



STATE OF KANSAS

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January 20, 1987

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ATTORNEY GENERAL OPINION NO. 87- 11

The Honorable Fletcher Bell
Commissioner of Insurance
Insurance Department
420 SW 9th Street
Topeka, Kansas 66612

Re: Insurance -- General Provisions Relative to
Casualty, Surety and Fidelity Companies -- Bail
Bonding Companies

Synopsis: There are generally two types of bonds accepted by courts in criminal proceedings. Insurance bail bonds are issued by a licensed surety under the authority of K.S.A. 40-1102. Non-insurance company bail bonds (commonly referred to as "pocket bonds") are issued under the authority of K.S.A. 22-2806. Only a natural person may write "pocket bonds" under the authority and regulation of K.S.A. 22-2806. A company may not write "pocket bonds" under the purported authority of K.S.A. 22-2806 as such action would be in violation of K.S.A. 40-214 and the Uniform Unauthorized Insurers Act, K.S.A. 40-2701 et seq. Cited herein: K.S.A. 22-2806; 40-201; 40-214; 40-1101; 40-1102; 40-2701 et seq.

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Dear Commissioner Bell:

As Commissioner of Insurance for the State of Kansas, you request our opinion concerning bail bonds. Specifically, you ask whether a company may lawfully write "pocket bail bonds"

for criminal defendants in the State of Kansas without being licensed by your department.

K.S.A. 40-1102 states in part:

"Any insurance company, other than a life insurance company, organized under the laws of this state or authorized to transact business in this state may make all or any one or more of the kinds of insurance and reinsurance comprised in any one of the following numbered classes, subject to and in accordance with its articles of incorporation and the provisions of this code.

. . . .

"(1) (d) To become surety or guarantor for any person, or copartnership or corporation in any position or place of trust or as custodian of money or property, public or private; to become a surety or guarantor for the performance by any person, copartnership or corporation of any lawful obligation, undertaking, agreement or contract of any kind, except contracts or policies of insurance."

K.S.A. 40-201 states in part:

"For the purposes of this article the term 'insurance company' shall, unless otherwise provided, apply to all corporations, companies, associations, societies, persons or partnerships writing contracts of insurance, indemnity or suretyship upon any type of risk or loss:
. . . ."

In Jordan v. Group Health Association, 107 F.2d 239, 245 (1939), the court discusses the elements of insurance or indemnity contracts: "Whether the contract is one of insurance or of indemnity, there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another." See also State ex rel. Londerholm v. Anderson, 195 Kan. 649 (1965). In the matter at hand, the

company is assuming the forfeiture of the bond to the court should the defendant fail to appear at the proper time. The company charges the defendant a portion of the bond that the company gives the court. The company retains this consideration after the disposition of the case as its profit. Thus, it is our opinion that a company or corporation engaged in the business of writing criminal defendant bail bonds is engaged in the business of insurance.

Your request indicated that at least one company is writing bonds under the purported authority of K.S.A. 22-2806, which states:

"Every surety, except an insurance company authorized to transact business pursuant to subsection (d) of K.S.A. 40-1102 and acts amendatory thereof, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified. The appearance bond and the sureties thereon may be approved and accepted by a magistrate, by the clerk of the court where the action is pending or by the sheriff of the county."

In our opinion, only individuals may act as non-insurance company sureties under K.S.A. 22-2806. Aside from the literal distinction between "[e]very surety, except an insurance company," K.S.A. 22-2806 refers to the non-insurance company surety as "he," "him," and "his," suggesting the statutory intent that it apply only to natural persons.

K.S.A. 40-214 states in part:

"It shall be unlawful for any person, company, corporation or fraternal benefit society to transact the business of insurance, indemnity or suretyship, or do any act toward transacting such business, unless such person, company, corporation or fraternal benefit society shall have been duly authorized under the laws of

this state to transact such business and shall have received proper written authority from the commissioner of insurance"

In that we believe only natural persons may act as sureties under the provisions of K.S.A. 22-2806, it is our opinion that a company writing pocket bail bonds under the purported authority of K.S.A. 22-2806 is in violation of K.S.A. 40-214. See also K.S.A. 40-2701 et seq.

Your request stated a concern pertaining to Supreme Court Rule No. 114, which states in part:

"Whenever any bond is permitted or required to be taken by a clerk or sheriff in accordance with the provisions of Chapter 60 without being approved by the court, it shall be sufficient if the surety thereon is a surety company currently admitted to do business in the State of Kansas. No corporation other than a surety company may be accepted as a surety unless so ordered and approved by the judge. Whenever a natural person is accepted and approved as a surety by a clerk or sheriff, the surety shall be required to attach to the bond a sworn financial statement which reasonably identifies the assets relied upon to qualify him as surety and the total amount of any liabilities, contingent or otherwise, which may affect his qualifications as a surety." Supreme Court Rule No. 114. (Emphasis added.)

Chapter 60 of the Kansas Statutes is entitled "Procedure, Civil." Thus, Supreme Court Rule No. 114 pertains to civil procedure; neither the rule nor Chapter 60 apply to K.S.A. 22-2806, which is a provision of the code of criminal procedure.

In conclusion, there are generally two types of bonds accepted by courts in criminal proceedings. Insurance bail bonds are issued by a licensed surety under the authority of K.S.A. 40-1102. Non-insurance company bail bonds (commonly referred to as "pocket bonds") are issued under the authority of K.S.A. 22-2806. Only a natural person may write "pocket

bonds" under the authority and regulation of K.S.A. 22-2806. A company may not write "pocket bonds" under the purported authority of K.S.A. 22-2806 as such action would be in violation of K.S.A. 40-214 and the Uniform Unauthorized Insurers Act, K.S.A. 40-2701 et seq.

Very truly yours,

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