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ATTORNEY GENERAL OPINION NO. 83- 84

John A. O'Leary, Jr.
Bank Commissioner
700 Jackson, Suite 300
Topeka, Kansas 66603

Re: Banks and Banking -- Banking Code -- Insolvency
Defined

Synopsis: As provided by K.S.A. 9-1902, the State Bank Commissioner may deem a bank to be insolvent when, among other things, the actual cash market value of the bank's assets is insufficient to pay the liabilities of its creditors. For the purposes of this statute, the term "assets" refers to the bank's capital account, bond and securities accounts, and other liquid items, but does not include furniture, equipment, buildings or real estate. Cited herein: K.S.A. 9-901, 9-1101, 9-1902, 9-1903, 9-1905, 9-1907, 9-1908.

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Dear Commissioner O'Leary:

As Bank Commissioner for the State of Kansas, you request our opinion on a question concerning the definition of the term "insolvency" as it is used in the Kansas Banking Code at K.S.A. 9-1902. Specifically, you inquire whether the statutory phrase "actual cash market value of its assets" includes physical property owned by a bank, such as buildings, furniture and real estate, or merely the capital account, bond accounts, and other accounts of similar liquidity. The question is important in determining whether a bank meets the insolvency tests of the statute, for the addition of the physical assets could allow the continued operation of an institution which would otherwise be subject to receivership.

K.S.A. 9-1902 is part of the original Banking Code adopted in 1947. As it presently reads, the statute states:

"A bank or trust company shall be deemed to be insolvent when (1) the actual cash market value of its assets is insufficient to pay its creditor liabilities except that for this purpose unconditional evidence of indebtedness of the United States of America may be valued, at the discretion of the commissioner, at par or cost whichever is the lesser; (2) when it is unable to meet the demands of its creditors in the usual and customary manner; (3) when it shall fail to make good its reserve as required by this act."

Once the bank commissioner determines that the above conditions exist, he is authorized by law to take charge of the insolvent bank and all of its "property and assets." (K.S.A. 9-1903) A receiver is then appointed (K.S.A. 9-1905), who may sell all the "property" of the bank on such terms as the court approves. If the federal deposit insurance corporation (FDIC) is involved, it may act as receiver without bond. (K.S.A. 9-1907.) The FDIC shall then, as receiver, assume "the possession of and title to all of the assets, business and property of every kind, including real estate," of the bank. (K.S.A. 9-1908.)

The above statutes, which are included in the same article regarding dissolution and insolvency as is K.S.A. 9-1902, seem to draw a distinction between the "assets" of a failed bank and its "property." Indeed, K.S.A. 9-1908 includes a third term, that of the bank's "business." The use of more than one term in these statutes is, in our opinion, important, and not merely excess verbiage. As is the case with the interpretation of any statute, effect should be given to each word and phrase used by the legislature, and it must be presumed that the legislature consciously chose the words which appear in the statutes. State ex rel. Stephan v. Unified School Dist. No. 428, 231 Kan. 579 (1982). In re Armed Forces Coop. Insuring Assn., 5 Kan.App.2d 787 (1981). Accordingly, when the Bank Commissioner takes action under K.S.A. 9-1901 et seq., against an insolvent bank, the term "assets" in K.S.A. 9-1902 must be read in light of the other statutes regarding insolvency in the same act, i.e., in pari materia with them.

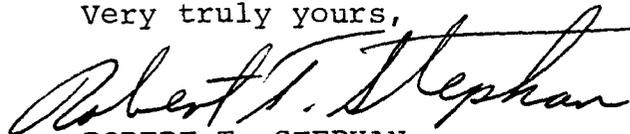
While the common meaning of the word "assets" includes anything of value which may be set off against liabilities [Black's Law Dictionary, 4th rev.ed (1968)], in our opinion a more restricted use is intended here. In concluding that the term as used in K.S.A. 9-1902 refers only to liquid assets in the bank's capital account (K.S.A. 9-901) and to marketable securities, stock and bonds (K.S.A. 9-1101), we

are mindful of the vital interest of the state in maintaining viable banking institutions. One way this interest is protected is through statutes such as K.S.A. 9-1901 et seq., which set out procedures by which insolvent banks can be dealt with promptly before further harm is done to their depositors and stockholders. In making the determination that an institution is insolvent, thus triggering the drastic steps outlined above, there should be as little margin for error as possible. The inclusion of the bank building itself, the land on which it sits, and the furniture and fixtures contained therein could give an otherwise insolvent institution a paper value which would preclude such a determination by the commissioner, perhaps with unfortunate results later.

Our conclusions are consistent with definitions of insolvency used by courts in common law determinations of whether a bank can be reasonably said to be insolvent. In Garrett v. Tunnicliffe, 145 So. 213 (Fla. 1933), the court determined that a bank is solvent so long as it possesses sufficient assets to pay, within a reasonable time, all its liabilities through its own agencies. Clearly, a bank which is reduced to selling the very building in which it does business in order to pay its liabilities should not be considered as solvent by the law. Further, since it is the responsibility of a bank to pay most deposits on demand, the fact that it has assets which ultimately may be worth as much as the deposits does not establish that it could (or should) keep its doors open. In re Franklin National Bank, 381 F. Supp. 1390 (E.D.N.Y. 1974). Finally, as was noted by the court in Smith v. Witherow, 102 F.2d 638, 640 (3rd Cir. 1939), a bank's insolvent status should not be determined "by the theoretical state of its balance sheet which may include assets whose actual value is far less than that at which they are carried on its books."

In conclusion, as provided by K.S.A. 9-1902, the State Bank Commissioner may deem a bank to be insolvent when, among other things, the actual cash market value of the bank's assets is insufficient to pay the liabilities of its creditors. For the purposes of this statute, the term "assets" refers to the bank's capital account, bond and securities accounts, and other liquid items, but does not include furniture, equipment, buildings or real estate.

Very truly yours,



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