INSURANCE DEPARTMENT: State not liable for fees of special counsel not employed as provided by statute.

January 20, 1938

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Hon. Charles L. Henson, Chief Counsel
Insurance Department
Jefferson City, Missouri

Dear Judge Henson:

This will acknowledge receipt of your letter of recent date in which you submit the following inquiry:

> "Enclosed is a memorandum by Judge Carlin P. Smith and Dean S. Lesher covering their services to this Department in some Federal Court proceedings which are plainly therein described.
>
> "We submit this memorandum to you with the request that you advise us if this Department is liable for this fee, and if so, whether or not it can be paid out of the appropriation made for this biennium to this Department. If liability is fixed on us, we will undertake to negotiate with them on the amount."

The rule as to when the state is liable on a claim against it has been stated in State ex rel. Buder v. Hackmann, 305 Mo. l.c. 351, in the following language:

> "Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment."

It is also well settled that the state is not liable for any compensation, fees or allowance to any person who renders services under any contract or agreement made without express authority of law. Article IV, Section 48, Constitution of Missouri, provides as follows:

> "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

We must, therefore, determine whether the claimants you inquire about rendered their services under a contract or agreement expressly authorized by law.

The authority for the Superintendent of Insurance to employ counsel is found in Section 5678, R.S. Missouri, 1929, which provides, in part, as follows:

> "The attorney-general shall be his legal adviser, but the superintendent may, with the approval of the governor, employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions."

There is also a provision in Section 5954, Laws of 1933, Extra Session, page 70, which provides as follows:

> "In proceedings to enjoin, rehabilitate, dissolve, wind up or otherwise settle the affairs and dispose of the assets of insurance companies, the superintendent of the insurance department shall receive no fees nor compensation for any services personally performed by him. He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to the amount of compensation to be paid them, and the expenses of such employment, together with all necessary expenses in the settlement of the business of the company, or the collection, disposition or distribution of its assets shall be taxed as costs, and paid by the superintendent out of the assets of such company; or, in case it is reinsured, by the reinsuring company, or if the company proceeded against has no assets, then as by law in such cases provided, to the persons doing the work and rendering the service."

The foregoing provisions are all the provisions we find covering the authority of the Superintendent of Insurance to employ counsel.

The following excerpts from the memorandum submitted with your inquiry are all the references there are to any employment of the claimants. They read as follows:

> "In May, 1936, while a hearing was being held in the United States District Court for the District of Kansas to determine the solvency of the Federal Reserve Life Insurance Company, a Kansas Corporation, the

> Superintendent of the Insurance Department of the State of Missouri requested Judge Carlin P. Smith to observe the proceedings and to report the result thereof."
>
> "Mr. O'Malley, Superintendent, requested Judge Smith to resist the appointment of anyone other than himself as the Ancillary Receiver in Missouri and to attempt to vacate the receivership."
>
> "We were requested by the Superintendent to file a return to this order and to represent him in connection therewith."

It will be seen from the foregoing record of employment that claimants were not employed in accordance with either Section 5678, R.S. Missouri, 1929, or Section 5954 of the Session Acts, supra, and we must therefore conclude that they were not employed by express authority of law. That being true, the state is not liable to them for any fee or compensation for services. It follows that if the state is not liable to the claimants, then no compensation can be paid them out of the appropriation for the Insurance Department for the current biennium, for as was said in State ex rel. v. Hackmann, 314 Mo. l.c. 53:

> "And it might be said in passing, that the Legislature could not now pass a valid act appropriating money out of which relator's claim could be paid, because his claim is based upon a contract entered into without authority of law and Section 48 of Article IV of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law, and that all such authorized contracts shall be null and void."

The major portion of the memorandum submitted by claimants deal with the nature and extent of the work done by them, and in said memorandum claimants say:

> "Throughout this entire period preceding the appointment of Judge Henson as counsel, the Insurance Department was without counsel except for the performance of such legal duties as Mr. Allebach could perform in connection with his functions as chief Deputy Superintendent."

We have no doubt but that claimants put in much time and effort in the matter they were handling, but such consideration is beside the question, since we can only pass upon the legality of their claim. State ex rel. Bradshaw v. Hackmann, 276 Mo. l.c. 611:

> "If so it be that the crying exigencies brought about by a World War unforeseen and undreamed of when the act in question was passed had so altered national and domestic conditions when the trips in question were made as to make it absolutely necessary and praiseworthy for the relator to incur the expense in controversy in the first and second counts, we are yet forced, however much the situation may appeal to our personal sympathies to relegate this phase of the case to the Legislature. Our duty in the premises is done when we are unable to lay our finger on any existing statute which, when construed under the rules laid down, supra, will justify us in adjudging payment.

CONCLUSION

It is, therefore, the opinion of this office that the Insurance Department is not liable for the fee claimed by Judge Carlin P. Smith and Dean S. Lesher, upon the facts submitted in their memorandum and that no fee or compensation can be paid them out of the appropriation for this department for the current biennium.

Respectfully submitted,

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APPROVED BY:

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