pursuant to a plan of reorganization and K.S.A. 17-6913, its name was changed to First Kansas Financial, Inc. On April 26, 1976, the United States District Court for the District of Kansas approved a plan of reorganization which has been approved by the requisite number of stockholders. The corporation is now being operated under the plan of reorganization by a court-appointed board of directors, with its officers in Wichita, Kansas.

In implementing the plan of reorganization, the corporation must undertake to engage in a profitable business for the benefit of its stockholders. The directors are considering the possible acquisition of the controlling stock in a multi-bank holding company located in another state. The corporation wishes to remain a Kansas corporation and to retain its principal offices in the State of Kansas, but is concerned whether the proposed transaction is prohibited by K.S.A. 9-505(a), which provides thus:

"After the effective date of this act, it shall be unlawful for any bank holding company, as defined by K.S.A. 9-504, to be organized, or transact business within the state of Kansas except that any such company operating with the state on the effective date of this act may continue its operations subject, however, to the restrictions and limitations of all of the provisions of this act."
[Emphasis supplied.]

The term "bank-holding company" is defined by K.S.A. 9-504(a), and First Kansas Financial, Inc., would constitute a "bank-holding company" as defined therein upon the acquisition of a controlling question.

Acquisition of a controlling interest in a multi-bank holding company by an existing Kansas non-banking corporation does not in and of itself constitute the organization of a bank holding company. We are concerned here with what constitutes the transaction of business which is prohibited by the statute.

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It is not proposed that First Kansas Financial, Inc., will engage in the banking business in this state. The banks owned by the holding company in which First Kansas proposes to acquire a controlling interest are all located outside Kansas, and First Kansas does not propose to acquire any banking interests domestically. Thus, the transaction in question here is not merely a local, i.e., Kansas matter, but a transaction in interstate commerce. If K.S.A. 9-505a is construed to prohibit the organization of a bank-holding company in this state, and secondly, to prohibit the transaction of banking business in this state by a bank-holding company, its application is in no wise extraterritorial. If, however, it is construed to prohibit the transaction of banking business in other states by a bank-holding company which has its corporate office located in this state, the extraterritorial application of the statute raises serious questions under the Commerce Clause.

In *Proctor and Gamble Company v. City of Chicago*, 509 F.2d 69 (7th Cir. 1974), cert. denied 421 U.S. 978, the court discussed the analysis to be applied to determine the validity of state legislation which is claimed to burden interstate commerce:

"It is difficult to discern the precise test that should be used to determine when a state or local legislative enactment's effect on an area of interstate commerce that has not been preempted by Congressional legislation is violative of the Commerce Clause of the Constitution. It is clear that we must first decide whether there is such an effect and what it is, for if we find no effect our inquiry need not progress. However, if some effect is found then we must proceed to consider whether the legislative body 'has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.' The more difficult question is whether our analysis should encompass an additional step if the legislation is found to be a reasonable means of achieving a legitimate end. The predominant test utilized by the Supreme Court appears to

require that the burden imposed on interstate commerce be balanced against the local benefit in order to determine the ultimate question of constitutionality. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959), and *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). The court's most recent formulation is that contained in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970):

'Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'

There is some support, though, for the proposition that once it is determined that the legislation is a reasonable means of achieving a nondiscriminatory, legitimate goal it should be deemed constitutional and any further weighing process need not occur. . . . Moreover, it is argued that in fact the Supreme Court has perhaps eliminated this final balancing step by its opinion in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129, 89 S.Ct. 323, 21 L.Ed.2d 289 (1968)." 509 F.2d at 75 [Footnotes omitted.]

Resolution of the threshold question, whether there is indeed any effect on interstate commerce, depends upon which construction is given to K.S.A. 9-505a. If it is construed to prohibit the transaction of banking business in other states as well as Kansas by a bank-holding company lawfully existing in this state, it has an obvious impact on interstate commerce. If it is construed to prohibit only the actual transaction of the business of banking in this state by a bank-holding company lawfully existing in this state, it has no effect on the proposed transaction and only incidental impact, if any on interstate commerce generally.

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Concerning the question whether the legislature has "acted within its province and whether the means of regulation are reasonably adapted to the end sought," *Proctor & Gamble, supra*, if given the former construction, the legislature is deemed to have sought to regulate not merely the domestic banking industry, but, as applied to the facts here, an exclusively interstate transaction of a lawfully existing Kansas bank-holding company. In my judgment, the purpose of K.S.A. 9-505a is to prohibit bank-holding companies from engaging in the business of banking in this state. Indeed, this purpose of the act is fairly inferred from the second clause of the title of the bill as enacted in 1974

"An Act relating to bank holding companies; *prohibiting* the organization of bank holding companies and *the transaction of business by any such company not doing business within the state on the effective date of this act. . . .*" [Emphasis supplied.]

The second section of the 1974 enactment concerns transactions by bank holding companies in *non-banking* companies. The first section, which is described by the underscored clause of the title above, inferentially refers to the transaction of *banking* business by bank holding companies.

There is, thus, no occasion to reach the further step, the "weighing process," referred to in *Proctor and Gamble, supra*. The value of the legislation is not disputed, *i.e.*, it is reasonably designed to implement its purpose, and the purpose itself, construed here to be to prohibit bank holding companies in this state from engaging in the business of banking in this state, is a reasonable, permissible and nondiscriminatory state objective.

Viewing the serious constitutional objections which flow from attributing to the legislature a broader design and purpose, *i.e.*, to prohibit a Kansas corporation from engaging in the business of banking in another state, and mindful that the local intrastate protection against bank-holding companies afforded by the statute is equally effective when given a narrower construction, it is my judgment that K.S.A. 9-505a should be construed to prohibit a Kansas bank holding corporation from engaging in the business of banking in this state, and not to prohibit a Kansas corporation from acquiring a controlling interest in banks or a bank-holding company located in other states, and engaging

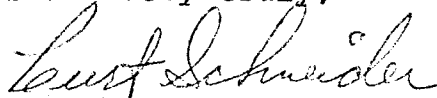
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in the business of banking in such other states. In acquiring such interests, the Kansas corporation does not, in my judgment, engage in the business of banking in the State of Kansas, for the banking interests so acquired are located and operated solely in such other states, and under the applicable banking laws of such other states.

Thus, to respond specifically to your first question, it is my judgment and opinion that, in the event the corporation acquired control of a multi-bank holding company in another state, the corporation would not be in violation of K.S.A. 9-505a, either by reason of being a Kansas corporation or by reason of maintaining its principal office in Kansas for the purpose of holding directors' and shareholders' meetings and generally managing and controlling the bank holding company which would conduct its operations solely in another state. Similarly, if the company were to reincorporate in another state, and become a bank holding company there, and transacted banking business in that state, the corporation would not be in violation of K.S.A. 9-505a by reason of maintaining its principal office in Kansas for the purpose of holding directors' and stockholders' meetings and generally managing and controlling the bank holding company which would conduct its operations solely in another state.

Lastly, you inquire whether, if the corporation would not be in violation of K.S.A. 9-505a by reason of either of the foregoing, whether the corporation would be in violation of K.S.A. 9-505a in the event the corporation conducted other business in the State of Kansas other than banking business, *i.e.*, business as other than a bank holding company. While K.S.A. 9-505a, as construed above, does not prohibit the corporation from engaging in non-banking business in this state, *i.e.*, from engaging in businesses other than banking or of managing or controlling banks in this state, or of furnishing services to or performing services for banks, the corporation remains subject to K.S.A. 9-505b in the conduct of its non-banking business in this state.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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