



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83-5

Arden Ensley
Revisor of Statutes
Office of Revisor of Statutes
Third Floor, Statehouse
Topeka, Kansas 66612

Re: Uniform Commercial Code--Secured Transactions--
Filing; Immunity of Public Officials

Synopsis: As introduced, 1983 Senate Bill No. 7 would amend K.S.A. 84-9-407, relating to the release of information concerning financing statements on file, so as to grant immunity to public officials from damages resulting from their negligence in releasing such information. Such a grant of immunity is permissible under the Kansas and United States Constitutions, and would act as an amendment by implication to the Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq. Cited herein: K.S.A. 46-901 (repealed by L. 1979, ch. 186), K.S.A. 1981 Supp. 75-6101, 75-6103, 75-6104, K.S.A. 84-9-401, 84-9-407, Kan. Const., Bill of Rights, §18, U. S. Const., Amend. XIV, L. 1981, ch. 357, L. 1981, ch. 358, 1983 Senate Bill No. 7.

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Dear Mr. Ensley:

As Revisor of Statutes, you request the opinion of this office concerning the constitutionality of a provision contained in 1983 Senate Bill No. 7. At the request of State Senator Neil Arasmith, you inquire whether Section 4(3), which provides a

limited form of immunity to certain public officials in the performance of specified duties, is constitutional. While you do not so specify, we presume that you refer to the question of whether such a statute would impermissibly grant immunity from suit in contravention of the principles of equal protection or due process under either the United States or Kansas Constitutions.

The provision in question is contained in a section of the bill which amends K.S.A. 84-9-407. That statute, contained in the Kansas Uniform Commercial Code (UCC), concerns the release of information by public officials who are designated as filing officers by K.S.A. 84-9-401. These officials, which include the Kansas Secretary of State and county registers of deeds, are required by K.S.A. 84-9-407(2) to release, upon request, information relating to any financing statements or statements of assignment which are currently on file that name a specific debtor. This duty is left intact by Section 4 of the bill, with subsection (3) limiting an official's liability for providing incorrect information. There, it is stated:

"Except with respect to willful misconduct, the state, counties and filing officers, and their employees and agents, are immune from liability for damages resulting from errors or omissions in information supplied pursuant to this subsection."

An exploration of the history of governmental immunity, as well as other forms of immunity, would properly be the subject of an extensive work or treatise, and is not necessary or possible here. A concise history of two types of immunity (governmental and charitable) is found in the decision of Brown v. Wichita State University, 219 Kan. 2 (1976), commonly known as Brown II. In reversing a portion of the first Brown decision [217 Kan. 279 (1975)], the Brown II holding determined that the Kansas Legislature could, if it desired, establish governmental immunity by statute following the abrogation by the court of judicially imposed governmental immunity. Further, even if the grant of immunity was a blanket one, without exceptions, the court found that no provision of the Kansas Bill of Rights, the Fourteenth Amendment to the U.S. Constitution or any other constitutional provision was offended thereby. 219 Kan. at 9. However, such was not the case with charitable immunity, which was held once again to be violative of Section 18 of the Kansas Bill of Rights. Id. at 10. (See also Attorney General Opinion No. 81-87.)

In 1979 the legislature acted to reduce the degree of governmental immunity previously established by the statutes upheld in Brown II, i.e., K.S.A. 46-901 et seq. (repealed L. 1979, ch. 186). This change was motivated in part by further judicial limitations

on the governmental immunity concept, most notably Flax v. Kansas Turnpike Authority, 226 Kan. 1 (1979), where K.S.A. 46-901 was held unconstitutional as applied to the Kansas Turnpike Authority. The legislature's response, the Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq., made liability the rule and immunity the exception for negligent or tortious conduct by government officers or employees acting within the scope of their employ. K.S.A. 1981 Supp. 75-6103. Accordingly, unless other provisions of the Act were determined to be applicable to a particular case, officers filing UCC documents are subject to liability for their conduct when such results in damage or injury.

Exceptions to the general liability rule are found at K.S.A. 1981 Supp. 75-6104, which consists of a list of 17 different functions or activities for which governmental immunity has been reimposed. While legislative functions, judicial functions and discretionary functions are but a few of the areas exempted from the general liability created by the Act, no subsection would appear to presently limit the liability of filing officers. However, in our opinion nothing prevents the Legislature from so acting, as it has previously acted in creating the exceptions initially and in subsequent amendments. See, e.g., L. 1981, ch. 357 (injuries to a firemen's relief association member, abandoned cemeteries taken over by municipality) L. 1981, ch. 358 (minimum maintenance roads).

It would further be our opinion that, in light of the above, some revision of the bill as it presently reads would be desirable. While the bill proposes to amend only statutes contained in the UCC, the clear effect is to create another exception to the Tort Claims Act. While the result would be valid as it now reads, an amendment by implication would be created to the Act. As such indirect amendments are not favored by the law, perhaps because of their failure to provide clear notice of the change [State v. Rural High School Dist. No. 4, 126 Kan. 166 (1928)], a reference to the change should also be made at K.S.A. 1981 Supp. 75-6104.

In conclusion, 1983 Senate Bill No. 7 would amend K.S.A. 84-9-407, relating to the release of information concerning financing statements on file, so as to grant immunity to public officials from damages resulting from their negligence in releasing such information. Such a grant of immunity is permissible under the Kansas and United States Constitutions, and would act as an amendment by implication to the Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General