



STATE OF KANSAS

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ATTORNEY GENERAL

September 18, 1978

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ATTORNEY GENERAL OPINION NO. 78- 297

Mr. W. Keith Weltmer
Secretary of Administration
Department of Administration
2nd Floor - State Capitol
Topeka, Kansas 66612

Re: Department of Administration--Setoff--Appropriation

Synopsis: When money is claimed to be due to a contractor for work on one construction project of the state, which is funded by one appropriation, and the state has claims against that same contractor for allegedly defective work performed on another construction project, funded by a different appropriation, the constraints imposed by the appropriation process forbid the state to assert a right of setoff respecting monies due from the former appropriation to satisfy the claims arising concerning the latter building.

* * *

Dear Mr. Weltmer:

You advise that in July, 1978, a construction company endorsed and submitted vouchers for payments alleged to be due and owing under a contract for construction of the Kansas Judicial Center. This company, you advise, is the prime contractor for another state building, specifically, the law school at the University of Kansas. You advise that the precast concrete walls on the latter structure pose serious problems and that the amounts now withheld under the contract for that structure are in all likelihood insufficient to pay for the replacement of those panels. At this point, the state has not made a demand upon the contractor to cure the known defects in the law school building, nor has the state reduced its claim to judgment.

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Under these circumstances, you request my opinion whether the Director of Accounts and Reports may properly be advised to withhold from monies due the contractor for the Kansas Judicial Center those funds which are anticipated to be necessary to satisfy claims which the state has against the same contractor for defects in the construction of the law school building.

In Opinion No. 75-408, dated October 23, 1975, we stated thus concerning an analogous question:

"In auditing any claim against the state presented for payment, the Director of Accounts and Reports must determine that such claim is due and unpaid, and in making that determination, the Director is entitled to exercise the right of the State as a creditor of such claimant to set off against such claimed indebtedness such amounts as are known to him to be due to the State from such claimant in determining the final indebtedness which is due and unpaid."

The authority of the director of accounts and reports to review claims submitted for payment is set out at K.S.A. 75-3731. It is set out at length in the earlier opinion, and need not be repeated here. It is sufficient to say that in my judgment, the director is entitled to exercise for the state, in determining the amount to a creditor, the same rights which any creditor has, and those rights include the right of set-off. Concerning the United States, the United States Supreme Court has said that the "government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *United States v. Munsey Trust Co.*, 332 U.S. 234, 91 L. Ed. 2023 (1947).

Because of the appropriation process, the state operates within certain constraints which are not applicable to private creditors. The question presented herein, in my judgment, is whether the exercise of the right of set-off in the circumstances here compromises the integrity of the appropriation process. Article 2, § 24 of the Kansas Constitution provides that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." The money from which the company seeks to be paid for work on the judicial building is due from an appropriation made for that purpose, and moneys in that appropriation may not

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be expended for any other purpose. If the state exercises the right of set-off in this instance, and refuses payment of moneys out of the appropriation to satisfy claims which the state has based upon another building, for which a different appropriation was made, the question is raised whether moneys in the judicial center appropriation are being applied to a purpose other than for which they were appropriated. Exercise of the right of set-off is based upon the assertion that the moneys must be withheld to satisfy another claim, arising out of another project for which a different appropriation was made. As indicated, moneys appropriated for the Kansas judicial center may not be expended for or applied to any purpose other than that specified in the appropriation. A creditor asserting a claim against the state arising out of the law school facility could not look for payment to the appropriation made for the judicial building. The state, likewise, in my judgment, may not divert its own appropriation to a purpose other than that for which it was made, and may not seek to apply moneys from one appropriation, authorized for one building, to satisfy its claim as a creditor against a contractor based upon defects in another structure, the construction of which is funded by a separate appropriation. If the state withholds from the appropriation for the judicial building moneys claimed to be due to it by reason of defects in another building, it is in effect applying moneys appropriated by the legislature for the judicial center to satisfaction of a claim which arose in another and separate construction project, *i.e.*, thereby applying moneys appropriated for one purpose to another purpose.

It may be argued that to withhold money from the judicial building claim would not result in withdrawal of any money from the treasury in violation of the appropriation, that upon the expiration of the appropriation, the moneys withheld would merely lapse into the general fund, as moneys not due and owing to complete the project for which the appropriation was authorized. However, even so, the return of the moneys to the general fund from the judicial building appropriation in these circumstances can only be justified on the ground that the general fund is thereby reimbursed for an unpaid claim due to the state from the same contractor relating to another building. At 20 *Am. Jur. 2d, Counterclaim, Recoupment, Etc.*, § 2, the writer summarizes various descriptions of the nature of the right of setoff:

"In a broad sense, setoff is the discharge or reduction of one demand by an opposite one, or represents a right one party has against another to use his claim in full

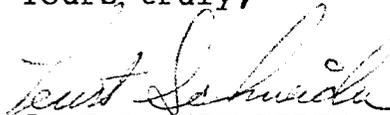
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or partial satisfaction of what he owes to the other. It has frequently been defined as a cross claim for which an action might be maintained against the plaintiff. Other definitions are that a setoff is a counterclaim which a defendant may interpose by way of cross action against the plaintiff; a defense or an independent demand of the defendant made to counterbalance that of the plaintiff, in whole or in part; a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action; a money demand independent of and unconnected with the plaintiff's cause of action; the right that exists between two persons each of whom under an independent contract, express or implied, owes an ascertained amount to the other, to set off their mutual debts by way of deduction so that in an action brought for the larger debt the residue only after such deduction may be recovered." [Footnotes omitted.]

To reiterate, moneys in the judicial building appropriation may be applied only to claims relating to the construction of that building, and no creditor may look to that appropriation for payment of a claim relating to a different building funded by a different appropriation. In asserting a right of setoff, the state stands in the position of a creditor of the contractor, and in seeking satisfaction from its own appropriations, the state in this respect is subject to the same constraints as a private creditor.

Thus, in my judgment, the right of setoff may not be asserted in these circumstances.

Yours, truly,


CURT T. SCHNEIDER
Attorney General

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