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Testimony in Support of Senate Bill 18
An act to amend K.S.A. 60-903 concerning temporary restraining orders

Presented to the Senate Judiciary Committee
By Assistant Attorney General Steve R. Fabert

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Mr. Chairman:

I am an Assistant Attorney General in the Civil Division. Among my regular duties is the defense of civil litigation against the State of Kansas, its agencies, and/or its employees. My experience includes the handling of cases where the relief requested includes a demand for the issuance of temporary restraining order, a temporary injunction, and a permanent injunction. All of these remedies are governed by K.S.A. 60-901 *et seq.*

My experience confirms the need to address an abuse under existing law, the misuse of temporary restraining orders to obtain unlawful results. Under existing law the TRO is a powerful procedural tool that allows a plaintiff to obtain burdensome and potentially wrongful judicial orders without affording any due process to the defendant. This is not the result of any consciously adopted rule of law, but is caused by an unintended procedural loophole. K.S.A. 60-903 needs to be amended to eliminate the loophole. The best way to do this is to conform Kansas law to the Federal Rules of Civil Procedure.

WHAT IS A TRO?

Injunctive relief is an important part of a court's equitable powers. Money damages awarded at the end of a trial are sometimes insufficient to provide a full remedy. There are times when full relief can only come from an order compelling a defendant to act, or prohibiting a defendant from acting unlawfully. Where the need for an injunction is not urgent, it can wait for trial of the lawsuit. Where the value of an injunction would be diminished substantially by awaiting trial, a preliminary temporary injunction may be issued after a hearing. In the most urgent and exceptional cases, it may sometimes be proper to issue an order even before there is time to afford a preliminary hearing. The issue today concerns this last and least numerous class of cases, the ones where relief is needed so urgently that there is no time to allow for a hearing before acting. These are the cases where a court will issue an *ex parte* TRO.

HOW DO KANSAS' TRO LAWS WORK NOW?

Although a defendant ordinarily has a right to a hearing in advance of the entry of any order that would adversely affect legal rights, *ex parte* TRO practice is an exception. Under present law a plaintiff can obtain a court order compelling a defendant to comply with whatever remedy the court orders without any opportunity for a hearing or a right to cross examine witnesses. All that the law now requires is a verified petition or an affidavit in support of the petition. A judge is then empowered by K.S.A. 60-903 to issue an order without a hearing, compelling the defendant to comply with the conditions sought by the plaintiff. The judge is permitted but not required to make the TRO conditional on the posting of a surety bond to compensate the defendant for resulting damage if it is later determined that the relief requested ought not to have been granted.

Ordinarily an *ex parte* TRO is rapidly replaced by a temporary injunction following a hearing where both parties are allowed to present evidence and cross examine witnesses, pursuant to K.S.A. 60-905. A defendant also has a right to seek relief from the TRO by motion filed pursuant to K.S.A. 60-910. But under existing law the judge is left with discretion to decide whether to grant relief from the TRO, and is also given discretion to decide when to hold a hearing to determine whether the TRO should be replaced by a temporary injunction.

WHAT IS THE PROBLEM THAT NEEDS TO BE FIXED?

Ex parte TRO procedures are so powerful and so open to abuse that they are categorically prohibited in actions challenging decisions made by state administrative agencies. See K.S.A. 77-616(f). In practice this prohibition is not obeyed, because it cannot be enforced effectively. An unlawful *ex parte* TRO cannot be challenged on appeal. Only an order granting a temporary injunction can be appealed under Kansas law. Any judge who wants to see an improperly entered TRO remain in place indefinitely needs only to delay the hearing that would convert the TRO into a temporary injunction. By doing so he evades appellate review simply by turning a blind eye to the defendant's requests for due process.

This is not a hypothetical concern. Just last year I defended a lawsuit filed against KDHE staff members demanding the payment of unlawful and excessive Medicaid benefits. The attorney who filed the lawsuit obtained an *ex parte* TRO requiring the defendants to pay more than \$20,000 each month for services that fell outside the Kansas Medicaid plan. The lawyer evaded a hearing intentionally, because there was more than enough time available to schedule a hearing for a temporary injunction. The Kansas Court of Appeals refused to hear an appeal from the TRO even though it was facially unlawful under clear federal precedent and K.S.A. 77-616(f). When a motion to set aside the TRO or convert it to an appealable temporary injunction was filed on remand, action on the motion was postponed indefinitely by the same judge who signed the original TRO. After eleven months and payment of more than \$200,000 of taxpayer funds, this judge finally decided that the case should never have been brought and dismissed it. Because the judge waived the requirement of a bond, the State of Kansas will not see any of those funds reimbursed. No hearing ever occurred to compel the plaintiff to prove a factual basis for the lawsuit. No witness was ever subjected to cross examination. This is not due process.

HOW WOULD SB 18 FIX THE PROBLEM?

SB 18 would prevent a recurrence of this sort of abusive tactic by imposing an automatic expiration date on TROs and requiring prompt hearings to dissolve a TRO or convert the appeal-proof TRO into an appealable temporary injunction. Every TRO would automatically expire after fourteen days unless it was extended for another fourteen days by agreement or for good cause shown. Any motion to set aside the TRO would be heard without delay, on two days' notice. SB 18 would also prohibit the entry of any *ex parte* TRO without requiring the posting of a bond, unless the judge affirmatively finds that no damage to the defendant is likely to result from the TRO. The language of SB 18 is patterned after Federal Rule of Civil Procedure 65. It would bring state practice into line with federal practice.

As can be seen from my experience, even a judge who may be tempted to grant an unjustified, facially unlawful *ex parte* TRO will shrink from signing an order that refuses to grant relief from it, once he is compelled to rule and knows he will be scrutinized promptly on appeal. This bill would operate to make the law function the way it was always intended to function. SB 18 makes no change to the law applicable to temporary injunctions, which are only entered following a hearing where evidence is properly considered. What it guarantees is a right to a hearing where the party seeking relief has to present evidence, and a remedy to the defendant in the event the relief requested is ultimately found to be unjustified.

The provision to exempt the State of Kansas and its agencies from the requirement of posting a bond would harmonize TRO practice and temporary injunction practice. K.S.A. 60-905 already exempts the State and its agencies from the requirement of posting a bond to give effect to a temporary injunction. SB 18 would apply the same exemption to the issuance of a TRO.

If SB 18 is not enacted, we can expect other lawyers to take advantage of this same loophole whenever opportunity presents itself to get something for nothing.