



STATE OF KANSAS

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August 26, 1980

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ATTORNEY GENERAL OPINION NO. 80-185

Ron Todd
Assistant Commissioner of Insurance
Kansas Insurance Department
State Office Building - First Floor
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--Kansas
Tort Claims Act--Interlocal Agreements For Purchase
Of Insurance Or Pooling Arrangements

Synopsis: Public agencies, as defined in the Kansas Interlocal
Cooperation Act, may enter into interlocal agreements
with other public agencies and private agencies, as
further defined in the Act, for the purpose of participat-
ing in a merchantile association which provides insurance
against tort liability for its members engaged in the
commercial distribution of natural gas. In addition, such
association is exempted from the Kansas Insurance Code
pursuant to K.S.A. 40-202. Cited herein: K.S.A. 12-2901,
12-2903, K.S.A. 1979 Supp. 12-2904, K.S.A. 40-202, K.S.A.
1979 Supp. 40-214, 75-6101 as amended, L. 1980, ch. 294,
75-6111, K.S.A. 77-201.

* * *

Dear Mr. Todd:

On behalf of the Kansas Insurance Commissioner, Fletcher Bell, you
have requested the opinion of this office regarding the Kansas
Tort Claims Act, K.S.A. 1979 Supp. 75-6101 et seq. as amended, L.
1980 ch. 294, and the Interlocal Cooperation Act, K.S.A. 12-2901
et seq. Specifically, you inquire whether a municipality can enter
into a self-insurance agreement with a private company or mercantile
association for the purpose of providing self insurance for their
respective natural gas distribution activities. In answering your

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question we must also decide the interpretation and application of the phrase mercantile associations as used in the Kansas Insurance Code, specifically K.S.A. 40-202.

You have summarized the circumstances giving rise to your request as follows:

"Insurance Management [Associates, Inc., a private corporation] informed our Department that they have held discussions with various municipalities and private companies that operate natural gas distribution systems and have found the market for insurance covering risks of bodily injury and property damage arising from the operation of the gas systems to be either non-existent or very expensive. Therefore, Insurance Management has indicated that they would like to administer a self-insurance plan comprised of Kansas municipalities and/or private companies engaged in the providing of natural gas distribution.

"Insurance Management indicated that they anticipate administering a plan whereby private companies and municipalities would form a non-profit 'mercantile association.' This association would provide its members with services other than just the pooling of risk exposure. These services would involve technical assistance, safety engineering, billing, etc. Each member of the association would be required to pay a standard membership fee and contribute to a fund to pay for the expenses incurred to provide defense and pay judgments rendered against association members. The fund would be in excess of \$100,000. Each association member would be a policyholder of the excess coverage with premiums based upon the particular member's exposure."

The 1979 Kansas Legislature enacted the Kansas Tort Claims Act which codifies the liabilities and immunities of Kansas governmental instrumentalities, including municipalities. As you note in your request, the Tort Claims Act allows municipalities to enter into cooperative and pooling arrangements to pay for the defense of and judgments for, actions arising out of the Act. This provision is found at K.S.A. 1979 Supp. 75-6111(b), which states:

"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

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"(2) pooling arrangements or other agreements 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 evident from the above language that municipalities may either purchase insurance or engage in "pooling arrangements or other agreements" in order to provide for the defense of employees or for liability for claims pursuant to the Act. According to the statute such arrangements are to be made pursuant to the interlocal cooperation act, the enabling language of which is found at K.S.A. 1979 Supp. 12-2904, as follows:

"(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 public utilities, . . . [and] the Kansas tort claims act . . . may be exercised and enjoyed jointly with any other public agency of this state or with any private agency, and jointly 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."

As used in the Interlocal Cooperation Act, the term "public agency" means

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"any county, township, city, town, village, school district, library district, road district, drainage or levee district, sewer district, water district, fire district or other municipal cooperation, quasi-municipal corporation or political subdivision of this state or of any other state and any agency or instrumentality of this state or any other state or of the United States." K.S.A. 12-2903(a).

Conveniently, the Act also defines "private agency" as "an individual, firm, association or corporation." Id. at (c).

It is clear from the above statutory language that municipalities may enter into an interlocal agreement with an individual, a private firm or corporation or an association in order to implement the tort claims act pursuant to K.S.A. 1979 Supp. 12-2904(b).

Although all municipalities are exempt from the insurance laws with reference to pooling arrangements permitted by the Tort Claims Act, K.S.A. 1979 Supp. 75-6111, it is not entirely clear which, if any, private individuals, firms, associations or corporations participating in such arrangements might also be exempt. The Legislature in enacting the Tort Claims Act might well have exempted such "persons" who participate in interlocal agreements for self insurance purposes as it did for public agencies participating in the same or similar agreements with such municipalities. Such exemption was not provided, however. Hence, in our judgment, the Kansas Insurance Code remains applicable to such private agencies except where limited by other statutory reference.

K.S.A. 1979 Supp. 40-214 prohibits any person, company, corporation or fraternal society from transacting the business of insurance without proper written authority from the insurance commissioner. However, the Kansas Insurance Code is not applicable to every person or organization. Specifically, K.S.A. 40-202 states in relevant part:

"Nothing contained in this code shall apply to . . . mercantile associations which simply guarantee insurance to each other in the same lines of trade and do not solicit insurance from the general public. . . ."

The above language was included in the original enactment of the statute in 1927 and has survived amendments to the statute in 1931, 1935, 1941, 1947, 1951 and 1970. There is no legislative evidence, however, as to a specific definition that should be attributed to

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the term "mercantile associations." As a general rule, "[w]ords and phrases shall be construed according to the context and approved usage of the language," unless such words or phrases "have acquired a peculiar and appropriate meaning in law." K.S.A. 77-201. Unfortunately, neither the Kansas Legislature nor Kansas Supreme Court has defined the word "mercantile." Black's Law Dictionary (5th Ed. 1979) defines "mercantile" as follows:

"Of, pertaining to, or characteristic of, merchants, or the business of merchants; having to do with trade or commerce or the business of buying and selling merchandise; trading; commercial; conducting or acting on business principles." Id. at 890.

The Kansas Supreme Court has defined "merchant" and "association." In National Bank v. Hannaman, 115 Kan. 370, 372 (1924), the Court, citing Campbell v. City of Anthony, 40 Kan. 652 (1889), said:

"A merchant is one who traffics or carries on trade, one who buys goods to sell again, one who is engaged in the purchase and sale of goods."

This definition appears to encompass distributors of natural gas, since distributors generally buy from one person and sell to another.

In Mellies v. Heilman, 131 Kan. 230, 234 (1930), the Court quoted with approval the definition of "association" found in 5 C.J. 1333 Associations §1 (1916):

"As the term is commonly used . . . an 'association' may be defined to be a body of persons acting together, without a charter, but upon the methods and forms used by incorporated bodies, for the protection of some common enterprise."

This definition is also now found in 7 C.J.S. Associations ¶2 (1980).

We therefore would generally construe the term "mercantile association," as used in K.S.A. 40-202, to mean a body of persons having to do with trade or commerce or the business of buying and selling who act together, without a charter, but upon the methods and forms used by incorporated bodies, for the protection of some common enterprise.

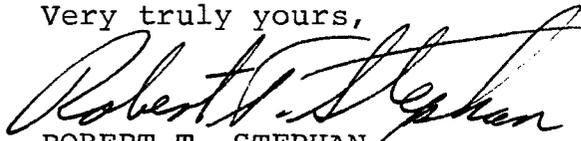
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In addition, in order to come within the exemption to the Insurance Code contained in K.S.A. 40-202, the mercantile association must offer insurance only to its members and not to the general public. Hence, the mercantile association contemplated must be restrictive enough in its membership that only distributors of natural gas [both public and private] may participate. We think that the natural gas distributors association you have described, which includes public agencies joining pursuant to the Interlocal Cooperation Act, may create a self insurance fund from the resources of its members to insure each against the risk of loss resulting from the tortious conduct of any member or their respective employees. And so long as the association does not offer insurance to the general public, it would not be subject to the Kansas Insurance Code by virtue of the exemption for mercantile associations contained in K.S.A. 40-202.

We expressly decline to opine on whether the private management corporation proposing this arrangement is somehow subject to insurance regulations or other state or federal statutory and regulatory schemes. Such an opinion is beyond the scope of your request.

Therefore, it is our opinion that public agencies, as defined in the Interlocal Cooperation Act, may enter into interlocal agreements with other public agencies and private agencies, as further defined in the Act, for the purpose of participating in a mercantile association which provides insurance against tort liability for its members engaged in the commercial distribution of natural gas. In addition, such association is exempted from the Kansas Insurance Code pursuant to K.S.A. 40-202.

Very truly yours,



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Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:phf