



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 32

Eugene T. Barrett, Jr.  
State Bank Commissioner  
Banking Department  
700 Jackson, Suite 300  
Topeka, Kansas 66603

Re: Banks and Banking -- Banking Code; Dissolution;  
Insolvency -- Appointment of Special Deputy to Take  
Over Insolvent Bank; Liability of Directors and  
Officers

Synopsis: In the event that a state bank is found to be insolvent, the bank commissioner may appoint a special deputy commissioner to take charge of the bank's affairs until either a receiver is appointed or a reorganization plan is prepared and approved. K.S.A. 9-1904, 9-1905. While the corporate structure of the bank remains during the appointment of the special deputy, officers and directors of the bank may act only with the direction and approval of the special deputy, who is a state employee covered by the Kansas Tort Claims Act, K.S.A. 75-6101 et seq. Officers and directors may be found personally liable for actions which are not approved by the special deputy. In addition, criminal penalties may be imposed pursuant to the Banking Code. (K.S.A. 9-2001, 9-2010). Cited herein: K.S.A. 9-1901; 9-1904; 9-1905; 9-2001; 9-2010; 75-1304; 75-3135; 75-6102; 75-6108; 75-6109.

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Dear Commissioner Barrett:

You have requested our opinion regarding the liability of the officers and directors of an insolvent bank. Specifically, you inquire about the duties, responsibilities and liabilities of such persons upon appointment of a special deputy pursuant to K.S.A. 9-1903, which provides in part:

"If it shall appear upon the examination of any bank or trust company or from any report made to the commissioner that any bank or trust company is insolvent, then it shall be the duty of the commissioner forthwith to take charge of such bank or trust company and all of its property and assets. In so doing the commissioner may appoint a special deputy commissioner to take charge temporarily of the affairs of such insolvent bank or trust company until a receiver is appointed. Such deputy shall qualify, give bond and receive compensation the same as the regular examiner, but such compensation shall be paid by the insolvent bank or trust company or in case of the appointment of a receiver allowed by the court as costs in the case . . . ."  
(Emphasis added.)

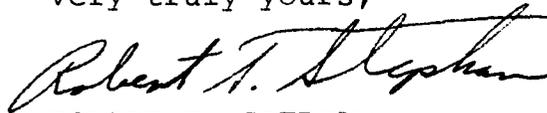
As the statute makes clear, while the commissioner has a statutory duty to take charge of the bank, its property and assets, it is discretionary on his part to appoint a special deputy until either a receiver is appointed (K.S.A. 9-1905) or the bank's affairs are reorganized (K.S.A. 9-1904).

The statute has been in substantially the same form since its enactment in 1897. In its long history, it has been subject to challenges of unconstitutionality as a violation of the separation of powers doctrine. See, e.g. Jeffries v. Barcastow, 90 Kan. 495 (1913). In upholding the constitutionality of the statute, the court noted that taking charge of the insolvent bank is a valid exercise of state police power for protection of the public welfare. It is important to distinguish this action from both a judicial procedure and from action under K.S.A. 9-1905. A judicial procedure contemplates imminent dissolution (K.S.A. 9-1901), while appointment of a receiver under 9-1905 will result in

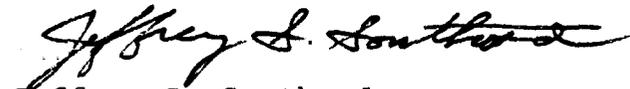
A special deputy commissioner is clearly within the scope of the Tort Claims Act when he acts to manage the affairs of a bank at the direction of the bank commissioner. Therefore, such a special deputy is ultimately responsible for officers and directors who act at his direction or order. While this would not prevent them from being the subject of a legal proceeding for their acts, under accepted principles of agency law, a special deputy appointed by the commissioner would be a necessary party to such a lawsuit, and would be able to invoke the Tort Claims Act. If liability was found in the acts of the officers or directors taken at the special deputy's direction, the state would be responsible for payment of the judgment, as well as legal costs. K.S.A. 75-6108, 75-6109.

In conclusion, in the event that a state bank is found to be insolvent, the bank commissioner may appoint a special deputy commissioner to take charge of the bank's affairs until either a receiver is appointed or a reorganization plan is prepared and approved. K.S.A. 9-1904, 9-1905. While the corporate structure of the bank remains during the appointment of the special deputy, officers and directors of the bank may act only with the direction and approval of the special deputy, who is a state employee covered by the Kansas Tort Claims Act, K.S.A. 75-6101 et seq. Officers and directors may be found personally liable for actions which are not approved by the special deputy. In addition, criminal penalties may be imposed pursuant to the Banking Code.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
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