



STATE OF KANSAS

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September 12, 1988

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ATTORNEY GENERAL OPINION NO. 88-134

W. Newton Male, Commissioner
Banking Department
700 Jackson, Suite 300
Topeka, Kansas 66603

Re: Banks and Banking--Banking Code; Powers--
Limitations on Loans; Exceptions

Synopsis: Generally, the obligation of any person, copartnership, association or corporation to a bank may not exceed 15% of that bank's paid-in and unimpaired capital stock plus unimpaired surplus. Certain obligations are not included in determining the total value of liability which is to be compared with the bank's lending limit. One such exclusion is the secondary obligation of a guarantor. A guarantor promises to answer for the debt, default or miscarriage of another. Cited herein: K.S.A. 1987 Supp. 9-1104.

* * *

Dear Commissioner Male:

As State Bank Commissioner, you have requested our opinion regarding a guarantor's liability as it relates to limitations on a bank's legal lending limitation. Your question arises in light of Attorney General Opinion No. 88-66 which discussed the issue of whether a distinction should be made between a limited partner and a general partner when determining statutory limitations on the total liability a person, copartnership, association or corporation may owe to a bank.

The total liability to any bank of any person, copartnership, association or corporation may not exceed 15% of paid-in and unimpaired capital stock plus unimpaired surplus. K.S.A. 1987 Supp. 9-1104(a). The statute includes guidelines for determining a copartnership's or an association's total liability to a bank, and for determining a member's liability to a bank. To establish the total liability of a copartnership, the liability of the member having the greatest liability to the bank in comparison to other members is added to the liability of the copartnership. To establish whether a person's liability exceeds the limitation, the individual liability to the bank is added to the copartnership's liability to the bank. We opined that no differentiation should be made between a general partner and a limited partner, as the purpose of the statute is to prevent a bank from "putting too many eggs in one basket." Attorney General Opinion No. 88-66 at page 2. That opinion cited and construed only the general rule regarding liability.

Certain transactions are excluded from the term "liability." A guarantor's obligation is not included if that obligation is secondary. K.S.A. 1987 Supp. 9-1104(a)(1). The nature of a guaranty was stated in Bomud Co. v. Yockey Oil Co., 180 Kan. 109 (1956).

"A guaranty is a contract by two or more persons . . . by which one person promises to answer to another for the debt, default, or miscarriage of a third person, and, in a legal sense, has relation to some other contract or obligation with reference to which it is a collateral undertaking." Syl. ¶1.

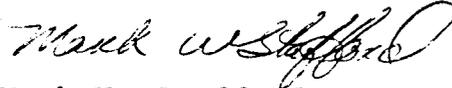
A guarantor's obligation is secondary. The obligation does not become primary and absolute until the principle defaults. Bomud, 180 Kan. at 115. In comparison, a limited partner's obligation is not secondary, as it is not a promise to answer for the debt or default of another. The limited partner's contribution becomes part of the firm's capital stock. 68 C.J.S. Partnership, §475 at 1024. Certificates of shares in a limited partnership constitute indicia of ownership of the firm's assets. See In re Estate of Girndt, 225 Kan. 352, 357 (1979). Therefore, a limited partner's liability should be treated as a member's liability, and not as a guarantor's obligation.

In conclusion, it is our opinion that, in general, the obligation of any person, copartnership, association or corporation to a bank may not exceed 15% of that bank's paid-in and unimpaired capital stock plus unimpaired surplus. Certain obligations are not included in determining the total value of liability, which is to be compared with the bank's lending limit. One such exclusion is a secondary obligation of a guarantor. A guarantor promises to answer for the debt, default or miscarriage of another.

Very truly yours,



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RTS:JLM:MWS:jm