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62708

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FILE NO. S-978

OFFICERS:

Capital Stock
and Surplus

Honorable Patrick E. Ward
State's Attorney
Lee County
P. O. Box 462
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Dixon, Illinois 61021

Dear Mr. Ward:

This responds to your request for an opinion concerning the conditions on the discharge from responsibility of a county treasurer for public funds deposited with a bank. There are similar statutory provisions for county treasurers of counties under 150,000 in population (sec. 4b of "AN ACT to revise the law in relation to county treasurer", Ill. Rev. Stat. 1973, ch. 36, par. 4b) and for county treasurers of counties over 150,000 in population. (Sec. 4 of "AN ACT

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concerning county treasurers, etc.", Ill. Rev. Stat. 1973, ch. 36, par. 20.) Since Lee County has a population of less than 150,000, the first cited statutory provision is relevant. It provides in part as follows:

"§ 4b. In counties having a population of less than 150,000 the county board, when requested by the county treasurer, shall designate a bank or banks or other depository in which the funds and other public moneys in the custody of the county treasurer may be kept * * * Each bank designated as a depository for funds or moneys shall, while acting as such depository, furnish the county board with a copy of all statements of resources and liabilities which it is required to furnish to the Department of Financial Institutions or to the comptroller of currency; provided, that, except as otherwise hereinafter provided in this Section, if such funds or moneys are deposited in a bank, the amount of such deposits shall not exceed 75% of the capital stock and surplus of such bank, and the county treasurer shall not be discharged from responsibility for any funds or moneys deposited in any bank in excess of such limitation.

The county treasurer may require any bank selected as a depository to deposit with him securities equal in market value to the amount of the funds or moneys deposited, and such county treasurer is authorized to enter into an agreement with any such depository bank relating to the deposit of securities * * * "

In regard to this provision you ask the following four questions:

- "1. Are undivided profits and reserves, excluding reserves for bad debts, included in the bank's capital stock and surplus?

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2. Are there any guidelines for acceptable securities constituting bank capital stock and surplus?
3. In determining 75% of the bank's capital stock and surplus, does the \$100,000.00 F.D.I.C. insurance coverage apply?
4. Does the 75% figure referred to in the above statute refer to the totality of County accounts, or does it refer to separate accounts, e.g. County Collector money and County Treasurer money."

In answer to your first and third questions, the capital stock and surplus of a bank is a well-defined term. It does not include undivided profits, reserves, or F.D.I.C. insurance. In Chicago Title & Tr. Co. v. Cent. Tr. Co., 312 Ill. 396, the Illinois Supreme Court defined "surplus" and "capital stock" as follows:

"* * * The item designated as 'surplus' represents permanent surplus or a liability that is carried permanently on the books and is rarely ever decreased or increased except by necessity, in case of a loss to the bank or in case of an increase by reason of a new declaration of a permanent fund to be carried under that designation. The undivided profits are the funds usually drawn on to pay the declared dividends of the bank. The term 'capital stock' requires no explanation. * * * "

The distinction between undivided profits and surplus has been defined by the Supreme Court of North Dakota in Sarles v. Scandinavian American Bank, 156 N.W. 556 (1915) as follows:

" * * *

It is also well to remember that there is a sharp distinction between undivided

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profits and surplus. Surplus, like the capital stock, constitutes the working capital of the bank and is, in addition, a fund for the protection of depositors. The undivided profits, on the contrary, is a temporary fund changing in size from day to day and carried only until dividend periods, when it is distributed to the stockholders or transferred to the permanent surplus. It is the fund from which the expenses and losses of the bank are paid."

Undivided profits may be transferred to surplus, but until it is done, undivided profits are not considered part of surplus.

In answer to your second question the cited statutory provisions do not define, nor provide, guidelines for acceptable securities which may be deposited by a bank with the county treasurer. The kind of securities which may be deposited with the county treasurer is left to the discretion of the county treasurer. However, he could not require the deposit of securities in which a bank is not allowed to invest. Limitation on the kinds of securities in which a bank is allowed to invest is provided in the Illinois Banking Act. (Ill. Rev. Stat. 1973, ch. 16 1/2, pars. 101 et seq.) Numerous statutory provisions also authorize banks to invest in bonds of specific public bodies.

As a guideline for the kinds of securities which could be accepted by a county treasurer, I refer you to section 11 of "AN ACT in relation to State monies" (Ill. Rev.

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Stat. 1973, ch. 130, par. 30), and section 2 of "AN ACT relating to certain investments of public funds by public agencies". (Ill. Rev. Stat. 1973, ch. 85, par. 902.) The first cited provision lists the kinds of securities the State Treasurer may accept as security for deposit of State monies. The second cited provision lists the kinds of securities in which public funds may be invested. The second list is more limited than the first. If a security is considered acceptable for investment of public funds or is security of State deposits, then it should also be considered safe as a security of county funds. Neither of these provisions is binding on the county treasurer for the purpose discussed. They are cited only as a guide for the kinds of securities which could be considered acceptable.

In answer to your fourth question, I am of the opinion that the amount of deposits which may not exceed 75% of the capital and surplus of the depository bank refers to the totality of county funds and other public monies in the custody of the county treasurer in his capacity as county treasurer, and also in any official capacity incidental to his incumbency of the office of county treasurer. However, as I advised in opinion No. S-794, the county treasurer may hold funds other than in his official capacity and such funds would not be considered as funds held by a county treasurer for purposes of the cited statutory provisions.

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The terms "county treasurer" and "county monies" are defined in section 1 of "AN ACT concerning county treasurers" (Ill. Rev. Stat. 1973, ch. 36, par. 17) as follows:

" * * *

The term 'county treasurer' shall include the county treasurer when acting as such or in any other official capacity incident to his incumbency of the office of county treasurer.

The term 'county moneys' shall include all moneys to whomsoever belonging, received by or in possession or control of the incumbent of the office of county treasurer when acting as such or in any other official capacity incident to his incumbency of the office of county treasurer.

* * *

While these definitions do not appear in "AN ACT to revise the law in relation to county treasurer" (Ill. Rev. Stat. 1973, ch. 36, pars. 1 et seq.) they apply to all county treasurers for they are merely declaratory of the law. In The People v. West Englewood Bank, 353 Ill. 451 at 465, the Supreme Court stated:

"* * * The constitution of 1870 provided for the offices of State and county treasurer without prescribing any general duties. In the absence of a constitutional definition of his powers and duties the primal functions of a treasurer are necessarily implied. He is required to perform the duty of receiving and safely keeping the public funds which are entrusted to him, even in the absence of a statute. The very name given to his office denotes his obligation in this regard and the constitution implies it. Both the power and the duty of receiving and safely keeping the public funds entrusted to him are within the purview of the powers and duties which are

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inherent in his office and in no way depend upon the authority of the General Assembly. He can neither be deprived of the power nor relieved of the duty. * * * "

By section 176 of "AN ACT to revise the law in relation to the assessment of property and the levy and collection of taxes, etc." (Ill. Rev. Stat. 1973, ch. 120, par. 657), the treasurers of all counties are ex-officio county collectors of their respective counties. In opinion No. S-573 I advised that the funds received by the county treasurer as ex-officio county collector are county monies. Therefore, in response to your specific example, the funds held by the county treasurer as county collector must be added to funds held by the county treasurer as county treasurer in determining whether the limitation has been exceeded.

Very truly yours,

A T T O R N E Y G E N E R A L