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Testimony in Support of House Bill 2461

Presented to the House Committee on the Judiciary
By Kansas Attorney General Derek Schmidt

January 29, 2020

Chairman Patton, Ranking Member Carmichael, Members of the Committee:

Thank you for this opportunity to testify in support of House Bill 2461, which proposes to enact the Public Litigation Coordination Act.

Introduction

The purpose of HB 2461 is to ensure that when multiple units of government within Kansas seek to bring lawsuits addressing part of the same misconduct or same legal dispute that has statewide or nationwide effect, no unit may unilaterally give away part of the eventual recovery without regard to the interests of others. Under this proposal, no public entity – state or local – may race to the courthouse and file lawsuits involving statewide or nationwide misconduct or pile on with new lawsuits late in litigation brought by others when global settlement is visible on the horizon – unless that public entity is either prepared to pay its own legal fees from its public funds or has coordinated its efforts through the attorney general before giving away part of the eventual public recovery.

It is important to note what this legislation does *not* do – it does not prevent any public entity from filing suit over any matter or bringing any claim that it currently may file or bring. Nor does it intrude on the home rule authority of local governments to decide whether and when litigation is needed to protect their interests. Rather, the bill simply regulates how and when a *specific method* of paying private outside counsel – the use of contingent fee arrangements – may be used by public entities in matters that have statewide or national implications and thus may be of interest to other public entities in Kansas. The bill requires that before a public entity may pay its lawyers by giving away part of any eventual recovery – a recovery in which many other public entities have an interest when litigation involves issues of statewide or national concern – it must coordinate its efforts through the attorney general to ensure the arrangement is fair to all Kansans affected and does not improperly impede the interests of the State, of other public entities, or of the state's citizens overall.

This approach also will discourage public entities from too-easily succumbing to the promise of "free money" sometimes presented by contingent-fee counsel shopping for public-entity clients without giving weight to the interests of other public entities and *their* citizens. It also will help prevent unjustifiable differences in contingent fees paid by different public entities bringing similar suits, and it will tend to diminish inequalities in recovery between or among similarly harmed public entities based on whether they pursued their interests through contingent-fee private counsel or by other means.

Background

Since the tobacco litigation of the 1990s, it has become big business for private outside law firms to represent governmental entities in bringing major national litigation with a significant public policy component. For example, the tobacco litigation *alone* resulted in arbitrated fee payments to private lawyers of more than $15 *billion*, payable over a 25 year period.[1] The value of the underlying contingency fee contracts was many times that amount. In response to that, this Legislature in 2000 enacted what now is K.S.A. 75-37,135, which prohibits the *state* from entering into potentially large contingent fee contracts with private attorneys without case-by-case legislative oversight and competitive bidding.

But that statutory limitation does not apply to local units of government.

These cases typically come about when outside counsel go "shopping" for government clients. When outside counsel present the *state* (usually through the attorney general) with a proposal for bringing contingent fee litigation, the state's approach to evaluating those proposals is consistent, coordinated with other statewide interests, and governed by statutory safeguards and limitations. But the same is not true when *local* governments are presented with proposals to hire private counsel on a contingent fee basis to pursue recoveries for conduct that is *not purely local* but instead is one small part of a much larger *statewide or national pattern of conduct*.

So perhaps it is not surprising that recent years have witnessed the rapid proliferation of *local* governments retaining contingent fee counsel to sue over harms that are statewide or national in nature. In the past, the targets of these local lawsuits in other states have been guns and subprime mortgage lenders, today the headline cases are opioids and vaping, and tomorrow – if left unchecked – the targets will be anything that makes the headlines as a national concern. Climate change? Food additives?

Some of the many concerns this new trend presents are well-summarized by an excerpt from a recent report on the subject:

"[T]he proliferation of individual municipal suits – opioid lawsuits now number in the thousands – threatens a variety of negative consequences. Municipal litigation limits the potential for global settlements, depriving parties of finality and predictability. It undermines the state's power, by displacing the role of the legislature in regulating activities, as well as the role of the attorney general in determining and representing the interests of the state's residents in litigation. And as commentators and courts have noted, although litigation can yield sizeable recoveries for municipal entities, *it reduces the funds available to compensate injured individuals*.

[1] Daniel J. Capra, et al., *The Tobacco Litigation and Attorneys' Fees*, 67 Fordham L. Rev. 2827, 2830 (1999).

Municipalities' use of contingent fee arrangements to pay for outside counsel only exacerbates these negative consequences."[2]

Although the plaintiffs in these lawsuits are all part of the same sovereign entity – the State of Kansas and its political subdivisions – and all involve claims for misconduct that is widespread and not limited to any one locality, nonetheless these proliferating lawsuits are uncoordinated. There can be a race to the courthouse on the front end when suits are first being filed, and there can be a piling-on race to the courthouse on the back end when global settlement appears near.

Potential counsel seeking to join in these national cases have now discovered that they can go "shopping" for a public-entity client and have in Kansas more than 1,000 options[3] that may hire them in the same matter – they are not limited to representing the state. Plus, when the public entity client is other than the state itself, contingent-fee outside counsel get the added benefit of no state-mandated requirement for competitive bidding and no legislative or other oversight of their contract when the client is a local entity.

Contingency Fees

These contingent-fee lawsuits often are "pitched" to governmental entities as being "free" – no recovery, no requirement to pay the lawyers. But they are *not* free; rather, when a local jurisdiction hires outside contingent-fee counsel to sue on a matter that goes beyond local concern, the costs of outside counsel are externalized – they often are *shifted* from the taxpayers of the local jurisdiction that hired the attorneys to non-litigating jurisdictions or to the state, which face a reduced pool of funds available for potential recovery *for the same harm*. Put a different way, when a public entity within the state hires outside contingent-fee counsel to pursue a matter that the state itself is pursuing, it is in effect paying for its attorneys from somebody else's potential funds – funds that otherwise could have been recovered by the state or other subdivisions that may have elected to pursue recovery without contingent fee private counsel.

Of course, the contingent fee has an important role to play in the U.S. legal system. It was developed to promote access to the courts for individuals who had been harmed but lacked funds to hire counsel to vindicate their interests in the justice system. That concern is substantially reduced – and in some cases may not be present at all – when the injured plaintiff is a governmental jurisdiction with staff attorneys or taxing power that could afford to pay for the legal services it requires. But sometimes, it certainly remains in the public interest for the state to retain contingent fee counsel to pursue a case that is in the public interest but that the state otherwise lacks resources to pursue. The 1990s tobacco litigation is one good example; right now, our office is seeking outside contingent-fee counsel to assist in potential litigation with pharmacy benefits managers.

But because using outside contingent-fee counsel is *sometimes* appropriate and beneficial does not mean it is *always* appropriate or beneficial. And the current uncoordinated, race-to-the-courthouse system has no rational method of separating those cases that serve the overall public interest from those that do not.

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[2] *Mitigating Municipality Litigation: Scope and Solutions*, U.S. Chamber Institute for Legal Reform, March 2019 at 2 (emphasis added).

[3] More than 600 cities, 105 counties, and nearly 300 school districts.

Regulating contingent-fee arrangements is not a new idea. This Legislature has found various circumstances in which it has determined as a matter of public policy that contingent fee arrangements should be prohibited or carefully regulated:

- As discussed above, K.S.A. 75-37,135 limits the ability of the state to hire legal counsel on a contingent fee basis.
- K.S.A. 79-2022 prohibits counties from employing certain auditors on a contingent fee basis.
- K.S.A. 46-267 prohibits lobbyists from being paid on a contingent fee basis.
- K.S.A. 79-2018 allows counties to employ tax-collectors on a contingent fee basis but caps the fee that is permissible.

Similarly, the Kansas Supreme Court has identified circumstances in which contingent fee arrangements for legal services are prohibited:

- Domestic relations matters, including divorce, alimony, support or property settlement. KRPC 1.5(f)(1)
- Criminal cases. KRPC 1.5(f)(2)
- *See also* KRPC 3.4 Comment 3 (noting most jurisdictions prohibit paying expert witnesses through contingent fee arrangements).
- *See also* KRPC 1.5(f)(2) (acknowledging contingent fees for legal services may be precluded by statute).

The federal government shares these public policy concerns and has adopted restrictions on contingent fees for legal services that are stricter than those we propose in HB 2461. In 2007, President George W. Bush issued an executive order that prohibits the federal government from using contingent fee arrangements for legal services except in limited matters required by law. President Bush titled his executive order "Protecting American Taxpayers From Payment of Contingency Fees" and explained it was necessary "[t]o help ensure the integrity and effective supervision of the legal … services provided to or on behalf of the United States" (Attached as Exhibit A).[4]

Last year, Texas enacted groundbreaking state legislation, part of which is quite similar to HB 2461, prohibiting political subdivisions from entering into most contingent fee contracts for legal services without the approval of the Texas attorney general.[5]

Conflicts and Impeding State Interests

As the federal government and the State of Texas have recognized, in order to avoid needless chaos in litigation on matters of statewide concern, *somebody* must coordinate the contingent-fee arrangements for legal services for public entities suing over the same or closely related subjects. HB 2461 suggests the natural person to provide that coordination is the attorney general, the constitutional officer with statewide authority who is the state's chief legal officer. Otherwise, the result is a hodgepodge of litigation on behalf of the same people (Kansas citizens) addressing the same misconduct (that is the basis of the claims) that resulted in the same harms. The current

[4] Executive Order 13433 – Protecting American Taxpayers from Payment of Contingency Fees, May 16, 2007.
[5] TX GOVT Sec. 2254.1038 (Political Subdivision: Attorney General Review of Contract) (2019 HB 2826, Sec. 4).

strategy of leaving coordination to a race to the courthouse is inefficient and, in some cases, impairs the legal interests of the state or the legal interests of other political subdivisions that suffered harm but choose to address it without giving away part of the overall recovery in contingent legal fees.

To illustrate the point, consider the current opioid litigation:

- Early in this process, I made a strategic litigation decision on behalf of the state not to retain outside counsel but rather to handle any necessary litigation through staff attorneys in the attorney general's office. To date, we have filed one case – *State of Kansas ex rel. Derek Schmidt, Attorney General v. Purdue Pharma L.P., et al.*, in the District Court of Shawnee County, Kansas, Case No. 2019-CV-369 – but we are involved in settlement negotiations with *all* of the target companies. By seeking pre-filing settlement, I concluded (I think correctly) that we could *maximize the recovery of funds for use in addressing the opioid crisis* by avoiding the need to give part of any funds recovered to private outside attorneys.

- Despite that, numerous local jurisdictions in Kansas – about 28 cities and counties at last count – have filed suit, most or all through use of outside private counsel to be paid on a contingent fee basis. Without discussing information that is part of confidential settlement negotiations, I can assure the Committee of two things: First, whatever global settlements are ultimately reached regarding opioids will address both state financial loss and local financial loss, and the Legislature of course retains authority to share any recovery obtained by the state with local units that are affected; Second, the single biggest obstacle to global settlements at this point in time is impasse on how to pay the *enormous* legal fees being demanded by outside contingent-fee counsel representing the more than 2,500 jurisdictions suing in the Multi-District Litigation pending in Cleveland and also how to resolve related demands being made by *local* governments' contingent-fee counsel regarding how *states* must prioritize and use any funds recovered.

- While I am not privy to all of the contingent fee contracts entered into by the suing Kansas jurisdictions, I am aware of provisions of a few. Suffice it to say there is no uniformity in the contingent fee being paid – despite all of these suits advancing essentially the same claims, and most (or all) of them riding through the Multi-District Litigation to become part of the eventual national settlement.

Remedy Proposed by HB 2461

HB 2461 proposes to remedy the problems described above on a *prospective* basis – it does not alter or affect *existing* contingent-fee contracts for legal services. It just resets the rules for whatever the Next Big Thing in widespread public-entity litigation may be.

The bill proposes a flat prohibition on all public entities in Kansas – state and local – from entering into contingent-fee contracts for legal services. In that regard, it is similar to the federal government's approach.

The bill further provides a procedure by which the attorney general may, upon request, waive that prohibition. In other words, it ensures the attorney general will play a gatekeeper role in

coordinating this sort of contingent-fee financed litigation by private outside counsel on behalf of public entities statewide.

The bill also ensures that current statutory safeguards on the state's ability to enter into contingent-fee arrangements for legal services will also govern similar contingent-fee arrangements by other public entities.

And it gives authority to the attorney general to help ensure uniformity of approach when multiple public entities are retaining contingent-fee outside private counsel for the same or related claims – for example, by preventing unjustified wide variations in the contingent fees charged to different public entities within the state.

Proposed Amendment

We have consulted with many of the opponents of this legislation in an attempt to find common ground. For some, I think it is fair to say we simply have a fundamental difference of opinion, and I am not confident we can reach agreement. But for others, compromise that preserves the purpose of HB 2461 while alleviating specific objections is possible. In particular, I am grateful for the efforts of the League of Municipalities in finding common ground.

Attached to this testimony is a proposed amendment (Attached as Exhibit B). Its main thrust is to exempt from the bill certain types of common contingent-fee contracts for legal services that are not problematic from a statewide standpoint (collections, utility fees, bond counsel, etc.) and to strengthen the waiver provision in ways that provide comfort that decisions of the attorney general in denying a request for waiver may be reviewed to ensure the attorney general does not abuse his or her discretion.

It is my understanding that if these amendments are adopted (after the Revisor puts them in proper form, of course), then the League of Municipalities no longer will oppose the legislation and instead will become neutral on the amended measure. With that in mind, I would favor the amendment and would encourage the Committee to adopt it.

Conclusion

Contingent-fee arrangements for legal services that may appear "free" to individual public entities often are not, in fact, "free" to the citizens of Kansas overall when they involve issues of statewide or national concern. To avoid inappropriate cost-shifting that can accompany the current race-to-the-courthouse approach, these efforts must be coordinated. HB 2461 proposes a method to coordinate future contingent-fee lawsuits to ensure they serve the overall public interests of the state. If adopted, the measure would put Kansas in the good company of the federal government and of Texas in addressing head-on the chaotic proliferation of these lawsuits and will deter the "shopping" for public-entity clients that is now becoming all too commonplace.

I recommend adoption of HB 2461 and the accompanying amendment. I would stand for questions.

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Exhibit A

Federal Register
Vol. 72, No. 96
Friday, May 18, 2007

Presidential Documents

Title 3—

The President

Executive Order 13433 of May 16, 2007

Protecting American Taxpayers From Payment of Contingency Fees

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. *Policy*. To help ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States, it is the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law.

Sec. 2. *Duties of Agency Heads*. (a) Heads of agencies shall implement within their respective agencies the policy set forth in section 1, consistent with such instructions as the Attorney General may prescribe.

(b) After the date of this order, no agency shall enter into a contingency fee agreement for legal or expert witness services addressed by section 1 of this order, unless the Attorney General has determined that the agency's entry into the agreement is required by law.

(c) Within 90 days after the date of this order, the head of each agency shall notify the Attorney General and the Director of the Office of Management and Budget of any contingency fee agreements for services addressed by section 1 of this order that are in effect as of the date of this order.

Sec. 3. *Definitions*. For purposes of this order:

(a) The term ''agency'' means an executive agency as defined in section 105 of title 5, United States Code, and the United States Postal Service and the Postal Regulatory Commission, but shall exclude the Government Accountability Office and elements of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 as amended (50 U.S.C. 401a(4)).

(b) The term ''contingency fee agreement'' means a contract or other agreement to provide services under which the amount or the payment of the fee for the services is contingent in whole or in part on the outcome of the matter for which the services were obtained. The term does not include:

(i) qualified tax collection contracts defined in section 6306 of title 26, United States Code, and

(ii) contracts described in sections 3711 and 3718 of title 31, United States Code.

Sec. 4. *General Provisions*. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an agency or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right, benefit, or privilege, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

THE WHITE HOUSE,
May 16, 2007.

[FR Doc. 07–2518
Filed 5–17–07; 8:45 am]
Billing code 3195–01–P

Exhibit B

Session of 2020

HOUSE BILL No. 2461

By Committee on Judiciary 1-22

AN ACT enacting the public litigation coordination act; relating to contracts by public entities for legal services on a contingent fee basis; powers and duties of the attorney general.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) This section shall be known and may be cited as the public litigation coordination act.

(b) Except as provided in subsections (c) and (d), on and after the effective date of this act:

(1) A public entity shall not contract for legal services on a contingent fee basis; and

(2) any contract for legal services in violation of this subsection is void and unenforceable.

(c) A valid contract for legal services in effect prior to the effective date of this act shall remain valid and enforceable, but on and after the effective date of this act, such contract shall not be extended or renewed, nor shall parties be added, except in compliance with subsection (d).

(d) (1) The attorney general shall establish by rule and regulation a procedure for a public entity to notify the attorney general the public entity desires to enter into a contract for legal services on a contingent fee basis and to request a waiver of the prohibition in subsection (b).

(2) ~~Except as provided by subsection (d)(2),~~ If the attorney general does not take any action authorized by subsection (d)(3) within 45 days after receipt by the attorney general of a waiver request pursuant to subsection (d)(1), ~~the~~then the waiver shall be deemed granted. ~~attorney general,~~ The attorney general and the public entity may, by agreement, extend the time period in this subparagraph beyond 45 days.

~~18~~20 (3) Upon receipt of any waiver request as provided by subsection (d)(1), the attorney general may:

~~19~~ (A) ~~upon written application by a public entity, may~~ grant the waiver request, and shall do so promptly if the request involves a matter of purely local concern that does not implicate any statewide interest; ~~the prohibition in~~

~~subsection (b);~~

(B) deny the waiver request because any provision of this section was not satisfied;

(C) deny the waiver request because:

(i) the legal matter that is the subject of the waiver request presents one or more questions of law or fact that are in common with a matter the state has already addressed or is pursuing; and

~~20~~ (ii) pursuit of the matter by the public entity will not promote the just and efficient resolution of the matter or may ~~only if, as determined in the sole~~

discretion of the attorney general, waiver would serve the public interest and would not impede legal interests of the state; or

(D) deny the waiver request because the legal matter that is the subject of the waiver request is of statewide concern and granting the waiver would not serve the public interest.

(4) If any waiver request waiver request to subsection (d)(1) involves a proposed contract that, if entered into by the attorney general, would be governed by K.S.A. 75-37,135, and amendments thereto, then the attorney general may waive the prohibition in subsection (b) only if the requirements of K.S.A. 75-37,135, and amendments thereto, and subsection (d)(1) are satisfied.

(5) Any waiver granted by the attorney general pursuant to this subsection shall be in writing, may be subject to conditions and shall be incorporated by the public entity into the contract for legal services. Any denial of a waiver by the attorney general pursuant to this subsection shall be in writing and shall be accompanied by a detailed explanation of the reason or reasons for denying the waiver.

A public entity as defined by subsection (f)(3)(B) may appeal such denial [[as provided by KJRA]].

(e)

(f) As used in this act:

(1) "Contingent fee" means a fee or other compensation contingent on the outcome of the matter for which the legal service is rendered.

(2) Except as provided in subparagraph (C), "lLegal services" means:

(A) All services performed by, or under authority of, a law firm or attorney, whether or not admitted to practice law in Kansas; and

(B) all services that constitute the practice of law in Kansas.

(C) "Legal services" does not include: (1) [bond counsel – per cities], (2) [collections], (3) [delinquent utilities – per cities], (4) [subrogation – per counties] or (5) [sale of real property - per cities].

(3) "Public entity" means:

(A) The state, as defined in K.S.A. 75-6102, and amendments thereto;

(B) any municipality, as defined in K.S.A. 75-6102, and amendments thereto; and

(C) any officer, agent or employee of the state or any municipality acting in an official capacity.

Sec. 2. This act shall take effect and be in force from and after its publication in the Kansas register.