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**MEMORANDUM**

To: Chairman Waymaster and members of the House Appropriations Committee

From: Jill A. Wolters, First Assistant Revisor

Date: March 2, 2018

Subject: Overview of *Kansas Building Industry Workers Compensation Fund, et al., v. State of Kansas*, 302 Kan. 656, 2015; transfers to the state general fund from special revenue funds; and review of K.S.A. 2017 Supp. 75-3036.

The Office of Revisor of Statutes was asked to present information relating to the transfer of moneys from the insurance department service regulation fund to the state general fund in section 44(c) of 2017 House Bill No. 2002. The transfer is for fiscal year 2019 and is approximately \$8,000,000.

Please see the attached memo concerning *Kansas Building Industry Workers Compensation Fund, et al., v. State of Kansas*, 302 Kan. 656, 2015.

On remand to the district court, the plaintiffs requested that \$3,085,188 be transferred back to the following funds in the following amounts: Real estate fee fund (\$195,671); Kansas workers compensation fund (\$2,355,000); and bank commissioner fee fund (\$534,517); plus prejudgment interest and attorney fees. In June of 2017, a settlement was reached between the parties and the litigation was terminated on September 28, 2017. The terms of the settlement were included in 2017 House Bill No. 2002, which provided for the transfers previously listed, with no prejudgment interest. Attorney fees and litigation costs were paid from these transfers in the following amounts: Real estate fee fund (\$28,350); and bank commissioner fee fund (\$76,650).

Since a settlement occurred in the case, the question of unlawful sweeps was not answered by the Court. However, in discussing the issue of standing and justiciability, the Court determined that funds in the state treasury designated for a particular purpose are not always “public funds.” Further, the state may overstep its police powers if an assessment is unreasonable in relation to the costs of regulation.

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Further during the 2017 legislative session, House Bill No. 2054 was enacted concerning transfers to the state general fund from special revenue funds, amending K.S.A. 2017 Supp. 75-3036. That law provides that moneys received or to be used under constitutional or statutory provisions are to be kept as separate funds and shall not be placed in the general fund or ever become a part of it. The statute lists several funds that shall be used for the purposes set forth in the statutes concerning such funds and for no other governmental purposes. Further, it states that the intent of the legislature is that the funds and the moneys deposited in such funds shall remain intact and inviolate for the purposes set forth in the statutes concerning such funds. The insurance department service regulation fund, K.S.A. 40-112, is included in the list of funds, as are the Kansas workers compensation fund and bank commissioner fee fund. (The real estate fee fund is not created in statute.)

If moneys received pursuant to statutory provisions for a specific purpose by a fee agency are proposed to be transferred to the state general fund or a special revenue fund to be expended for general government services and purposes in the governor's budget report or any introduced bill, the person or business entity who paid such moneys within the preceding 24-month period shall be notified by the fee agency within 30 days of such submission or introduction: (1) By electronic means, if the fee agency has an electronic address, or by written notice by first-class mail; or (2) any agency that receives fees from a tax, fee, charge or levy paid to the commissioner of insurance shall post the notification required by this subsection on such agency's website.

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***Kansas Building Industry Workers Compensation Fund, et al., v.  
State of Kansas, No. 108,607, 2015 WL 5081350 (Kan. August 28, 2015)***

**Executive Summary**

Gordon Self, Revisor of Statutes  
Jill Wolters, First Assistant Revisor, Daniel Yoza, Assistant Revisor

Procedural History

The plaintiffs, workers compensation insurers, the Kansas association of Realtors and a trade association of bankers, claim that transfers made from special revenue funds to the state general fund in 2009 Sen. Sub. for HB 2373 were an invalid exercise of the state's police powers and an unconstitutional exercise of its taxing authority.

The Kansas Supreme Court reviewed and affirmed the judgment of the court of appeals in *Kansas Bldg. Industry Workers Compensation Fund v. State*, 310 P.3d 404 (2013). The court of appeals overturned the district court which dismissed the original lawsuit because the plaintiffs lacked standing. *Kansas building*, 2015 WL 5081350, then remands the case back to the district court to reinstate the lawsuit because the plaintiffs do have standing.

As a practical matter, what *Kansas building* does is allow the lawsuit to begin. The Supreme Court resolved the standing matter declaring the plaintiffs have standing to sue, but it made no determinations about the facts of the case nor did it prescribe any remedy for the plaintiffs. Rather, it declares the plaintiffs have standing to bring the suit, which was first initiated in 2010.

The Supreme Court was asked to review multiple facets of the judgement of the court of appeals, but only granted review to the political question doctrine and the standing issue.

**Political Question Doctrine**

The Supreme Court found that the courts do have subject matter jurisdiction over this case and it does not present a nonjusticiable political question. The court described the political question doctrine as one that is intertwined with the separation of powers. The state argued that a suit about the appropriation of public funds is nonjusticiable because the appropriation of public funds is the sole prerogative of the legislature. However, the court determined that funds in the state treasury designated for a particular purpose are not always "public funds". Further, the

state may overstep its police powers if an assessment is unreasonable in relation to the costs of regulation. For these reasons the court ruled that this case does not present a nonjusticiable political question.

### **Standing**

When an appellate court is considering a district court's dismissal of a suit based on standing, it must accept the facts alleged as true and if those facts demonstrate that the appellant has standing then the district court must be reversed. This is an important point because the Supreme Court, in analyzing standing, discusses the facts of the case as presented by the plaintiffs. The Supreme Court did not rule that the plaintiffs were correct in their assessment of the facts.

The Supreme Court found that the plaintiffs do have standing to sue in this case. The state argued that the plaintiffs do not have standing to sue in this case because they failed to show an interest greater than anyone else who pays taxes, failed to show how the injury was caused by the state and failed to show how the state can redress their injury. The Supreme Court noted that standing is also grounded in the doctrine of separation of powers and that the test for standing is that the plaintiff must show that they suffered a cognizable injury and a causal connection between the injury and the challenged conduct. The Supreme Court agreed with the court of appeals that the fund transfers presented a cognizable injury which was suffered by the plaintiffs and not by taxpayers as a whole. The Supreme Court also agreed with the court of appeals that there was a causal connection between the fund transfers and the increased fees that the plaintiffs were forced to pay.

### **Conclusion**

In *Kansas building*, the Kansas Supreme Court affirmed the court of appeals in overturning the district court and found that the plaintiffs have not submitted a nonjusticiable political question and they do have standing to sue the state. The Supreme Court did not make any factual determinations in the case. This case allows the plaintiffs to proceed in the district court in seeking a declaration that the fund transfers were unconstitutional, injunctive relief barring further such transfers, reimbursement of the transfers and class certification. In this case the Supreme Court allowed the plaintiffs to begin making their case in the district court.