

**Testimony before Senate Judiciary Committee**  
**HB 2153 – fee sweep prohibition**  
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**March 20, 2017**  
**(Testimony in support)**

Mr. Chairman and members of the Committee

I appreciate the opportunity to appear in favor of HB 2153, dealing with the subject of sweeps of statutory fee funds and amending the current law to make clear the legislative intent prohibiting such improper revenue transfers.

The phenomena of the state diverting statutory fee funds into the state general fund has been an ongoing concern for decades. Democrat and Republican Governors alike have utilized the practice. The Kansas Supreme Court addressed the issue as far back as 1958 in *Panhandle Eastern v. Fadely*, 183 Kan. 803. There the Legislature had diverted funds from the Natural Gas Conservation Fund into the state treasury. The fund, administered by the KCC, contained assessments paid in by producers to fund the operations of the Conservation Division of the KCC. Following the sweep into the SGF, the KCC assessed producers again for the loss of funds. The Court struck down the transfer noting:

*“It is clear that under its police power the state may reimburse itself for the costs of an otherwise valid regulation and supervision by charging the necessary expenses to the businesses or persons regulated. A statute, however, is void if it shows on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation, or if more than adequate remuneration is secured.”*

Even though K.S.A. 75-3036 has been on the books since 1937, its intent has been ignored by a number of administrations over time. Fee agency fund sweeps were a source of controversy in 2002, when Workers Compensation Fee Fund balances were swept into the SGF to help balance the books during that recession, under Governor Graves, giving rise to an Attorney General’s Opinion, stating:

*“If an assessment is determined to so exceed the cost of regulation that it is apparent the legislature is using it as a general revenue raising measure, the overage cannot stand on police power authority. If the assessment is in fact a revenue raising measure, it must be analyzed as such, which may include a determination as to whether it meets Commerce Clause and Equal Protection requirements, as well as any state constitutional requirements applicable to the type of tax it is.”* (A.G. Opinion 2002-45)

In 2009, the Sebelius administration proposed sweeping some \$29M of fee agency fund balances into the SGF to balance the books in the aftermath of the 2008 recession. The Legislature eventually agreed to sweep a little over \$20M from various fee funds. Entities who were required to pay into the Workers Compensation Fee Fund, Bank Commissioner Fee Fund, and Real Estate Commission Fee Fund were affected, among others. These groups filed suit to recover amounts swept and for a court order finding the sweeps to be an unconstitutional tax. I am the attorney in that case, filed in January of 2010 and that case is pending still, although the Kansas Supreme Court a year ago last August issued a ruling that all but suggests that the Plaintiffs should prevail, stating:

*“Not all moneys deposited into the State Treasury represent public monies subject to unfettered general appropriation by the legislature. Moneys received or to be used under constitutional or statutory*

*provisions or under the terms of a gift or payment for a particular and specific purpose are to be kept as separate funds within the State Treasury and shall not be placed in the state General Fund.” Kansas Building Industry Workers Compensation Fund, et al v. State (Docket #108,607)*

The Court cited the statute which is the subject of HB 2153. HB 2153 would reinforce the fee sweep prohibition already contained in K.S.A. 75-3036. A key aspect of HB 2153 is the stricken language on line 16, which has been used by those seeking to sweep funds as some sort of exception. It is not. Improper fee sweeps of agency funds for transfer to the SGF are never “proper” statutory enactments. HB 2153 would prevent such claims in the future and should protect against protracted, expensive and unnecessary litigation on the part of those burdened with the requirement of paying fees.

This same language was introduced in the House in the 2016 Session, where it passed the House and was sent to the Senate. It was amended in the House Committee to add a specific listing of potentially affected fee funds, requiring notice of any attempt to transfer those funds by the Governor or Legislature, and added language of specific legislative intent that these funds ***“shall remain intact and inviolate for the purposes set forth in the statutes concerning such funds.”***

This legislation would not and does not affect the pending litigation, as the litigation is limited to specific sweeps in 2009, but this legislation is a critical reform to prevent sweeps from happening in the future and should help prevent future litigation and the type of “double taxation” such sweeps invariably cause. The sweeps that are in litigation were proposed by the Sebelius administration but sweeps of a similar nature have been proposed since by both the Parkinson and Brownback administrations. This legislation is backed by strong bi-partisan support. Ironically, since 2009 there have been proposed sweeps of funds administered by the Attorney General’s Office, which is currently defending the lawsuit, and also the Judicial Branch, which has jurisdiction to decide the matter.

Thank you, and I’ll be happy to answer any questions the Committee may have.