

2009 HOUSE JUDICIARY

HB 1384

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1384

House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 1/27/09

Recorder Job Number: 7818

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1384.

Rep. Kim Koppelman: Sponsor, support. The bill deals with a private right of action. We've begun to see language in legislation that says this does not create a private right of action.

The reason for that language is that some may try to assign the rights to sue someone under laws that we passed, which might be unintentional. In other words, you pass a certain piece of legislation to accomplish a certain objective and if someone comes along later, and because of the way something was created in that law, somebody says that now they can sue somebody for something. It might not have anything to do with the statute that's been enacted itself for a purpose, and I noticed it a couple of sessions ago I think for the first time. The problem that was created, as I discovered in my discussions with Legislative Council, or potential problems was that if you put that in some areas of the law, then someone very enterprising can say that in this statute it says that it doesn't create a unique private right of action, and here it doesn't say that, so that must imply that this statute does create a private right of action. Frivolous lawsuits could ensue. There are several states that are looking at this kind of legislation and what it would do is to simply say that if the Legislature wants to create a right to sue somebody and enacts a statute, it just says that it should say so. If we don't say so, we don't mean to.

Rep. Delmore: We have another bill before us this morning that makes sure that those types of actions can't happen. But you offer a bill that you say will prevent frivolous lawsuits, what is an example of one that has come out of legislation that we passed that's been interpreted that way by the public and you.

Rep. Koppelman: I'm not sure I followed your question. We had difficulty in talking about several topics, residence, and pornography. I think we all know our society, certainly, on a national basis, has become more and more litigious. I think most Americans think it's not a good thing. Should we have the right to sue people for legitimate reasons, absolutely? Should the legislature be able to put something in statute that says, here's the problem we're trying to deal with, one way to deal with it is like this and this creates a right for somebody to sue somebody else under this, to take civil action against them. The point is when you do that it should be intentional. Someone shouldn't be able to read something into the statute that is unintentional and be able to sue for it. This language would not create a private of action has cropped up in several bills in this session. It is a problem that people who are attorneys were trying the cases on, and people were smarter and took up an action. We need to make sure that what the legislature intended and what it is used for.

Rep. Delmore: We have legislative intent for a lot of things that obviously gets ignored, even when transcripts are available. Why do you want to limit that right for people to bring forth a lawsuit if they feel that's validation?

Rep. Koppelman: My intent is not to stop lawsuits; my intent was to stop unintended consequences from legislation. When we, as legislators, come to LC with an idea, we know that the attorneys at LC draw up the legislation that we are asking for them to do. This is what I want done and they draft up a bill. You see it in legislation now, that something does not create a private right of action. If those words aren't in there, someone thinks that that section

does create a private of action. We don't want that to be the standard. We want it to say that nothing creates a private of action unless it specifically says so in the legislation that it is does.

Rep. Delmore: Are there any other states that have this.

Rep. Koppelman: I know of several looking at this very legislation.

Rep. Delmore: Looking at it, haven't adopted.

Rep. Koppelman: I don't know if adopted.

Rep. Griffin: Looking at section 2, it says this will not apply to anything that has already been initiated or pending right now. I would ask, what is really the point of this right now. If it's not going to apply to anything we've done, why do we need this bill?

Rep. Koppelman: That's debatable. I guess what we didn't want to do in saying that this act applies to any action that has not yet been initiated or which is pending on the effective date of this act. The point of that is to say, anything from here forward. We didn't want to change effective law that's on the books. That's not our intent to go back and say there's something over here we're worried about and we better put something in now in the statutes. We just want to draw a line in the sand and say that since we've been putting this phrase into some legislation recently, and we'll probably continue to do it as we go forward, let's just make it clear that as LC draws up new legislation and they note of this, they will know if you're intent is to do that when you draw up the bill, that the language be included. It would be pretty hard to go back and look at all the statutes that this is a private cause of action and this isn't. I don't think we have a lot of frivolous lawsuits in our state. Our state's pretty good about that. I'm not worried about history as much as I am about the future.

Rep. Griffin: Can you give an example of a section where we didn't intend to do that.

Rep. Koppelman: I generally don't propose legislation to fix a specific problem that happens occasionally. Usually I do it for public policy to make sure that we don't get into trouble.

Rep. Klemin: I'm having a little difficulty in reading section 2 the same way you just did. It seems to me that when it says it applies to any action, which means a lawsuit, that hasn't been initiated or which is pending. That does not refer to any statute that has not been enacted yet.

Rep. Koppelman: You're absolutely right. It should be act not action.

Rep. Klemin: It would not only deal with future lawsuits, it may deal with a lawsuit that was started two years ago, but wasn't completed it and still pending. In fact, it would also seem to apply to statutes where even the ND Supreme Court might have held that this does create a private right of action and said so 10 years ago, or 20 years ago, and there have been many lawsuits that in effect have been commenced during that whole period based on this type of a decision. But now, since that statute that might have been enacted 20 years ago, does not contain this express language, they no longer would be able to use that for a private right of action, is that your intent.

Rep. Koppelman: No, it is not. As I said, this legislature is being looked at in other states. I believe that LC looked at another state's draft in drafting this. I would have no objection to striking section 2.

Rep. Klemin: In fact, if we don't do that, we're going to have a number of bills coming in putting that language in all over the place where it's been interpreted to mean that it does create a private right of action.

Rep. Koppelman: That's not my intent. I'd be amenable to changing that.

Rep. Zaiser: There appears to be some resemblance to workers compensation legislation here. Does this follow legislation about injured workers?

Rep. Koppelman: I don't think so. It says that if the legislature in casting a statute in our laws in ND, wishes to create a right for somebody to sue somebody, it should say so.

Rep. Zaiser: I thought it was a constitutional right to sue and be able to be sued. I think it is a basic right that we all have.

Rep. Koppelman: This isn't going to rule out anyone's right to sue anyone. The bill says that if a right to sue is created by a law that is passed in ND, the law should say so. If it doesn't say so, it doesn't do that.

Rep. Zaiser: All of the changes in the legislation, it would have to be drafted giving people the right to sue if they were treated maliciously, inappropriately or whatever. I don't think you should be expressly permitted by statute. I don't understand how this would give up your right because it had to be expressly identified in legislation.

Rep. Koppelman: If what you want is for someone to sue somebody for anything and try to find a statute to hang it on, even though that's not what the statute says, then it might be something that a court might look at and say that's not what this statute says, and they do that now. What this does is makes it clear it's not the intent of the legislature to create that kind of atmosphere that unless it specifically says it.

Rep. Zaiser: I would guess that in probably 80% of state law, I'm sure that it's not expressly written into the law that if you're aggrieved in any way that you may sue. To me that would be limiting an individual's ability to sue.

Rep. Koppelman: I understand that if people sue somebody typically under a state or federal law, they're basing that lawsuit on something that is in the law. Occasionally, however, what the person may be doing is suing under a statute that doesn't expressly forbid it.

Chairman DeKrey: Thank you. Further testimony in support.

Mark Behrens, American Legislative Exchange Council: Support (attachment). Tort law is judge made law and 80-90% is judgment law.

Rep. Griffin: How would you address the fact that we have made laws for many years without any kind of clause whether you can have a private of action or not. Let's say we just made it effective for new laws created after today. I still don't know how you would deal with people's act, do we go back and amend our previous laws, now is that one that you have to put a clause on that.

Mark Behrens: Again, I think, the purpose is just to say that if the legislature intended to create a new law, they would make it clear. As far as the laws already on the books, if it still doesn't apply to those, then you would have the potential for litigation. Did the legislature intend to create a right to sue or not. Generally, the ND courts are reluctant to enforce a cause of action. Under the separation of powers, the courts understand that it is your job to write the law and their job to interpret. They have generally been reluctant to infer legislative intent.

This bill essentially furthers what is the principle that the ND Supreme Court finds now; in terms of having it apply retroactively to laws that are on the books. I see that as a policy decision whether you want to do that or not.

Rep. Zaiser: Going back to all the legislation, if it is not clearly identified that the intention was to give the plaintiff the ability to sue for some reason. What's going to be the process by which one leaves the legislation, the intent? Is it the intent to allow or not.

Mark Behrens: You would make that clear. Most of the tort law is going to be assault, battery, product liability, medical liability, that's all possible, these wouldn't be affected. This would be a situation where the legislature would pass a safety bill of some sort, then the question would be in passing the standard, if a person were not to meet that, then did the legislature also intend for that to give rise to a lawsuit. Maybe you do, that is part of the deterrent for a private right of action. You're going to just put it into the law in there, indicating that it is the intent of the bill is to create a private right of action.

Rep. Zaiser: If it is implied, how would you handle that specifically?

Mark Behrens: If it is implied, if all we're doing is trying to clarify what the legislature's intent and for the law to follow what you intended it to do. So it's time to stop the situation where a court, based it on things that were not your intent. So if the cause of action is being implied, and that's consistent with what legislation intended, then you just go beyond making it implied, you make it clear.

Rep. Zaiser: My concern is that wouldn't make it clearer, it would muddy the matter.

Mark Behrens: That would be dealt with in retroactivity.

Rep. Dahl: In your testimony you laid out the fact that ND views it, would analyze the other areas and apply the statute, but nevertheless the test is inconsistently applied. In the course of your research do you mean inconsistently applied as to ND law, or...

Mark Behrens: It's a standard in state court.

Rep. Dahl: In the course of your research that it is inconsistently applied in ND.

Mark Behrens: I can't recall. In other state courts, they are ignoring what the legislative intent was, and use their own thing. It doesn't seem to be the problem here. The bill is codifying the principle that the legislature writes the law.

Rep. Klemin: Going to section 2, on the application, whether it is prospective or retroactive, the language that is in this bill right now, is not entirely clear. It doesn't imply that it is retroactive. We also have a statute in ND that says that no part of this code is retroactive, unless it is expressly declared to be so. So if this were intended to be retroactive, we'd actually have to say it here.

Mark Behrens: I think the section is applying to cases that are being looked at as legislators, as opposed to law. In essence it is saying, that if there is a case pending today, the question

in that case is, did the legislature intend to create a new law system or not. The law would apply to that case.

Rep. Klemin: Of course, that case may have been based on legislation that was enacted 10 years ago. So that legislation would still be there so it would have a retroactive effect from that standpoint, that the particular language required by section 1, wouldn't be in the law that was enacted 10 years ago. So now I find that these private right of action cases seem to come about if there is some regulatory function of a state agency. There are some statutes that do say a private right of action and some that say no. Is that the kind of statute that you're really looking at, those kinds of regulatory functions where a citizen may have a private right to sue or not.

Mark Behrens: That's right. I think that Rep. Koppelman laid it out very well. The issue or confusion that narrows it, is in ND law is that you referenced, is that there are some statutes that say that there is no private cause of action created. Then there are other statutes that don't say that, then that leads to the question, well if it's not in there, does that mean that the legislature intended to create a lawsuit, or was the legislature just not thinking about it when they passed that law. Probably, in most cases, the legislature is what they can concur on. This is going to deal with situations, that 1) avoid having to put the line in every bill that you pass; and 2) fills in the gaps. We really didn't intend to create new law, but you didn't make that clear as you had on other bills.

Rep. Klemin: On the other hand, review of legislative history, and the corporate case plaintiffs show there was an intent to create a private right of action although it's not expressly stated in there, and this section 1 will supersede what would be that intent because that express language wasn't there. Is that correct.

Mark Behrens: It would. That goes to retroactivity in terms on how you look back to those in the past. That would be something that you could consider in terms of how you apply it. The bills after today would have to have a cause of action. The bill says that if the intent is really there, put it clearly in the bill that it creates a private right of action.

Rep. Delmore: I don't think the courts need the legislature to spell out what their job is; they do a pretty good job right now. Is there another state that has enacted it?

Mark Behrens: I think it was recently adopted by the Task Force, so I haven't had a docket anywhere yet that I know of; but it's being considered in many states.

Chairman DeKrey: Thank you. Further testimony in support.

Marilyn Foss, ND Bankers Association: We did look at this bill and actually think that you should give it serious consideration, not because it would diminish or increase the number of lawsuits, but because we think it would focus the legislature's attention on who and how are laws that are passed going to be enforced. People involved in car accidents or workers comp. cases are not going to be affected because those statutes do have specific provisions of how to write and enforce them.

Rep. Wolf: Before you can sue someone, don't there have to be damages incurred.

Marilyn Foss: Yes, unless you are suing for some kind of injunctive relief.

Rep. Wolf: In your scenario, you would have to show some kind of damages to convince an attorney to take on those types of litigation.

Marilyn Foss: Some attorneys may take the case regardless of what the facts are. This is how we got to require causation, and it's not as if we don't still have issues over causation and damages, etc.

Rep. Koppelman: One of my concerns is that in recent legislation we have put it in the bill that it didn't create a private right of action, for exactly this concern. It could create that

implication, or at least someone could raise the question of whether it created the implication, in another law that was passed before we ever thought about using that kind of language.

Marilyn Foss: I guess that could be an issue but honestly I can't see that as a big issue. I think that if this bill is supposed to be truly prospective, the issue of whether under all the past statutes there is a delayed action is there. We have to deal with it.

Rep. Koppelman: I have worked with Administrative rules process and one of the questions that has come up there is does an agency make rules just because they want to make a rule in an area that they have prevue over or if they have blanket authority. I know questions have been raised more frequently that we are including in bills and statutes language that says the agency this affects shall make rules concerning them. If we don't pass something like this, do you think it will be likely that we're going to have to take a much closer look to include that kind of language almost everywhere unless it's our intent to create a private right of action, which some statutes already have in them?

Marilyn Foss: I think that the regulatory process, we can mostly agree has a level of frustration; we want to make rules and we don't want to make rules. The degree of frustration is reflected in the details in a piece of legislation. We think, for the most part, it is good policy, because there have been issues and questions, and people spend time and effort arguing about how to do things; argue over how to enforce this bill. Who is going to do that? I actually see this bill encouraging that consideration legislatively in a manner that is contemporaneously with the time I am thinking about where sections give rise to that are being addressed. That's why I think this is good.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition.

Ed Christianson, private citizen: I am opposed to this bill. Any bill that you write would be like taking and telling the Supreme Court that you guys are writing this bill and it's corporate. I

think that every person's comp bill that came along, from now in, you could not sue over it.

Don't forget one thing in this room, we're not all perfect. We aren't going to do perfect things.

To take the liability away from an injured worker. I don't believe that we need this bill.

Chairman DeKrey: Thank you. Further testimony in opposition.

Al Austa, ND Association for Justice & Trial Lawyers: Opposed. Mr. Weikum will be bringing testimony on our behalf.

Jeffrey Weikum, President of ND Association for Justice & Trial Lawyer: Opposed (attachment). I disagree with the gentleman from Washington, DC who talked about ND law, and the law being common law. This will be a burden shifting problem from the private citizen to the state, state to county, county to city, etc. Who is going to enforce that, I don't think these entities will have the resources or time to do that.

Rep. Klemin: What if this were to be prospective only as far as new legislation, and to not affect any legislation that's already been enacted in past; I'm talking specifically about section 2. We've had some discussion about application, whether it would be retroactive, which is the issue that you raised and the problems you perceive, or prospective as new legislation. Do you have any comment on that?

Jeffrey Weikum: I think there are a host of problems with even being prospective. The reason for that is that our laws and standard of code is a living, breathing item, and it's all interconnected. Any time there is an amendment to it or a reference to it, there is going to be mass confusion as to what does and what does not apply. I think this is really designed to do what the gentleman from Washington, DC talked about, as far as talking about this area of legislation in the regulatory manner. Those things should probably be discussed when you're discussing legislation regarding regulatory issues. I think this is going to try and backdate what is and what isn't a private right of action based on legislation, based on references to cases

from the past. I think this wouldn't be workable, I think it would cause considerable amounts of confusion and again there hasn't been any testimony that the Supreme Court has been getting wrong at all when it comes to private right of action. I think it's just the opposite. We're not fixing something that's a problem. Additionally I think we should be going to the regulatory agencies and ask their representatives, is this something that they want to be forced to enforce it. Because all of a sudden they are going to be responsible for it all. That is a huge burden that they will have.

Rep. Koppelman: As an attorney if you're going into court to try a case, would you rather have a statute on the books that you're relying upon that says I have a right to sue under this statute, or would you be hoping the court will find the right that isn't there, that you think are the facts of the case.

Jeffrey Weikum: I want what is just. I think the problem with the legislation that you are now proposing is that even though your intent may be good, the far-reaching effect on other things will create huge problems, you are painting it with broad strokes.

Rep. Koppelman: You talk about confusion being created. It seems to me if we were to adopt this bill, it would clarify rather than confuse, from the standpoint that you're saying if there is intent to be a private right of action it will say so. If there's not, we won't. That's pretty clear to me. I think if there would be any confusion, it would be with the status quo. You might be looking at statutes on the books and saying, is there a private right of action here or not, it's not specifically laid out in that manner. I would rather have something in my hand legally to support the facts of the lawsuit.

Jeffrey Weikum: I don't believe so. The reason for the difference is when I am trying to make sure that this is a ND statute, we are not looking for one law here and one law there. We are looking at a bigger body of laws, you can't take legislation and tie it up without looking at

language; we're going to have a lot of funny things in our constitution. I think the failsafe way for this committee and the legislature to move in, is by bill, by each piece going forward. Because that's the understanding when you talk about ramifications. To do it in this way is really massive.

Rep. Koppelman: Despite your disagreement with the bill, do you see anything in the bill as has been implied, that would limit workers' rights under worker's compensation. The way I understand that worker's comp works is that people are agreeing to give up their right to sue in exchange for the services they receive.

Jeffrey Weikum: I don't practice in the area of worker's compensation so I can't speak to that. I can tell you what I believe that the bill is talking about and that is not the right to actually sue your employee, but the right to seek redress for compensation if the employer doesn't follow the law.

Chairman DeKrey: Thank you. Further testimony in opposition. We will close the hearing.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1384

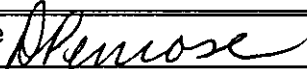
House Judiciary Committee

☐ Check here for Conference Committee

Hearing Date: 2/4/09

Recorder Job Number: 8693

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1384. What are the committee's wishes?

Rep. Koppelman: I move the amendment 90559.0102 on HB 1384. It is designed to address the concern about court decisions that may have been made. It simply says that a court that has found that there is a private right of action in some statute in our law, before this bill would go into effect, that this would not affect that. Even if that statute were later amended, whatever right of action a court may have found would stand. So it changes the bill significantly, and hopefully that makes it much more probable.

Rep. Dahl: Second.

Chairman DeKrey: Voice vote. Motion carried. We now have HB 1384 before us as amended.

Rep. Koppelman: I move a Do Pass as amended.

Rep. Boehning: Second.

Chairman DeKrey: Discussion.

Rep. Klemin: I'm going to have to vote against this bill. I think this creates more problems than it solves. Particularly on section 2, on the application, I don't see that being deleted out of here, that's confusing. I guess I'm comfortable with the state of the law the way it is.

Rep. Koppelman: I did intend to amend that out as well. I withdraw my motion of a Do Pass.

I would like to further amend to amend out section 2.

Rep. Dahl: Second.

Chairman DeKrey: Voice vote on this amendment. Motion carried. We now have the bill before us as amended.

Rep. Koppelman: I move a Do Pass as amended.

Rep. Dahl: Second.

4 YES 8 NO 1 ABSENT MOTION FAILED

Rep. Wolf: I move a Do Not Pass as amended.

Rep. Griffin: Second.

8 YES 4 NO 1 ABSENT DO NOT PASS AS AMENDED

CARRIER: Rep. Griffin

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1384

Page 1, line 3, after the boldfaced period insert:

"1."

Page 1, after line 6, insert:

2. A court of this state may not construe subsection 1 to affect a private right of action that before the effective date of this Act a court of this state recognized as arising under a statute enacted in this state, including a statute that is amended after the effective date of this section unless the amendment expressly bars the private right of action."

Renumber accordingly

VR
2/4/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1384

Page 1, line 1, remove "; and to provide for application"

Page 1, line 3, after the second boldfaced period insert:

"1."

Page 1, replace lines 7 and 8 with:

"2. A court of this state may not construe subsection 1 to affect a private right of action that before the effective date of this Act a court of this state recognized as arising under a statute enacted in this state, including a statute that is amended after the effective date of this section unless the amendment expressly bars the private right of action."

Renumber accordingly

Date: 2/4/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1384

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ DP ☐ DNP ☒ DP AS AMEND ☐ DNP AS AMEND

Motion Made By Rep. Koppelman Seconded By Rep. Dahl

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore		✓
Rep. Klemin		✓	Rep. Griffin		✓
Rep. Boehning	✓		Rep. Vig		✓
Rep. Dahl		✓	Rep. Wolf		✓
Rep. Hatlestad	✓		Rep. Zaiser		✓
Rep. Kingsbury					
Rep. Koppelman	✓				
Rep. Kretschmar		✓			

Total (Yes) 4 No 8

Absent 1

Floor Carrier: _____

If the vote is on an amendment, briefly indicate intent:

Motion Failed

Date: 2/4/09
Roll Call Vote #: 2

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1384

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ DP ☐ DNP ☐ DP AS AMEND ☒ DNP AS AMEND

Motion Made By Rep. Wolf Seconded By Rep. Griffin

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey		✓	Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning		✓	Rep. Vig	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Hatlestad		✓	Rep. Zaiser	✓	
Rep. Kingsbury					
Rep. Koppelman		✓			
Rep. Kretschmar	✓				

Total (Yes) 8 No 4

Absent 1

Floor Carrier: Rep. Griffin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1384: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (8 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1384 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "; and to provide for application"

Page 1, line 3, after the second boldfaced period insert:

"1."

Page 1, replace lines 7 and 8 with:

"2. A court of this state may not construe subsection 1 to affect a private right of action that before the effective date of this Act a court of this state recognized as arising under a statute enacted in this state, including a statute that is amended after the effective date of this section unless the amendment expressly bars the private right of action."

Renumber accordingly

2009 TESTIMONY

HB 1384

**TESTIMONY OF MARK BEHRENS, ESQ.,
SHOOK, HARDY & BACON L.L.P.**

**ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL**

**IN SUPPORT OF HOUSE BILL 1384,
AN ACT TO PROVIDE TRANSPARENCY IN PRIVATE RIGHTS OF ACTION**

**BEFORE THE NORTH DAKOTA
HOUSE JUDICIARY COMMITTEE**

JANUARY 27, 2009

**TESTIMONY OF MARK BEHRENS, ESQ.
SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL**

Thank you for allowing me to testify on behalf of the American Legislative Exchange Council (ALEC) in support of H.B. 1384. I am an attorney in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. Most of our firm's practice involves representing corporate defendants in complex civil litigation. I have written extensively on liability issues and serve as advisor to ALEC's Civil Justice Task Force.

BACKGROUND

ALEC is the nation's largest nonpartisan membership association of state legislators. The goal of ALEC's Civil Justice Task Force is to restore fairness, predictability, and consistency to the civil justice system. ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies, and draft model legislation. H.B. 1384 is based on ALEC's model Transparency in Lawsuits Protection Act. H.B. 1384 would codify the principle that new private rights of action are created under statutes only when expressly authorized by the legislature. The legislation provides a common-sense solution that would increase clarity and transparency in North Dakota law. As advisor to ALEC's Civil Justice Task Force, I had input into the development of the ALEC model bill.

I. The Problem

The potential for a court to recognize a private right of action when the legislature did not intend for a law to create a new form of lawsuit is a source of unpredictability that gives rise to litigation that could easily be avoided. Creation of a new private right of action is a significant public policy decision that should be reached by the legislature after close consideration and deliberation. When the legislature intends to

create a new right to sue it often makes that clear in the law.¹ When a statute is silent on this point, however, courts arrive at their own conclusions as to whether a new right to sue has been created.² For this reason, North Dakota legislators have included language in some laws to disclaim an intent to create a private right of action.³ While attempting to clarify the law, this approach may have the unintended consequence of leading courts to incorrectly conclude that a new right of action can be inferred from legislation that is silent on this point.

A. Uncertainty, Inconsistency, and Needless Litigation

The lack of an express statement by the legislature regarding private enforcement of a law results in uncertainty and unfairness for all parties. Plaintiffs may go through costly litigation only for a court to hold that private claims were not “intended” by the legislature. Similarly, where courts find an “implied right of action” based on their view of legislative intent at the time of enactment, defendants are exposed to unexpected liability. To complicate matters, courts occasionally reach different conclusions on the same

¹ See, e.g., H.B. 1181, 61st Leg. Assem. (2009) (creating a private right of action for employment discrimination for volunteer emergency responders); S.B. 2126, 60th Leg. Assem. (2007) (creating a private right of action to enforce North Dakota’s False Claims Act on behalf of the state for alleged fraud in Medicaid claims); S.B. 2350, 60th Leg. Assem. (2007) (creating a private right of action related to the filing of fraudulent and harassing financing statement records).

² See, e.g., *Kouba v. State*, 687 N.W.2d 466 (N.D. 2004) (statute requiring notice of intention to suspend a driver’s license did not create a private cause of action); *Ernst v. Burdick*, 687 N.W.2d 473 (N.D. 2004) (statute on gathering and disseminating criminal history information did not create a private cause of action); *Trade ‘N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707 (N.D. 2001) (no implied private right of action for damages under North Dakota’s Unfair Discrimination Law or Unfair Trade Practices Law); *Werlinger v. Champion Healthcare Corp.*, 598 N.W.2d 820 (N.D. 1999) (recognizing an implied private right of action under North Dakota’s Wage Collection Act).

³ See, e.g., H.B. 1309, 61st Leg. Assem. (2009) (no private right of action against the state for violations of compact on educational opportunity for military children); H.B. 1316 & S.B. 2255, 60th Leg. Assem. (2007) (no private right of action for the unauthorized or fraudulent procurement, sale, or receipt of telephone records); S.B. 2040, 60th Leg. Assem. (2007) (no private right of action for facilitating certain deceptive acts or practices); H.B. 1179, 1477 & 1485, 58th Leg. Assem. (2003) (no private right of action for certain unauthorized disclosures of nonpublic personal information).

statute, permitting private lawsuits in some cases, but not others.⁴ Further, placing enforcement of public laws in the hands of private lawyers rather than exclusively with government agencies may have significant adverse public policy implications. It may effect the interpretation and application of the law, remove administrative discretion in prosecuting violations, and lead to lawsuits driven by profit rather than the public interest.

The most common test for determining whether a legislature intended to create a private right of action, and the approach adopted in North Dakota,⁵ was established by the U.S. Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). In deciding the availability of private claims under a statute, courts consider whether (1) the plaintiff is a member of the class for whom the statute was enacted; (2) there is an indication of legislative intent to create or deny an implied remedy; and (3) a private cause of action is consistent with the underlying purposes of the legislative scheme. Each of these factors is filled with subjective words that may lead courts to reach a decision that may not reflect the legislature's actual intent. For this reason, in recent years, courts have more closely focused their inquiry on legislative intent shown by the statutory language itself.⁶ Nevertheless, the test is inconsistently applied and leaves plaintiffs, defendants, government agencies, and the courts guessing as to a legislature's intent on so important an issue.

⁴ Compare *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000) (finding that Congress intended to create a private right of action for an accounting under the Federal Deposit Insurance Act) with *Hindes v. FDIC*, 137 F.3d 148 (3d Cir. 1998) (reaching opposite conclusion) and *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242 (5th Cir.1997) (finding a private right of action for a retaliation claim under Title IX) with *Atkinson v. Lafayette College*, 2002 WL 123449 (E.D. Pa. Jan. 29, 2002) (finding no private right of action); see also *Qwest Communications Corp. v. City of Greensboro*, 440 F. Supp.2d 480, 486 (M.D.N.C. 2006) (citing cases showing courts have reached differing conclusions as to whether a private right of action is implied under Section 253 of the Federal Telecommunications Act).

⁵ See *Ernst v. Burdick*, 687 N.W.2d 473, 477 (N.D. 2004).

⁶ See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (Stevens, J., dissenting) (reviewing the Court's increasingly constrained approach to recognizing implied rights of action); see also *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Transamerica v. Mortgage Advisors v. Lewis*, 444 U.S. 1 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

In North Dakota, the state supreme court has emphasized the potential constitutional deficiencies where state courts imply a private right of action. For example, the court has warned that such actions raise separation of powers concerns and may present an “unwarranted intrusion upon the legislative domain.”⁷

**B. Clarity and Transparency Benefits
North Dakota’s Legislature, Courts, and Litigants**

H.R. 1384 would fulfill the U.S. Supreme Court’s strong suggestion that when a legislative body “intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.”⁸ The bill also is consistent with the U.S. Supreme Court’s instruction that statutory intent is determinative, “[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”⁹ Thus, it is imperative that if the legislature intends to create a new private right of action, it should say so explicitly in the legislation. Moreover, as government leaders have recognized, transparency in lawmaking is highly valued by the American people. Transparency in lawsuits legislation provides a practical way of infusing more clarity and transparency in the legislative process; namely, by ensuring that the legislature is explicit when it creates new rights to sue.

II. Conclusion

If new private rights of action are to be enacted by legislation, then fundamental principles of transparency and fairness suggest that the legislation should be explicit in doing so. The legislature should enact H.B. 1384.

⁷ *R. B. J. Apts., Inc. v. Gate City S. & L. Ass’n*, 315 N.W.2d 284, 289 (N.D. 1982).

⁸ *Cannon v. Univ. of Chicago*, 441 U.S. 667, 717 (1979).

⁹ *Sandoval*, 532 U.S. at 286-87.

Testimony in Opposition to House Bill No. 1384

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Mr. Chairman and members of the Committee:

Thank you for allowing me to speak with you this morning. I am attorney from Bismarck and I have been practicing law in North Dakota for fourteen years. I am also licensed to practice in Minnesota, South Dakota and Montana. I am also the President of the North Dakota Association for Justice.

I am here in opposition to House Bill No. 1384.

The North Dakota Century Code full of laws which set forth the rules for the citizens of this State. When a citizen fails to follow the law or has a disagreement with another citizen, there are two options available:

- 1) The state, county or city can take action against a citizen who breaks the law or attempt to remedy the disagreement between citizens; or
- 2) The person aggrieved by the citizen's failure to follow the rules or individuals involved in a disagreement can seek redress under the statute controlling the respective citizen's behavior.

Aside from criminal prosecutions for violations of the criminal code, Option 2 (the private right of action) is by far the most common means of resolving these issues between citizens.

There are a number of reasons why the Private Right of Action option is chosen most frequently but primarily it is utilized because the state, county and city simply do not have the time or resources to act as the private attorney for all of its citizens in a laundry list of situations.

Under the North Dakota Constitution the citizens have the right to seek redress against individuals who have not followed the law. "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. " (ND Const. Art. I, Sec. 9).

The North Dakota Constitution will not change if HB No. 1384 is passed. Rather HB No. 1384 will shift the burden for seeking that redress from the citizen to the state, county and city.

There are many areas in the Century Code which do not expressly provide for a private right of action but for the very reasons discussed above have been handled in that manner. A short list of those includes the following areas.

- Intentional injury
- Breach of contract
- Collection actions
- Deceit
- Divorce
- Child Support
- Consumer fraud claims
- Misrepresentation

Respectfully, HB No. 1384 will cut a wide swath through the Century Code and is simply not appropriate.

Thank you for your time.

If you have any questions, please feel free to contact me.