



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 85- 112

Eugene T. Barrett, Jr.
Kansas Bank Commissioner
700 Jackson, Suite 300
Topeka, Kansas 66603

Re: Banks and Banking--Banking Code; Dissolution;
Insolvency--Receiver Take Charge of Assets;
Distribution

Synopsis: K.S.A. 9-1906, as amended by L. 1985, ch. 59, provides a statutory procedure for the distribution of assets of an insolvent bank or trust company. As a general rule of law, purely procedural statutes which do not affect substantive rights are given retrospective application. Provided no distributions have been made to creditors, K.S.A. 9-1906 may be applied retrospectively to an existing receivership. However, after the distribution process has begun, creditors of the insolvent institution have a vested right in the method of distribution. In such a case, K.S.A. 9-1906 should be given prospective application only. Cited herein: K.S.A. 9-1906, as amended by L. 1985, ch. 59; 44-1211; 75-4221; 84-9-301; 84-9-312, as amended by L. 1985, ch. 346, §1.

* * *

Dear Commissioner Barrett:

As Bank Commissioner for the State of Kansas, you request our opinion on a question concerning the application of K.S.A.

9-1906, as amended by L. 1985, ch. 59. Specifically, you inquire whether the statute as amended should be construed prospectively or retrospectively, and whether the statute should be applied as of the date of the receivership or the date of distribution. Further, you are concerned whether K.S.A. 9-1906 should apply to existing receiverships where distributions have been made. You have informed us that the aforementioned questions regarding the prospective or retrospective application of K.S.A. 9-1906 were not considered at the legislative hearings on the bill which amended the statute.

K.S.A. 9-1906 as amended concerns the distribution of assets of an insolvent bank and the order in which payments are made by the receiver, and provides the following procedure for distribution [at new subsection (b)]:

"(b) In distributing assets of an insolvent bank or trust company in payment of its liabilities, the order of payment, in the event its assets are insufficient to pay in full all of its liabilities, shall be by category as follows:

"(1) The costs and expenses of the receivership;

"(2) claims which are secured or given priority by applicable law;

"(3) claims of unsecured depositors;

"(4) all other claims exclusive of claims on capital notes and debentures; "

"(5) claims on capital notes and debentures.

"Should the assets be insufficient for the payment in full of all claims within a category, such claims shall be paid in the order provided by other applicable law or, in the absence of such applicable law, pro rata."

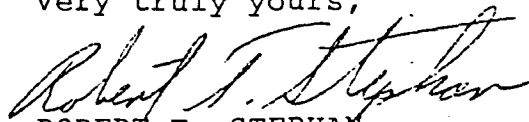
Examples of those claims given priority by K.S.A. 9-1906(b)(2) include lien creditors and secured creditors under Article 9 of the Uniform Commercial Code (K.S.A. 84-9-301, 84-9-312, as amended by L. 1985, ch. 346, §1), secured deposits of public funds (K.S.A. 75-4221) and claims for unpaid wages. (K.S.A. 44-1211).

A statute, in absence of a clear legislative expression to the contrary, is presumed to operate prospectively. Ohio Casualty Insurance Company v. State Farm Automobile Insurance Company, 601 F.Supp. 345 (D.Kan. 1985). However, purely procedural statutes which do not affect substantive rights are ordinarily given retrospective application. Tew v. City of Topeka Police and Fire Civil Service Commission, 237 Kan. 96 (1985).

The amendment to K.S.A. 9-1906 describes the procedure by which creditors and depositors of an insolvent bank or trust company shall be paid. Provided no distributions have been made, application of the amended statute to an existing receivership does not affect substantive rights of creditors of such insolvent bank or trust company and should therefore be applied retrospectively. However, if the receiver has already begun distribution of the insolvent bank or trust company assets, creditors of the institution have vested rights in the procedure, as the new order for payment may alter the amount which a creditor would otherwise have received, either in full or on a pro rata basis. In such situations, K.S.A. 9-1906 should be applied only prospectively.

In conclusion, K.S.A. 9-1906, as amended by L. 1985, ch. 59, provides a statutory procedure for the distribution of assets of an insolvent bank or trust company. As a general rule of law, purely procedural statutes which do not affect substantive rights are given retrospective application. Provided no distributions have been made to creditors, K.S.A. 9-1906 may be applied retrospectively to an existing receivership. However, after the distribution process has begun, creditors of the insolvent institution have a vested right in the method of distribution. In such a case, K.S.A. 9-1906 should be given prospective application only.

Very truly yours,



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RTS:JSS:jm