

## Opinion No. 24-3750

January 30, 1924

**BY:** JOHN W. ARMSTRONG, Assistant Attorney General

**TO:** Requested by: Hon. Warren Graham, State Treasurer, Santa Fe, New Mexico.

### **Surety Companies are Liable for Interest Accruing on Bank Deposits, After Failure of Such Banks, up to Time of Settlement.**

#### **OPINION**

{\*119} We have the letter submitted to you by C. A. Bishop & Co., of Santa Fe, written by the United States Fidelity & Guaranty Co., under date of January 23, 1924 relating to the state's claim against the McKinley County Bank.

The U. S. F. & G. Co. was surety for this bank for the deposits therein to the extent of \$ 20,000.00. The bank failed owing the state, at the time of closing, \$ 64,125.41. The U. S. F. & G. Company's proportionate share of the loss, at the time the bank closed, was \$ 16,901.60. The bank closed on or about August 20, 1923 and the U. S. F. & G. Co. could not have settled with the state at that time for the sum of \$ 16,901.60. The question then is whether or not the surety company is liable for interest at 3 per cent per annum on said amount from the date said bank closed.

"Any bank authorized to receive public monies may file with the board of finance having control of any such monies, a deposit of which is desired by said bank, its written proposal to receive such monies on deposit, together with its agreement to pay interest on daily balances of such monies so deposited at the rate of three (3) per cent per annum; \* \* \*." -- Sec. 10, Chap. 76, S. L. 1923.

"\* \* \* Any bank designated as such depository by the proper board of finance shall give a bond or bonds in such sum as may be determined by said board of finance, for {\*120} the safekeeping and payment of such monies, and all interest thereon, \* \* \*". -- Sec. 8, Chap. 76, S. L. 1923.

"\* \* \* Upon the first day of each month all interest accrued upon the deposit with it of any public monies under the provisions of this Act shall by the bank be credited to the state, \* \* \*, whose money it so holds. \* \* \*". -- Sec. 14, Chap. 76, S. L. 1923.

The principal and the surety undertake and obligate themselves by the provisions of the contract, to pay the state Treasurer interest on all monies so deposited at the rate of three per centum per annum. They further undertake and obligate themselves to the following effect:

"\* \* \* If said person shall, from the 10th day of February, 1917, to the \_\_\_ day of \_\_\_, 192], on the first day of each and every month, render to the treasurer and the board of Finance of the State of New Mexico a statement, in duplicate, showing, in detail, the daily balance of said monies, so held by said person on deposit, and the amount of interest accrued thereon, for the past preceding month, and shall pay over said deposit and said interest, upon the check, order or demand in writing of the officer thereunto duly authorized, and shall calculate, credit and pay interest as aforesaid, at the rate and in the manner aforesaid, and shall in all respects save and keep said State of New Mexico safe and harmless by reason of the making of said deposit or deposits, and shall generally do and perform each and every thing required of depositories of public funds to be done and performed by the provisions of a certain Act of the State of New Mexico, entitled 'An Act in Relation to Public Monies', enacted by the Sixth Legislature of the State of New Mexico, then the obligation shall be void and of no effect, otherwise to be and remain in full force and virtue. \* \* \*". -- Sec. 8, Chap. 76, S. L. 1923.

Under the contract, we think the U. S. F. & G. Co. is clearly required to pay the interest up to and including the time of settlement. It might have paid or tendered its share of the loss at an earlier date and thereby have stopped the further accrual of interest, but it did not do so.

"The rate of interest, in the absence of a written contract fixing a different rate, shall be 6 per cent per annum, in the following cases: On money due by contract; \* \* \* On money due upon the settlement of matured accounts from the day the balance is ascertained. \* \*". -- Sec. 3525, Code 1915.

The foregoing is quoted merely for the purpose of showing what our law contemplates in a general way, and not for the purpose of showing the rate of interest.

The statutes seem to contemplate that state monies deposited in such manner shall draw interest at 3 per cent from the time of deposit until restored to the Treasurer or paid on his order. The contract between the state and the depository bank and its sureties undertakes to guarantee the payment of interest and to keep harmless the state in the making of any deposit of this character.

{\*121} The tender offered, in our opinion, is insufficient to satisfy the state's demand.

The letter of the U. S. F. & G. Co. contains the following statement and proposal:

"We are not asking the State Treasurer to accept this in full settlement of our liability unless he so cares to; we are requesting that he accept it, giving us an assignment for the amount which we are paying together with receipt."

In view of this, we think the Treasurer may accept the \$ 16,901.60 in part discharge of the state's claim.