

KANSAS TRIAL LAWYERS ASSOCIATION



To: Rep. Fred Patton, Chairman
Members of the House Judiciary Committee

From: Mike Fleming, Kapke Willerth Attorneys at Law
On behalf of the Kansas Trial Lawyers Association

Date: March 22, 2021

Re: HB 2412 Amended Concerning the governmental response to the COVID-19
pandemic in Kansas - Opposed

Re: HB 2412 – Enacting the Kansas fights addiction act and grant program --
OPPOSE

Thank you for the opportunity to testify on behalf of the Kansas Trial Lawyers Association. KTLA opposes HB 2412 because it goes beyond establishing a fund and grant program for the money recovered in the state's litigation of opioid claims. HB 2412 contains unnecessary limitations on the rights of municipalities to obtain private counsel and file opioid litigation on behalf of local taxpayers. KTLA recommends that the committee oppose HB 2412.

HB 2412 prohibits municipalities from filing or maintaining opioid litigation after 1/1/21, without obtaining the Attorney General's prior approval. Municipalities that file opioid litigation after 1/1/21 must withdraw unless they obtain the permission of the Attorney General.

Establishing a "gatekeeper" for opioid litigation in the Office of the Attorney General is neither required for the Legislature to establish a fund and grant program for opioid settlement money, nor is it required by the court.¹ But the "gatekeeper" system in HB 2412 ignores and zeroes out the costs to municipalities and local taxpayers of the opioid crisis. It suspends and nullifies the

¹ In the recent settlement with McKinsey & Co., Inc., Shawnee County District Court ordered McKinsey to pay the Settlement Amount into a fund in the National Association of Attorney Generals (NAAG Fund). A specified amount will be taken for expenses of NAAG and the Settling States, and then distributed according to an agreement of the Settling States. The Settling States, including Kansas, agree that "the funds will be used, to the extent practicable, to remediate the harms caused to the Settling States and their citizens by the opioid epidemic within each State." See pgs. 14-15 of the Final Consent Order/Consent Judgment/Stipulated Judgment, https://ag.ks.gov/docs/default-source/documents/kansas-v-mckinsey-co-petition-and-cj.pdf?sfvrsn=dc5cab1a_2

legal rights and remedies available to municipalities and replaces local governance with centralized legal decision-making.

HB 2412 undermines Kansas law which empowers both the Office of the Attorney General and municipalities to litigate against industries who harm citizens or add financial burdens to taxpayers. It is in taxpayers' best interests that both the state and local government may act to make taxpayers financially whole and hold dangerous industries accountable.

The Attorney General acting alone to recover damages to Kansas cannot fully recover the individual harms caused to specific Kansas communities, because the harms aren't the same. For example: Citizens of a municipality pay for the costs of drug treatment courts² or increased costs of emergency medical services to respond to drug overdoses. Mitigation costs to the State of Kansas include costs related to prescription drug monitoring program that documents prescription dispensing data so that patients acquiring drugs from multiple prescribers or pharmacies may be tracked.³

Local government lawsuits should not be underestimated. They are a powerful means to not only compensate taxpayers but to hold unsafe industries fully accountable. Local governments across the nation have already been successful in the fight to hold opioid defendants accountable and they are continuing to play a role.

Litigating municipalities' opioid claims do not add to taxpayers' costs. Under Kansas law, a court may order defendants to pay plaintiffs attorneys' fees and costs as part of the judgment or settlement. Also, private attorneys work on a contingency fee basis; municipalities pay nothing up front. Private attorneys often work for years, paying millions of dollars in litigation expenses before there is a recovery. If and only if there is a net positive financial recovery for a municipality are attorneys reimbursed their expenses or paid a fee. The contingency fee system allows municipalities to obtain legal expertise and resources beyond what they could otherwise commit. For context, the multidistrict litigation opioid attorneys have collectively paid \$120 million in expenses out-of-pocket and put in 1.5 *million* hours on the case.

Finally, HB 2412 sets a new and dangerous precedent. It establishes state oversight and control over public entities and their ability to self-govern. It takes a step towards centralizing legal decision-making in the Attorney General, a departure from the Kansas Constitution's Article 12, Section 5 guarantee of home rule protecting local government and local decision-making. Municipalities have legal authority, and the authority to make decisions about legal representation, that are separate from the Office of the Attorney General and not derived from the Attorney General.

KTLA wholeheartedly believes that people and industries should pay for the harm that they wrongly cause. If that harm is caused to a municipality and, indirectly, to the local taxpayers, then KTLA believes those that caused the harm should be held accountable to the municipality.

² As of 2019, Kansas City, Topeka, and Wichita have municipal or county-level programs and Chase, Geary, and Lyon counties have drug court programs. Kansas Legislative Research Department, *2019 Briefing Book, F-4 The Opioid Crisis*, p. 4. http://www.kslegresearch.org/KLRD-web/Publications/BriefingBook/2019_briefing_book.pdf

³ K-TRACS. Ibid.

The right of municipalities to take action on behalf of taxpayers should not be eliminated in opioid litigation when Kansas communities as well as the state have suffered billions in damages in addition to the incalculable human costs to Kansas citizens.

On behalf of the Kansas Trial Lawyers Association, I respectfully request that the committee oppose HB 2412.