May 2, 1986

ATTORNEY GENERAL OPINION NO. 86-67

Charles A. Peckham
Rawlins County Attorney
Rawlins County Courthouse
Atwood, Kansas 67730

Re: Banks and Banking -- Banking Code; Dissolution;
Insolvency -- Liability of FDIC for Personal
Property Taxes Owed at Time State Bank Failed

Synopsis: As receiver of a failed state bank, the FDIC is
liable for the personal property taxes that were
due and owning at the time the state bank failed.

Dear Mr. Peckham:

As Rawlins County Attorney, you request our opinion on a
question concerning receivership liability. Specifically, you
inquire whether the FDIC, acting as receiver for the failed
Herndon State Bank, is liable for personal property
Rawlins County taxes that were due and owing at the time the
Herndon State Bank failed.

K.S.A. 1985 Supp. 9-1906 states:

"The receiver, under the direction of the
commissioner, shall take charge of any
insolvent bank or trust company and all of
its assets and property, and liquidate the
affairs and business thereof for the
benefit of its depositors, creditors and
stockholders. The receiver may sell or
compound all bad and doubtful debts and sell all the property of the bank or trust company upon such terms as the district court of the county where the bank or trust company is located shall approve. The receiver shall pay over all moneys received to the creditors and depositors of such bank or trust company as ordered by the commissioner.

"(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." (Emphasis added.)

K.S.A. 9-1907 authorizes the FDIC to be a receiver, stating:

"The federal deposit insurance corporation or its successor, hereby is authorized and empowered to be and act without bond as receiver or liquidator of any insolvent bank or trust company, the deposits in which are to any extent insured by said corporation, and which bank or trust company shall have been closed. In the event of any such closing of any bank or trust to said insurance corporation the appointment as receiver or liquidator of
such bank or trust company, and if said
insurance corporation accepts said
appointment then such insurance
corporation shall have and possess all
the powers and privileges and shall
assume all the duties and requirements
provided by the laws of this state with
respect to a state receiver or
liquidator, respectively, of a bank or
trust company, its depositors and other
creditors, and shall be subject to the
jurisdiction of the district courts and
supreme court of Kansas." (Emphasis
added.)

Several cases have held that taxes lawfully levied on a bank's
intangible property are to be paid out of the assets of the
bank as a claim prior to the depositors' and creditors'
rights. (See Farmers State Bank of Belden v. Nelson,
218 N.W. 393; see also State v. Ord State Bank, 220
N.W. 265; and State v. American State Bank of Lincoln, 209
N.W. 621, where insolvent state bank's assets were sufficient
to pay taxes, but had been paid to depositors, or sold in
liquidation, taxes may be ordered paid out of depositors'
guaranty fund.)

Federal law analogous to K.S.A. 1985 Supp. 9-1906 considers
any tax to be an administrative expense (11 U.S.C.
§503(b)(1)(B)), and prioritizes administrative expenses on
category one level [11 U.S.C. §507(a)(1)], before other
creditors.

In conclusion, it is our opinion that personal property taxes
due and owning to Rawlins County at the time the Herndon
State Bank failed are to be paid by the FDIC. Whether the tax
is a claim prior to all other creditors or an administrative
expense, FDIC is liable as receiver.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Thomas Lietz
Assistant Attorney General

RTS:JLM:TL:crw