

**REQUESTED BY:** A. L. CHADWICK  
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**QUESTION:** May the Arizona Highway Department enter into a contract in which the following "save and hold harmless" clause is granted to the other party?

"Licensee shall be liable for any and all damage to the property of the licensor, or to the property of any other party or parties by reason of the exercise of the privileges herein given to the licensee. And the licensee agrees to, and by these presents, does indemnify and hold harmless the licensor against any claims, actions and causes of actions for property damages or personal injuries in any way caused by or related to the erection or existence of the above described installation for a period of one year after final acceptance of said installation."

**ANSWER:** No.

Section 5 of Article 9 of the Arizona Constitution reads in part as follows: "No money shall be paid out of the state treasury except in the manner provided by law."

This sentence has been construed to mean that no money can be paid out of the State Treasury, even for public purposes, unless the Legislature has made a valid appropriation for such purpose and funds are available for the payment of the specific claim. *Cockrill v. Jordan*, 72 Ariz. 318, 235 P.2d 1009; *Eide v. Frohmiller*, 70 Ariz. 128, 216 P.2d 726; *Crane v. Frohmiller*, 45 Ariz. 490, 45 P.2d 955; *Proctor v. Hunt*, 43 Ariz. 198, 29 P.2d 1058.

A.R.S. §35-154 provides that:

"No person shall incur . . . any obligation against the state or . . . any expenditure not authorized by an appropriation and an allotment. Any obligation incurred in contravention of this chapter shall not be binding upon the state and shall be null and void and incapable of ratification by any executive authority to give effect thereto against the state."

As provided for in A.R.S. §18-134:

"The highway department is declared to be subject to the provisions of chapter 1 of title 35 relating to public finances, and all other acts of the legislature applicable to the expenditure of public monies. The highway department shall conform in all respects to the state budget system and no expenditures shall be made by the department unless and until they have first been authorized by the legislature and the money appropriated therefor."

In *New York Central Railroad Co. v. General Motor Corp.*, 182 F. Supp. 273, the court in construing a "save and hold harmless clause" similar to the one involved here stated that:

"'Indemnify' is defined by Webster to mean: '(1) to save harmless; to secure against future loss or damage; (2) to make up for what

is past; to make good; to reimburse.' By Worcester it is defined to be '(1) to secure against damage, loss, injury, or penalty; to save harmless; (2) to compensate for loss or injury; to reimburse, to remunerate.' The word then appears to be used in two general senses: first, in the sense of giving security; and, second, in the sense of compensation for actual damage; . . ."

"'Hold harmless' means to *assume all expenses* incident to the defense of any claim and to fully compensate an indemnitee for all loss or expense, undiminished by the cost of defending a claim or litigation." (Emphasis supplied.)

Thus, in effect, the inclusion in a contract of the above-quoted "save and hold harmless" clause makes the state bound to assume all expenses in defending a suit against the licensor, thereby becoming an insurer of claims against the other party. Further, in agreeing to the inclusion of such a clause the state could be required to actually undertake the defense of an action brought against the licensor.

The powers and duties of the Attorney General are fixed solely by statute and are not derived from the common law. Arizona Constitution, Article 5, §9; *State ex rel, Frohmler v. Hendrix*, 59 Ariz. 184, 124 P.2d 768. The statutes fixing the powers and duties of the Attorney General require that he be the legal advisor for the departments of the State. There is no provision or statute allowing the Attorney General to conduct the defense of a suit brought in the instant situation. A.R.S. §41-191, §41-192 and §41-193.

In addition, there is no appropriation authorized to cover the anticipated expenses and obligations as a result of the inclusion of a "save and hold harmless" clause. Thus, in view of Article 9, §5, Arizona Constitution, A.R.S. §35-154, §18-134, §41-191 through §41-193, it is our opinion that the Highway Department cannot legally enter into a contract in which the State agrees to save and hold harmless the other party.