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Testimony before the Senate Committee on Judiciary
in Support of
HB 2253 – *Transparency in Lawsuits Protection Act*
on Behalf of the Kansas Chamber

Dear Mr. Chairman and Members of the Committee:

Thank you for affording me the opportunity to testify on behalf of the Kansas Chamber in support of HB 2253.

Background

Taking an admittedly simplistic example, if you were in an automobile accident caused by another driver who was speeding, you would have the right to, in your suit against that driver for negligently operating a motor vehicle, point to his excess speed as a method for proving his negligence. You do *not*, however, have the right to issue him a speeding ticket or "sue him for speeding" – that is the government's role, not yours. Similarly, Kansas courts – *and Kansas litigators* – have spent vast quantities of time and money arguing whether various statutes create private causes of action by members of the public in the event of a violation.

Historically, courts faced with the question of whether a particular statute created a private cause of action have followed a two-part test, as described by our Kansas Supreme Court in its decision in the case of *Nichols v. Kansas Political Action Comm.* In *Nichols*, an unsuccessful state House of Representatives candidate brought claims for declaratory relief and damages against a PAC and others for not only the torts of fraud and civil conspiracy, but also for the defendants' alleged violations of the Kansas Campaign Finance Act by making campaign contributions to candidate's opponent in excess of the Act's limits and by failing to file organization statements. The Supreme Court, in holding that no private cause of action existed, reiterated the two-part test:

> "Whether a private right of action exists under a statute is a question of law…. Generally, Kansas courts have developed a ***two-part test*** for determining whether a private right of action is created. First, the party must show that the statute was ***designed to protect a specific group of people*** rather than to protect the general public…. Second, the court

> must ***review legislative history in order to determine whether a private right of action was intended***…."[1]

Kansas courts have consistently applied this two-part test to suits in which the plaintiff pled causes of action based on violations of a variety of state and even federal laws. For example, in *Estate of Pemberton v. John's Sports Ctr., Inc.,* our Kansas Court of Appeals was required to analyze the question of whether the federal firearms statute created a private cause of action in a case involving a minor child's use of an illegally-obtained firearm to commit suicide. The appellate court held it did *not*, because the federal statute didn't provide for it:

> Under recent federal cases, a federal court, when determining whether Congress intended to create a private right of action, must look for "'rights-creating language' " which "'***explicitly confer [s] a right*** directly on a class of persons that include[s] the plaintiff" and language identifying "the class for whose especial benefit the statute was enacted."[2]

Just as federal courts require a federal statute to "explicitly" create a private cause of action, so, too, should ours require a express statement of legislative intent. HB 2253 would take the guesswork out of the analysis of whether the Legislature intended to create a private cause of action.

Discussion

In light of the forgoing analysis, a fair question might be, "Given that Kansas courts already look to legislative intent and rarely find a private cause of action, what impact will HB 2253 have on our courts and litigants?"

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[1] *Nichols v. Kansas Political Action Comm.*, 270 Kan. 37, 48, 11 P.3d 1134, 1143 (2000)(*internal citations omitted*)(emphasis added)(*citing Kerns v. G.A.C., Inc.,* 255 Kan. 264, 281, 875 P.2d 949 (1994); *OMI Holdings, Inc. v. Howell,* 260 Kan. 305, 340, 918 P.2d 1274 (1996); *Greenlee v. Board of Clay County Comm'rs,* 241 Kan. 802, 805-06, 740 P.2d 606 (1987); *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *Jack v. City of Wichita,* 23 Kan.App.2d 606, 611, 933 P.2d 787 (1997)).

[2] *Estate of Pemberton v. John's Sports Ctr., Inc.,* 35 Kan. App. 2d 809, 816-17, 135 P.3d 174, 180-81 (2006)(emphasis added) (*citing Boswell v. Skywest Airlines, Inc.,* 361 F.3d 1263, 1267 (10th Cir.2004) (quoting *Alexander v. Sandoval,* 532 U.S. 275, 288, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) and *Cannon v. University of Chicago,* 441 U.S. 677, 688, n. 9, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979))).

1. HB 2253 Would Reduce Litigation Costs

Just as the cases cited above might suggest, the current ambiguity that litigants face when contemplating whether there is a private cause of action can be extremely costly for the parties in terms of legal fees and can unnecessarily consume significant court resources. Currently, litigants must pay their attorneys to research, brief, and argue to the trial court whether a statute might create a cause of action in addition to their other legal theories (e.g., tort, breach of contract). HB 2253 will eliminate this ambiguity – if a litigant wants to know if there is a private cause of action, they need look no further than the express language of the statute.

2. HB 2253 is a Prophylactic Measure

While HB 2253 would have been a "good bill" years ago for the reasons articulated above, it is also necessary to prevent any erosion of Kansas' analytical framework regarding the existence of private causes of action.

So, what's changed? In the most edition of the *Restatement of Torts, Third*, judges are encouraged to imply from statutes new duties of care. This is of particular importance, as a recognition of a new duty of care creates the potential for new, unexpected theories of liability that are quite likely not intended by the state legislatures.

3. HB 2253 Doesn't Bar Legitimate Suits, Only Unnecessary Counts

In a typical suit, including each of the cases cited herein, the plaintiff brought a suit with multiple legal theories in addition to the defendant's alleged violation of a statute. Thus, the litigants in those suits were forced to expend great sums of money litigating the "side issue" of whether a private right of action existed and, in each case, the courts ultimately concluded no such private right of action existed. Instead of achieving a more swift and economical resolution of their other claims, the parties were bogged-down in unnecessary litigation.

This point is demonstrated in the Fiscal Note to HB 2253, which notes that "litigation would decrease", but also that "[t]he issue of whether a statute creates a private right of action is normally raised as an additional issue with existing cases". Thus, HB 2253 would effectively reduce the *costs* of litigation by removing the question of whether a violation of statute triggered a private right of action without *eliminating* the suit altogether.

Overview of HB 2253

The heart of this short, one-page bill rests in lines 8 – 14, appearing below. In a nutshell, this legislation provides that, in order for someone to have a cause of action for someone else's violation of a statute or regulation, the statute or regulation has to expressly create that cause of action:

> (b) It is the intent of the legislature ~~to ensure that no legislative act, regulatory or otherwise, in this state~~ **that no statute, rule, regulation or other enactment of the state** shall create a private right of action unless such ~~a~~ right is expressly stated ~~in the legislation~~ **therein**.

One concern raised by Members of the House Committee on Judiciary was that, in the absence of additional language, a tortfeasor's violations of statute might not be able to be relied upon by a plaintiff in proving a departure from the applicable standard of care. For example, the House was concerned that a plaintiff could not point to a driver's act of running a red light in violation of law in proving that that driver was negligent. To address this, the House Committee on Judiciary added the following language, which is not objected to by the proponents.

> **(d) Nothing in this act shall be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law, including, but not limited to, theories of recovery under the law of torts or contract.**

Conclusion

It is incumbent in legislator to address the question of enforcement in every piece of legislation. Typically, it is clear that it is the government's role to enforce a law, but occasionally it is not. The *Transparency in Lawsuits Protection Act* reduces for both plaintiffs and defendants the costs of litigating cases where such ambiguity exists by requiring the Legislature be explicit about its intent to create a new cause of action.

Whether a law creates a private right of action or a new duty of care is a significant public policy decision that should be reached by you, the Members of this Legislature, and should not be the subject of subsequent, unnecessary debate in the courts.

Thank you.

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