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STATE OF KANSAS

Testimony on HB2492 (Oral Proponent)

House Committee on Appropriations
Tuesday, March 15, 2022

Chairman Waymaster and members of the Committee:

Thank you for the opportunity to provide comments on HB2492. Together with the Office of Attorney General, the Secretary of State requests payment of \$1.9 million combined judgment in two cases as a claim against the state, pursuant to K.S.A. 46-907. In joint testimony before the Joint Committee on Claims Against the State in October 2021, the Office of Attorney General and Office of Secretary of State presented testimony that included the following information.

The two cases (*Parker Bednasek, et al. v Scott Schwab, in his official capacity as Secretary of State for the State of Kansas*, Case No. 15-cv-9300, United States District Court, and *Steven Wayne Fish, et al., v Scott Schwab, in his official capacity as Secretary of State for the State of Kansas*, Case No. 16-cv-2105, United States District Court) were handled by the Office of Secretary of State throughout the trial stage and the initial appeal to the U.S. Court of Appeals for the Tenth Circuit. At the request of Secretary of State Scott Schwab, the Office of Attorney General assumed representation late in the case during the second appeal to the Tenth Circuit that occurred post-judgment and during the petition for certiorari filed with the U.S. Supreme Court.

The two lawsuits challenging the constitutionality of provisions of K.S.A. 25-2309(i) and K.A.R. 7-23-15 were filed in 2015 and 2016 and were ultimately consolidated for trial purposes in the two cases, 15-cv-9300 and 16-cv-2105, U.S. District Court, which resulted in the two judgments that are before you today. The *Bednasek* case judgment is \$475,000 and the *Fish* case judgment is \$1,425,000, for a combined total of \$1,900,000. This amount reflects a negotiated reduction from the approximately \$4.2 million initially demanded by plaintiffs for their attorney fees in this federal civil rights case, which successfully challenged the constitutionality of K.S.A. 25-2309(i) and K.A.R. 7-23-15.

The lawsuits were filed against then-Secretary of State Kris Kobach, in his official capacity, and judgment ultimately was entered by the U.S. District Court for the District of Kansas against his successor, Secretary of State Scott Schwab, in his official capacity. At the time lawsuits initially were filed, Secretary Kobach consulted with the Attorney General and expressed a desire to handle representation in the case himself, as was his prerogative. The Attorney General explained that unless the Attorney General handled the legal representation, he would not extend Kansas Tort Claims Act (KTCA) coverage in the case and, as a result, the Secretary of State would be responsible for paying any resulting judgment. Having been so informed, the Secretary determined to represent himself.

At no time was a request for representation or indemnification made by Secretary of State Kobach to the Attorney General, and KTCA coverage was not extended to this case. Secretary Kobach handled this litigation through the trial stage and the first appeal to the U.S. Court of Appeals for the Tenth Circuit. The State did not prevail in those proceedings. Secretary Kobach then left office in January 2019, and Secretary Schwab by law necessarily assumed responsibility for the case. Shortly after taking office in early 2019, Secretary Schwab requested representation from the Attorney General, and the Attorney General exercised his discretion and agreed to handle further representation in the case during the remaining appeals. Those appeals were unsuccessful. The Attorney General did not extend indemnification coverage under the KTCA, and consequently did not budget for payment of this judgment.

When a federal court enters judgment against the State of Kansas, its agencies, or its employees acting within the scope of their employment, the defendant in any particular case is obligated to pay the judgment. The State has various mechanisms for paying a judgment. By default, the actual defendant in any individual case is the entity directly responsible for paying the judgment since it is the entity against which or whom the judgment has been entered by the court. In general, there are four methods by which a judgment against a state agency may be paid.

First, the agency itself may pay the judgment using whatever funds it has available and may lawfully use for that purpose. This does occur from time to time and might properly be described as the presumptive method of payment. However, the legislature long has recognized that in many cases – perhaps most – individual agencies will have no funds available that may lawfully be used to pay a judgment, and therefore has provided for alternative methods of payment.

Second, the agency may request coverage from the Attorney General under the Kansas Tort Claims Act. In general, coverage must be requested at the start of any litigation, and when the Attorney General extends KTCA coverage he also obtains a degree of control over the agency's handling of the litigation. This pairing of the Attorney General providing both legal representation to the agency and indemnification for paying any ultimate judgment makes sense because the Attorney General then is responsible for the handling of the litigation and has the opportunity to make litigation decisions designed to minimize the amount of any resulting judgment. If an agency fails to timely make a request for KTCA coverage, then the Attorney General is not obligated later to extend it.

Third, the legislature may pay the judgment ad hoc. This tends to occur on major cases, such as school finance.

Fourth, the legislature has provided for payment of judgments through the claims against the state process set forth in K.S.A. 46-907 and 46-912 through 46-915. This mechanism provides that when no other method of payment is available, then the duty to pay defaults to a claim against the state.

The current judgments in the *Bednasek* and *Fish* cases are presented as claims against the state. There was limited discussion near the end of the 2021 legislative session about establishing methods of payment for potential judgments, but no action was taken by the legislature. Consequently, the Attorney General's budget has no authority to pay the pending judgments. Nor does the Secretary of State have the ability to pay the current judgments from funds in that office. No such funds are available, and as a fee funded agency whatever funds do reside in our office are dedicated for purposes other than paying these judgments.

Consequently, there is no other method of paying these judgments available, and by operation of law they become claims against the state (K.S.A. 46-907). The State of Kansas owes these judgments entered by the federal court against the Secretary of State in his official capacity. Payment of this judgment as a claim against the state is the appropriate method for payment as provided by law. We respectfully request favorable consideration of this claim against the state.

Thank you for the opportunity to provide comments to the Committee.

Respectfully submitted,

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General Counsel