



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

September 29, 2004

Wayne F. Rush, Esquire
State Budget and Control Board
General Services Division
1201 Main Street, Suite 420
Columbia, South Carolina 29201

Dear Mr. Rush:

You note that the "State of South Carolina recently purchased a tract of approximately eleven acres of real property." You further indicate that "[d]uring the title examination it was discovered that a fence bordering a county right-of-way encroached into an unpaved portion of the right-of-way." By way of background, you further state the following:

On behalf of the State, an encroachment permit was requested in order to avoid the expense of relocating the fence. The County requested that the State provide an agreement to "indemnify the County for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment."

The County was notified of the South Carolina Attorney General's opinions, such as that by John P. Wilson, dated October 20, 1971, stating that:

This Office has uniformly advised State agencies, including your Department, that they do not have authority to enter into any indemnification agreement whether limited by the phrase "insofar as it lawfully may" or otherwise. The Department's liability for damage claims is strictly regulated by statute (i.e., Section 33-112, 22-171, 33-229, Code of Laws of South Carolina (1962) as amended), and may not be extended by agreement or contract.

and continuing:

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While it is believed that such agreements, even if entered into, would allow no rights to arise thereunder against the Department, clearly the best policy is to totally avoid any such possibility. Therefore, it is our suggestion that "hold harmless" or indemnity clauses be avoided.

and the State deleted the indemnification portion of the Application for Encroachment Permit.

The County responded, referring to South Carolina's Attorney General's Opinion No. 89-43, dated April 10, 1989, which provides:

We are not unfamiliar with the problem faced by DSS, since indemnification agreements are common in contracts proposed to be entered into with federal agencies. We suggest that contract negotiations include elimination of indemnification clauses altogether or else insertion of language such as "so far as the laws of the State permit." (emphasis added)

and the County reiterated its' request for the inclusion of the language, "so far as the laws of the State permit."

Accordingly, we request the Attorney General's opinion clarifying the question regarding a State agency's authority to enter into indemnification agreements, and whether the opinion would be changed by the addition of the language, "so far as the laws of the State permit."

Law / Analysis

It is our longstanding opinion that a state agency possesses no authority to enter into indemnification agreements. It is our further opinion that this conclusion is not changed by the addition of language "so far as the laws of the State permit" or any other language. Because a state agency possesses no authority to enter into indemnification agreements, insertion of the above-cited language or any other language cannot change or alter such lack of authority.

Our opinions concluding that a state agency possesses no authority to enter into indemnification or "hold harmless" agreements date back at least to 1966. On February 21, 1966, we concluded the Railroad Commission "is without authority to bind itself or the State to ... an indemnification agreement, and therefore paragraph 8 would be of no binding effect.

Likewise, in an opinion of January 8, 1968, we stated:

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[i]t is a general rule of law that no State agency is liable for suit except as provided by statute or constitutional provision. This being so, the University is not empowered to assume such liability.

It is my opinion that the quoted paragraph should be deleted from the contract.

Immediately thereafter, on February 13, 1968, we stated that “[w]e have uniformly advised State agencies that they do not have authority to enter into indemnification agreements of this nature. Even if entered into, it is questionable if any rights could arise thereunder.”

As noted in your letter, we concluded in an opinion of October 20, 1971 that insertion of the phrase “insofar as it lawfully may” or otherwise in an indemnification agreement containing such phrase did validate the agreement because “[t]he Department’s [Highway Department] liability for damage claims is strictly regulated by statute ... and may not be extended by agreement or contract.”

In an opinion dated August 15, 1972, we articulated the reasoning underlying the lack of authority of a state agency to enter into indemnification agreements:

[t]his problem has continually appeared in this Office, particularly in connection with the construction of Highway projects. It appears in other forms also It has been the consistent opinion of this Office that governmental agencies, in the absence of specific authority therefor, do not have the authority to execute such ‘hold harmless’ clauses. The basis for this conclusion is that this State possesses sovereign immunity, with certain deviations therefrom in limited circumstances. These relate primarily to subjection of the State for claims for damages resulting from the operation of State-owned motor vehicles. The execution of a ‘hold harmless’ cause is nothing more nor less than subjection of the State or one of its political subdivisions to tort liability and, in the opinion of this Office, can only be done by the State itself through legislative enactment.

Former Attorney General McLeod again addressed the issue of indemnification agreements in an opinion of September 27, 1972. In that opinion the former Attorney General explained:

In my opinion, there is no authority for the execution by the State of ‘hold harmless’ clauses. Similar instances occur in nearly all agreements with the federal government and, while such clauses have been inserted in many instances in various agreements, there is, in my opinion, no authority for the inclusion of such clauses. The basis for this position is that the State thereby subject itself to tort action, for which there is no authority absent legislative authorization.

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Subsequently, we commented on April 22, 1983 that "the State may not enter into hold harmless agreements with private individuals or corporations." And on November 4, 1991, we commented that

[w]e realize that the question you have presented is not whether the County may agree to indemnify a third party; however, as to that limited question, we advise that this Office has previously opined that State agencies, as a general rule, lack authority to enter into open-ended indemnification agreements. Op. Atty. Gen., April 10, 1991. ~~We have no doubt that a similar conclusion would be reached with regard to~~ counties. See, Wright v. Colleton County School District, 301 S.C. 282, 391 S.E.2d 564 (1990) [A political subdivision may not waive immunity provisions provided by State law]; see also, S.C. Const. Art. X, Section 8 (1990 Cum. Supp.) ["Monies shall be drawn from ... the treasury of any of [the State's] political subdivisions only in pursuance of appropriations made by law."] Id., Art. X, Section 7(b) [Annual expenditures shall not exceed annual revenues].

Thus, there has been no deviation from the Attorney General's consistent conclusion over the years. Nevertheless, you reference the opinion of April 10, 1989 (Op. No. 89-43) as perhaps departing from the many opinions quoted from and referenced above because of certain non-controlling language contained therein. Apparently, the 1989 opinion is relied upon by some based upon the language included therein "or else insertion of language such as 'so far as the laws of the State permit.'" In our view, however, such reliance is misplaced.

We first note that the October 20, 1971 opinion of Mr. Wilson, referenced above, rejects any conclusion that insertion of any such language as was mentioned in the 1989 opinion in an indemnification agreement serves to validate that agreement. It is clear that the 1989 opinion does not purport to overrule the 1971 opinion, but instead cites it with approval. Moreover, Op. No. 89-43 discusses in some detail how indemnification clauses in a contract violate "state law in at least two ways." Moreover, the author of the 1989 opinion also wrote the subsequent 1991 opinion, referenced above, which concluded that state agencies generally lack authority to enter into indemnification agreements. Finally, we have consistently concluded that a state agency "derives its powers solely from the statutes created by the Legislature." See, e.g. Op. S.C. Atty. Gen., December 20, 1966. See also, Op. S.C. Atty. Gen., March 18, 2004 (citing Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1993); Nucor Steel v. S.C. Public Service Comm., 310 S.C. 539, 426 S.E.2d 319 (1992).

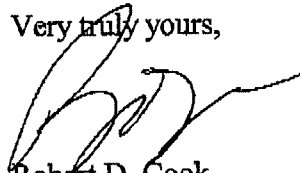
Conclusion

Accordingly, based upon all of the above reasons, we conclude that the phrase "or else insertion of language such as 'so far as the laws of the State permit'" in the 1989 opinion was inadvertent on the part of its author. In any event, we do not deem this language as in any way controlling or dispositive and we caution that phraseology should not be relied upon in an effort to

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validate an indemnification agreement. Thus, to the extent inconsistent with the many other opinions referenced herein, we overrule that portion of Op. No. 89-43 which employs such language. We continue to adhere to our longstanding opinion that indemnification agreements are without legal authority.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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