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October 30, 1986

ATTORNEY GENERAL OPINION NO. 86- 152

Barbara J. Sabol, Secretary
Department of Health and Environment
Forbes Field, Building 740
Topeka, Kansas 66620-0110

Re: Insurance -- Uniform Unauthorized Insurers Act --
Hazardous Waste Liability

Synopsis: The United States Environmental Protection Agency allows for the use of a parent corporate guarantee as an additional financial responsibility mechanism for subsidiary owners and operators of hazardous waste facilities to comply with the third-party liability requirements of 40 C.F.R. §§264.147 and 265.147. Regardless whether this guarantee is defined as "insurance," it is enforceable against the parent company. Cited herein: K.S.A. 1985 Supp. 40-2702; K.A.R. 28-31-8; 40 C.F.R. §§264.147; 265.147.

* * *

Dear Secretary Sabol:

As Secretary of the Kansas Department of Health and Environment (KDHE), you request our opinion concerning parent corporate guarantees as an additional financial responsibility mechanism for owners and operators of hazardous waste treatment, storage, and disposal facilities. Specifically, you ask whether such a guarantee, if adopted by the KDHE, would be fully valid and enforceable against the parent corporation when third parties are injured in accidents arising from the operation of a subsidiary facility covered by the guarantee.

The United States Environmental Protection Agency (EPA) promulgated an interim final rule on July 11, 1986 to amend the financial responsibility requirements concerning liability coverage for owners and operators of hazardous waste treatment, storage, and disposal facilities. This amendment allows a parent corporation to guarantee additional financial responsibility for owners or operators to comply with the third-party liability requirements of the Resource Conservation and Recovery Act, 40 C.F.R. 264.147 et seq. KDHE has adopted this act. K.A.R. 28-31-8.

The interim final rule report, as it appeared in the July 11, 1986 Federal Register at p. 25351, states:

"A corporate guarantee is a promise by one corporation to answer for the default of another. It is a collateral undertaking and presupposes another obligation which is identified in the guarantee. There is ordinarily a contract or other agreement between the principal (obligor) and a third party creating the primary obligations. The guarantee is then a contract between the principal and the guarantor, guaranteeing payment of the primary obligation. However, in the corporate guarantee that is the subject of today's rule, the obligation between the principal and third party will generally arise out of tort liability, not contract. (Emphasis added.)

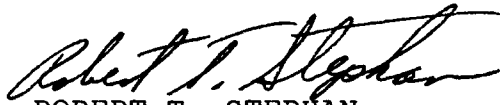
The term "insurance" has been defined as any contract whereby one party promises for a consideration to indemnify the other against certain risks. Whether a company is engaged in the insurance business depends upon (1) the character of the business it transacts, and (2) whether the assumption of a risk is a principal object and purpose of the business. State, ex rel., v. Anderson, 195 Kan. 649, 662 (1965). See also, Attorney General Opinion Nos. 76-372 and 80-8. However, this contract would be enforceable under Kansas law, regardless whether or not the guarantee is deemed "insurance." K.S.A. 1985 Supp. 40-2702 states in part:

"The failure of an insurer transacting insurance business in this state to obtain a certificate of authority from the commissioner of insurance shall not impair

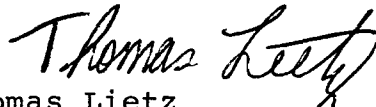
the validity of any act or contract of such insurer and shall not prevent such insurer from defending any action at law or suit in equity in any court of this state,"

Given this statutory language, it is our opinion that the guarantee between the parent and subsidiary would be enforceable and valid under Kansas law, regardless whether the guarantee would be defined as "insurance."

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



Thomas Lietz
Assistant Attorney General

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