



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 23, 1986

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 86- 134

Eugene T. Barrett
Commissioner
Banking Department
700 Jackson, Suite 300
Topeka, Kansas 66603

Re: Banks and Banking -- Banking Code; Powers -- 1986
Senate Bill No. 432

Synopsis: The 1986 Kansas Legislature enacted Senate Bill No. 432 (L. 1986, ch. 57) in response to numerous bank failures in one-bank towns. As an exception to the long-standing public policy against branch banking, L. 1986, ch. 57 grants a very limited form of branch banking under specifically delineated circumstances.

L. 1986, ch. 57 is not preempted by federal law. All receivers of a failed state bank must comply with the provisions of L. 1986, ch. 57.

The State Bank Commissioner is involved in many facets of the closing and reopening of a failed bank, i.e. the initial pre-screening of potential bidders for a failed bank, the closing of the bank, ordering the receiver to pay creditors and shareholders of a failed bank, receiving reports from the receiver and removing the receiver for cause, approving receiver indebtedness, determining when a banking emergency exists, etc. Once a party accepts the receivership, however, the commissioner does not take part in the bidding and purchasing process. The receiver, pursuant to L. 1986, ch. 57 and other Kansas law, takes charge

upon appointment and administers the bidding and purchasing process.

L. 1986, ch. 57, §2 mandates a four-tiered approach by which the receiver must abide in selling certain failed banks. If the failed bank is the only bank in a community of 3,500 or less and all attempts at rechartering the bank as a new bank have failed (tier one), limited branching is allowed. The branch bids must be received from banks in descending order in the county or contiguous county of the failed bank (tier two), from counties contiguous to contiguous counties (tier three), or from a community no more than 100 miles from the county lines of the failed bank (tier four). Each tier must be thoroughly analyzed and all bids of the tier rejected before the receiver may analyze bids from the next level. Every effort must be made by the receiver to recharter the bank as a new (de novo) bank. Only when all else fails may the branch bids be reviewed and then only in the order recited above.

Under no circumstance may a de novo bid be rejected merely because a higher branch bid was offered. Separate evidence and a factual basis for rejection should be supplied by the receiver with every rejection.

L. 1986, ch. 57, §2 does not conflict with the receiver's fiduciary duty to the shareholders, creditors and depositors of the failed bank. The receiver may strive for the maximum bid allowed under the law. The law mandates a tiered-bid system and the receiver may seek the maximum bid only within this system.

Cited herein: K.S.A. 1985 Supp. 9-520; K.S.A. 9-1801; 9-1802; 9-1903; 9-1905; K.S.A. 1985 Supp. 9-1906; K.S.A. 9-1907; 9-1908; 9-1911; L. 1947, ch. 102, §40; L. 1957, ch. 72, §1; L. 1967, ch. 70, §1; L. 1973, ch. 46, §1; L. 1975, ch. 43, §1; L. 1978, ch. 45, §2; L. 1984, ch. 48, §5; L. 1984, ch. 49, §2; L. 1984, ch. 50, §1; L. 1986, ch. 57, §§1-2; 12 U.S.C. §36; 12 U.S.C. §321.

*

*

*

Dear Commissioner Barrett:

As the State Bank Commissioner, you request our opinion on several issues regarding the Federal Deposit Insurance Corporation (FDIC), receiverships of failed banks, and 1986 Senate Bill No. 432 (L. 1986, ch. 57). Your threshold inquiry concerns whether L. 1986, ch. 57, §2 is preempted by federal law regulating the FDIC.

In general, if there is a direct conflict between state and federal law, federal law prevails. Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). However, in matters involving the FDIC acting as receiver of a failed state bank, statutory and case law has held that no conflict exists and state law controls. K.S.A. 9-1907 states in part:

"In the event of any such closing of any bank or trust company the commissioner may tender to said insurance corporation [the FDIC] 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.)

FDIC v. Sumner Finance Corp., 602 F.2d 670 (5th Circuit, 1979) held in matters involving failed state banks that the rights of the FDIC, as subrogee of the depositors, are to be determined by state law. 12 U.S.C.A. §321 (1935) states that any national bank operated as a branch bank must meet the same requirements as a branching state bank. 12 U.S.C.A. §36(c) (1935) states that a national banking association may establish branch banks only if expressly authorized by and pursuant to state law. In our opinion, therefore, L. 1986, ch. 57, §2 is not preempted by federal law, and the FDIC acting as receiver is bound to follow its provisions.

Your second inquiry concerns whether the Commissioner is required or authorized by law to review the adequacy of bids for a failed bank. L. 1986, ch. 57 states in part:

"New Section 1. As used in this act:

"(a) 'Bank' means any bank the deposits of which are insured by the federal deposit insurance corporation or its successor.

"(b) 'Bidding bank' means a bank submitting bids to the receiver for assets and liabilities of a failed bank. A bidding bank must be a bank domiciled in the state of Kansas and shall not include a bank which is directly or indirectly owned or controlled by a bank holding company, as defined in K.S.A. 1985 Supp. 9-519, and amendments thereto, which owns or controls three or more banks domiciled in the state of Kansas.

. . . .

"(d) 'Failed bank' means a bank declared insolvent and closed by the state bank commissioner, in the case of a bank organized under the laws of the state, or the comptroller of the currency, in the case of a national banking association.

"(e) 'Failing situation' means that a bank has been classified as a five-rated bank by the federal deposit insurance corporation or jointly by (1) the state bank commissioner and the federal deposit insurance corporation, (2) office of the comptroller of the currency and the federal deposit insurance corporation, or (3) the federal reserve system and the federal deposit insurance corporation during an asset review at a visitation or through a regulatory examination.

"(f) 'Acquiring bank' means a bank purchasing or merging with a bank in a failing situation. An acquiring bank must

be a bank domiciled in the state of Kansas and shall not include a bank which is directly or indirectly owned or controlled by a bank holding company, as defined in K.S.A. 1985 Supp. 9-519, and amendments thereto, which owns or controls three or more banks domiciled in the state of Kansas.

"New Sec. 2. When a bank is declared insolvent but attempts by the receiver to find a purchaser for the assets and liabilities of the failed bank to be rechartered as a new bank are not successful, such assets and liabilities may be purchased by a bidding bank and operated as a branch bank as provided for in K.S.A. 9-1111, and amendments thereto, subject to the following requirements:"
(Emphasis added.)

In our opinion, Kansas law mandates that the commissioner is involved in many facets of the closing and reopening of a failed bank, i.e. in the initial pre-screening of potential bidders for a failed bank, the closing of the bank, ordering the receiver to pay creditors and shareholders of a failed bank, receiving reports from the receiver and removing the receiver for cause, approving receiver indebtedness, determining when a banking emergency exists, etc. See K.S.A. 1985 Supp. 9-520(b); K.S.A. 9-1801(b); 9-1903; 9-1905; K.S.A. 1985 Supp. 9-1906(a); K.S.A. 9-1907; 9-1908. Once the decision to close a bank is made, however, the receiver takes charge of the insolvent bank and receives the bids submitted by parties offering to purchase the failed bank. New Section 1(b) of L. 1986, ch. 57 directly addresses this point in stating that bidding banks are to submit bids to the receiver. After the receiver is appointed by the commissioner, it is the receiver's duty to find a purchaser for the failed bank. L. 1986, ch. 57, §2. The receiver reviews the bids to determine an acceptable purchaser.

This analysis is further buttressed by the fact that no explicit language exists granting the commissioner the power to select the purchasing bank. Had the legislature intended the commissioner to be in charge of reviewing the bids, it would have been a simple matter to have included such requirement in the statute. For example, Arkansas Statutes Annotated §67-2114(c) "Emergency acquisitions" states:

"Where applications are submitted by more than one bank holding company for an emergency acquisition of a particular institution the Commissioner shall first consider all Class A applications; if in the judgment of the Commissioner no Class A application is adequate, the Commissioner shall then consider Class B application; if in the judgment of the Commissioner no Class B application is adequate, the Commissioner shall then consider all Class C applications; if in the judgment of the Commissioner no Class C application is adequate, the Commissioner shall then consider all Class D applications." (Emphasis added.)

Similar legislation granting the commissioner these selection powers was enacted by the State of Indiana. See, Indiana Statutes Annotated 28-1-7.2-3.

Your third inquiry concerns the order of bid priority for a failed bank. New Section 2 of L. 1986, ch. 57 states:

"When a bank is declared insolvent but attempts by the receiver to find a purchaser for the assets and liabilities of the failed bank to be rechartered as a new bank are not successful, such assets and liabilities may be purchased by a bidding bank and operated as a branch bank as provided for in K.S.A. 9-1111, and amendments thereto, subject to the following requirements:

"(a) The failed bank is the only bank located in a city or township;

"(b) the failed bank is located in a city having a population of 3,500 or fewer persons based on the most recent federal census; and

"(c) the bidding bank must come from the home county or an immediate contiguous county to the home county of the failed bank, except that if an acceptable and qualified bidder is not found in the home

county or contiguous counties, the bidding bank may come from counties contiguous to counties contiguous to the home county. If an acceptable and qualified bidder is still not found, the bidding bank may come from a city or township not more than 100 miles from the boundary lines of the home county of the failed bank."

It is a fundamental rule of statutory construction that the purpose and intent of the legislature governs when that intent may be ascertained from the statute. State v. Thompson, 237 Kan. 562 (1985). Further, courts are not limited to only the language of the statute. Historical and legislative background of the statute, purposes to be accomplished and the statute's effect may also be considered in construing the statute. Jackson v. City of Kansas City, 235 Kan. 278 (1984).

It has been the long-standing policy in Kansas to prohibit branch banking. K.S.A. 9-1111 was enacted in 1947 and has been amended nine times, the most recent being L. 1986, ch. 57, §8, as amended by L. 1986, ch. 58, §1. L. 1947, ch. 102, §40 states:

"Branches prohibited. The general business of every bank shall be transacted at the place of business specified in its certificate of authority and it shall be unlawful for any bank to establish and operate any branch bank or branch office or agency or place of business."

The complete ban upon branch banking has evolved to allow specific exceptions. Motor banks to cash and deposit checks, allowing safety deposit boxes in branch buildings, the arrival of automatic teller machines (ATM's), etc. -- these specific exceptions have been carved out of the 1947 prohibition. See L. 1957, ch. 72, §1; L. 1967, ch. 70, §1; L. 1973, ch. 46, §1; L. 1975, ch. 43, §1; L. 1978, ch. 45, §2; L. 1984, ch. 48, §5; L. 1984, ch. 49, §2; L. 1984, ch. 50, §1.

The recent increase in bank failures in Kansas has created a tension against the public policy prohibiting branch banking. With increasing frequency, small-town banks are difficult to sell as rechartered new banks. L. 1986, ch. 57 has accommodated this tension by creating another specific exception allowing branch banking under very stringent

circumstances. Because of the policy prohibiting branch banking, any exception must be strictly construed.

Your third inquiry, order of bid priority, poses several questions: (1) what procedure must the receiver follow to conform to the law; (2) what is entailed in the receiver's decision that its attempts to find a purchaser for the failed bank to be rechartered as a new bank are unsuccessful (thus allowing the receiver to accept a branch bid); and (3) what allowances must be made to comply with the fiduciary obligation of the receiver to the shareholders, creditors and depositors of the failed bank?

The first two of these questions, bid procedure and bid rejection/acceptance, are answered by analysis of L. 1986, ch. 57, §2. "Tier one" mandates bids to be taken for de novo charters only. If all attempts to find a de novo purchaser are deemed inadequate by the receiver, "tier two" allows branch bids from banks located in the county or contiguous county of the failed bank. If an adequate and qualified bidder is not found at "tier two," "tier three" allows branch bids from banks contiguous to counties contiguous to the failed bank. If an acceptable and qualified bidder is not found in "tier three," "tier four" allows a branch bid to be accepted from a bank no more than 100 miles from the failed bank. The language and intent of the legislature are clear: branch banking is contrary to the public policy of the State of Kansas. Only when all else fails does the law allow for branching, and then only under specific circumstances.

To stay within the bounds of the law, the receiver must follow the four-tiered approach mandated by the legislature. To conform to this mandate, it is recommended that the receiver apply L. 1986, ch. 57, §2 in the following manner. Bidding banks should be required to designate on their sealed bid envelopes whether they are a de novo bid or a branch bid. The branch bids should also designate their location on the envelope. The receiver should then open only the de novo bids. The receiver should compare all of the de novo bids with each other. The receiver should accept one de novo bid over all of the other de novo bids. This acceptance should be based upon the bid price, soundness of the management of the bidder, financial and business standing of the bidders, prospects for success of the proposed bidder, etc. (in short, whatever criteria normally used in choosing a bid for a bank). See, e.g., K.S.A. 9-1802.

Some situations may occur where the receiver rejects all of the de novo bids (" . . . attempts by the receiver to find a purchaser for the . . . failed bank to be rechartered as a new bank are not successful") L. 1986, ch. 57, §2. These rejections should be based upon the bid price being below the receiver's predetermined minimum sale price, the management of the bidder being inferior, etc. The receiver should never accept a branch bid over a de novo bid if the only reason is that the branch bid was higher. Deeming a de novo bid inadequate solely because a higher branch bid exists would give the rejected de novo bidder(s) cause for litigation, as this would violate the clear intent of L. 1986, ch. 57, §2.

If all of the de novo bids are rejected for good cause, the receiver should then open all of the branch bids from the county of the failed bank and the branch bids from counties contiguous to the county of the failed bank. These "tier-two" bids should then be analyzed by the receiver in the same manner as the "tier-one" de novo bids (as recited above), with the receiver accepting or rejecting these branch bids based upon the size of the bid, predetermined minimum sale price, prospects for success of the bidder, etc.

Should the receiver reject all "tier-two" branch bids (and have evidence and reason to do so), then all of the branch bids originating from counties contiguous to counties contiguous to the county of the failed bank should be opened. The same analysis again applies to these "tier-three" branch bids.

Should the receiver fail to accept a "tier-three" bid, then the receiver should open the remaining branch bids, those from a bank in a township or city not more than 100 miles from the boundary lines of the county of the failed bank. Again, the same analysis applies to these "tier-four" branch bids.

The last question raised by the issue of bid priority involves the fiduciary duties of the receiver to the creditors, depositors and shareholders of a failed bank. K.S.A. 1985 Supp. 9-1906(a) states in part:

"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. (Emphasis added.)

Your request letter indicates that a conflict between L. 1986, ch. 57, §2 and K.S.A. 1985 Supp. 9-1906(a) may exist, in that the receiver must strive to accept the highest bid possible to fulfill the statutory fiduciary obligation to the shareholders, creditors and depositors. It is our opinion that L. 1986, ch. 57, §2 and K.S.A. 1985 Supp. 9-1906(a) are compatible with one another.

K.S.A. 1985 Supp. 9-1906(a) mandates that the receiver accept the highest bid possible under the law. The law, L. 1986, ch. 57, §2, orders that the receiver follow the four-tiered procedure outlined above. The receiver may accept the best and highest bid available at the tier in which acceptable bids are found.

For example, if all "tier-one" de novo bids are rejected as inadequate and three acceptable "tier-two" branch bids are found, the receiver should pick the highest bid of the three. Should the receiver choose the second or third highest of these bids, the receiver, to fulfill the fiduciary obligation, should have a sufficient factual basis to explain (in this case, to the creditors, shareholders and depositors) why the highest bid was not accepted.

As to what an acceptable bid is, (or as L. 1986, ch. 57, §2 states, an "acceptable and qualified bidder"), it is our opinion that in no circumstance may the receiver accept a branch bid over a de novo bid simply because the branch bid was higher. This would violate the letter and spirit of L. 1986, ch. 57.

In conclusion, the 1986 Kansas Legislature, in response to numerous bank failures in one-bank towns, enacted L. 1986, ch. 57. As an exception to the long-standing public policy against branch banking, L. 1986, ch. 57 grants a very limited form of branch banking under specifically delineated circumstances.

L. 1986, ch. 57 is not preempted by federal law. All receivers of a failed state bank must comply with the provisions of L. 1986, ch. 57.

The State Bank commissioner is involved in many facets of the procedures surrounding the closing and reopening of a failed bank. Once a party accepts the receivership, however, the

commissioner does not take part in the bidding and selection process. The receiver, pursuant to L. 1986, ch. 57, §2 and other Kansas law, takes charge upon appointment and administers the bidding and purchasing process.

L. 1986, ch. 57, §2 mandates a four-tiered approach which the receiver must abide by in selling certain failed banks. If the failed bank is the only bank in a community of 3,500 or less and all attempts at rechartering the bank as a new bank have failed (tier one), limited branching is allowed. The branch bids must be received from banks (in descending order) in the county or contiguous county of the failed bank (tier two), from counties contiguous to contiguous counties (tier three), or from a community no more than 100 miles from the county lines of the failed bank (tier four). Each tier must be thoroughly analyzed and all bids of the tier rejected before the receiver may analyze bids from the next level. Every effort must be made by the receiver to recharter the bank as a new (de novo) bank. Only when all else fails may the branch bids be reviewed and then only in the order recited above.

L. 1986, ch. 57, §2 does not conflict with the receiver's fiduciary duty to the shareholders, creditors and depositors of the failed bank. The receiver may strive for the maximum bid allowed under the law. The law mandates a tiered-bid system and the receiver may seek the maximum bid only within this system.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Thomas Lietz
Assistant Attorney General