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January 21, 1980

ATTORNEY GENERAL OPINION NO. 80- 17

The Honorable Wesley H. Sowers
State Senator, 31st District
128-S, State Capitol
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--Kansas Tort Claims Act--Interlocal Agreements for Purchase of Insurance or Pooling Arrangements

Synopsis: Pursuant to K.S.A. 1979 Supp. 75-6111(b) and K.S.A. 1979 Supp. 12-2904, a municipality may undertake self-insurance, pooling arrangements or make interlocal insurance purchasing agreements with other municipalities and private agencies. However, if a pooling arrangement involving a private agency is contemplated, and the private agency wishes to avoid regulation by the Kansas Insurance Department, such agreement must be structured so that the basic purpose of the relationship is not one whereby the private agency assumes the risk of indemnifying the municipality.

* * *

Dear Senator Sowers:

You request our opinion as to whether municipalities and private companies may enter into agreements to provide self-insurance funds pursuant to the Kansas Tort Claims Act. Specifically, you note that it is contemplated that a large number of municipalities in Kansas, in organizing to provide natural gas distribution, will formulate a pooling arrangement whereby they would establish a primary self-insurance fund with which to pay bodily injury or property damage claims. You further note that the size of the fund is yet to be determined and that additional insurance will be purchased to provide limits of protection above that of the self-insurance fund. Finally, you point out that private business is also interested in such an arrangement, although your request does not indicate the business normally transacted by the private parties which are contemplating entering into the pooling arrangements. Likewise, we are not advised whether the activities, for which the pooling arrangement is to provide protection, are engaged in as a joint venture. Nor are we given a copy of proposed pooling arrangements. Therefore, we can only evaluate the proposal in general terms and identify the legal considerations pertinent to your inquiry.

Your letter evinces your awareness of K.S.A. 1979 Supp. 75-6111(b), which provides in pertinent part:

> "Pursuant to the interlocal cooperation act, municipalities may enter into interlocal agreements providing for:
>
> "(1) The purchase of insurance to provide for the defense of employees and for liability for claims pursuant to this act; or
>
> "(2) pooling arrangements or other arrangements to share and pay expenditures for judgments, settlements, defense costs and other direct or indirect expenses incurred as a result of implementation of this act including, but not limited to, the establishment of special funds to pay such expenses. With regard to establishing and maintaining such pooling arrangements or other agreements to share in expenditures incurred pursuant to this act, governmental entities and employees or agents thereof shall not be required to be licensed pursuant to the insurance laws of this state."

It is also evident from your letter that you are aware of the provisions of K.S.A. 1979 Supp. 12-2904, which is part of the Interlocal Cooperation Act referenced in the foregoing provisions of 75-6111. It states in pertinent part:

> "(a) Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state including but not limited to those functions relating to . . . the Kansas tort claims act . . . exercised and enjoyed jointly with any other public agency of this state or with any public agency of any other state or of the United States to the extent that the laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public or private agency may exercise and enjoy all of the powers, privileges and authority conferred by this act upon a public agency.
>
> "(b) Any public agency may enter into agreements with one or more public or private agencies for joint or cooperative action pursuant to the provisions of this act. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force."

K.S.A. 1979 Supp. 75-6111(b) clearly illustrates a legislative intent that municipalities be able to share the expense of protecting themselves from possible tort claims by utilizing interlocal agreements to purchase insurance or by pooling resources in a self-insurance fund. K.S.A. 1979 Supp. 12-2904, incorporated by reference in K.S.A. 1979 Supp. 75-6111(b), clearly expresses legislative intent that municipalities be able to engage in such activity through agreements with private agencies, as well as with other public agencies. We are, therefore, of the opinion that municipalities and private agencies may make self-insurance pooling agreements.

However, it is important to note that this power may be subject to the Kansas Insurance Code. As noted above, K.S.A. 1979 Supp. 75-6111(b)(2) provides that with regard to pooling arrangements or other agreements to share in expenditures, governmental entities shall not be required to be licensed pursuant to Kansas insurance laws. But there is no similar provision in either K.S.A. 1979 Supp. 75-6111(b) or K.S.A. 1979 Supp. 12-2904 regarding private agencies in a similar relationship with a municipality or other governmental agency. Therefore, such private agencies may be subject to the Kansas Insurance Code.

The Kansas Insurance Code does not clearly specify elements which may be utilized in ascertaining when organizations are engaged as insurance companies or whether contracts or promises are contracts of insurance. Pertinent provisions, however, are K.S.A. 40-201 and K.S.A. 1979 Supp. 40-214. An insurance company is defined in K.S.A. 40-201 as follows:

> "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: Provided, however, That this definition shall not be held to include fraternal benefit societies as defined in section 40-701 of this code or hospitals or hospital associations which have been in operation ten years or more."

Further, K.S.A. 1979 Supp. 40-214 provides in pertinent 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 conformity with the provisions of the laws of this state relative to insurance, indemnity and suretyship, and further, it shall be unlawful for any insurance company to effect contracts of insurance in this state on the life or person of residents of this state or on property located in this state except through persons duly licensed and certified in accordance with the insurance laws of this state . . . ."

The question of what constitutes insurance was spoken to by the Kansas Supreme Court in State ex rel. Londerholm v. Anderson, 195 Kan. 649 (1965), which identified the two main elements of insurance as "assumption of risk" and "indemnification." Anderson involved a company selling cemetery lots and pre-need burial merchandise. In finding that the company was not transacting insurance business, the Court adopted the position discussed in 44 C.J.S. Insurance, §59 at 528 that the question depended on whether the "principal object and purpose" of the business is the assumption of a risk or some matter to which it is related.

As noted above, K.S.A. 1979 Supp. 75-6111(b)(2) specifically relieves governmental entities from any requirement to be licensed pursuant to Kansas insurance laws with regard to interlocal pooling arrangements. Although no similar exclusion exists for private agencies involved with municipalities under such circumstances, we perceive no problem with interlocal agreements between such parties to purchase insurance or engage in pooling arrangements so long as the private agency neither assumes a risk beyond the fund nor promises to indemnify the municipality. If the private agency does assume some risk beyond the fund or promise to indemnify the municipality, where such indemnity is merely incidental to the pooling arrangement and the business of the private agency, it is our opinion that such arrangements would not constitute the transaction of the insurance business. However, depending on the provisions of the agreement and the nature of the risks assumed, as well as the identity of the private agency and its role in the joint natural gas production venture, there remains a possibility that the private agency can run afoul of the Kansas insurance laws if the private agency is not licensed in Kansas.

We are therefore of the opinion that pursuant to K.S.A. 1979 Supp. 75-6111(b) and K.S.A. 1979 Supp. 12-2904, a municipality may undertake self-insurance, pooling arrangements or make interlocal insurance purchasing agreements with other municipalities and private agencies. However, if a pooling arrangement involving a private agency is contemplated, and the private agency wishes to avoid regulation by the Kansas Insurance Department, such agreement must be structured so that the basic purpose of the relationship is not one whereby the private agency assumes the risk of indemnifying the municipality.

Very truly yours,

Robert T. Stephan

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RTS:BJS:gk