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TO: Bill Taylor, Legislative Counsel, Oregon Joint Judiciary Committee
FROM: Amy L. Becerra
DATE: April 25, 2000
RE: **Case Law concerning Private Right of Action based on Statutory Duty**

MEMORANDUM

At your request, I read a Senate Judiciary Committee memo dated May 26, 1999, entitled "Case Law Concerning Implied Private Right of Action Based on Statutory Duty to Report Possible Child Abuse." You asked me to check the memo's accuracy. In addition, you also asked me to find case law from jurisdictions outside Oregon addressing the issue of whether or not plaintiffs had a private cause of action arising from mandatory child abuse reporting statutes. You also asked me to find case law addressing the larger question of whether other states have imposed third party liability arising from a statutory duty. I reviewed both federal and state case law. For purposes of convenience, I included sections from the prior memo in this one. In addition, the current California child abuse reporting statute is attached—it does not appear to require attorneys to report.

PRIVATE CAUSE OF ACTION—MANDATORY CHILD ABUSE REPORTING

The common law does not recognize a cause of action for failure of a lawyer or other person to report child abuse.[1]

With the exception of California courts (and one maverick federal court in Tennessee), courts in all jurisdictions have uniformly rejected plaintiffs' attempts to create a private right of action based on a violation of a state child abuse reporting statute that provides only for a criminal penalty or fine.

Alabama

In C.B., v. Bobo,[2] the Supreme Court of Alabama found that the Child Abuse Reporting Act creates a duty owed to the general public, not to specific individuals, and that as such, it does not create a private cause of action.

"Our review of Section 26-14-1 et seq. persuades us that the legislature did not intend to confer a private right of action for any breach of the duty to report imposed by the statute.[3]

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[1] *See* Letlow v. Evans, 857 F. Supp. 676, 678 (W.D. Mo. 1994); Freehauf v. School Bd. Of Seminole Cty, 623 So. 2d 761, 764 (Fla. App. 1993); Borne v. N.W. Allen Cty School Corp., 532 NE2d 1196, 1203 (Ind. App.3 Dist. 1989).

[2] 659 So.2d 98 (Ala. 1995).

[3] The purpose of the statute is contained in 26-14-2:

"In order to protect children whose health and welfare may be adversely affected through abuse and neglect, the legislature hereby provides for the reporting of such cases to the appropriate authorities. It is the intent of the legislature that, as a result of such efforts, and through the cooperation of state, county, local agencies and divisions of government, protective services shall be made available in an effort to prevent further abuses and neglect, to safeguard and enforce the general welfare of such children, and to encourage cooperation among the states in dealing with the problems of child abuse."

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California

Contrary to other jurisdictions is Landeros v. Flood,[4] where the Supreme Court of California held that the mandatory child abuse reporting statute creates a private cause of action under the common law. The case is partially distinguishable because it examined whether the cause of action existed for *intentional* violations rather than a cause of action based on negligence. In addition, the California courts during the 1970s allowed a significant expansion of personal tort liability much broader than that allowed in other states.

Florida

In Fischer v. Metcalf,[5] the Court of Appeals of Florida for the Third District underwent a lengthy analysis before concluding that the Florida reporting statute did not provide a private cause of action for a civil remedy. The court reasoned:

> "[T]here is no indication, either explicit or implicit, to suggest a legislative intent to create a private remedy on behalf of individuals who are abused, neglected, or exploited. …The legislature has had ample opportunity to broaden the penalty for failure to report or to add a companion civil remedy. The unchanged nature of the penalty, in the fact of repeated reenactments and revisions, implies an intention on the part of the legislature *not* to provide a private right of action
>
> "Finally, an implied civil remedy is inconsistent with the underlying purposes of the legislative scheme. …Without question, the legislature intends that such protection be provided through increased supervision and regulation by [the Department of Health and Rehabilitative Services,] rather than through implication of a private right of a private remedy.
>
> "The legislature established that violation of the mandatory reporting provision would constitute a second degree misdemeanor. To find a legislative intent to provide a private right of action against non-reporters, we would have to ignore the well-established rule that a court may not disregard the plain purpose and language of the statutes to bring about what some of its members may conceive to be a more proper result."[6]

More recently, in Mora v. South Broward Hosp.[7], another Florida Court of Appeals also found that no private cause of action existed under the reporting statute:

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[4] 131 Cal. Rptr. 69; 551 P.2d 389 (Cal. 1976).
[5] 543 So.2d 785 (Fla. App.3 Dist. 1989). *See also* Freehauf v. School Bd. of Seminole Cty, 623 So.2d 761 (Fla. App.5 Dist. 1993).
[6] Id., at 790-791.
[7] 710 So.2d 633 (Fla. App.4 Dist. 1998).

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> "We note that in the 1995 amendment to chapter 415 [the child abuse reporting statute], the legislature included a section entitled "Civil Penalties," section 415.1111. This section provides that anyone named as a perpetrator in a confirmed report of abuse shall be subject to civil fines. This section also provides victims with a private cause of action against the perpetrator of abuse. But this section provides no civil penalties against those who merely fail to report an incident. Rather misdemeanor penalties are provided in section 415.111 for violation of the mandatory reporting requirements.
>
> "It is evident that the legislature considered both civil and criminal penalties under this statute, but subjected only actual perpetrators of abuse to civil penalties. This is strong evidence of a legislative intent not to provide a civil cause of action for victims against those who fail to report the abuse as required by this act."[8]

Georgia

In Cechman v. Travis,[9] the Georgia Court of Appeals found that while the reporting statute "establishes the public policy of this state on [the] subject [of reporting suspected child abuse, it does not expressly create] a civil cause of action for damages in favor of the victim or anyone else."

Illinois

In Cuyler v. U.S.,[10] the federal district court, the plaintiff brought a negligence suit for child abuse under the Federal Tort Claims Act (FTCA). In order to maintain the suit, however, Illinois law had to recognize a claim for negligence under its Abused and Neglected Child Reporting Act. Prior to the suit, no Illinois court had expressly addressed whether a private cause of action arose based on a failure to report suspected child abuse. In its motion to dismiss, the United States posited that Illinois courts, given the chance, would not find a private cause of action, but the Court deftly avoided the issue altogether (as plaintiff did not seek relief based on any implied private cause of action) and instead found negligence based on a violation of an Illinois public safety statute.

Indiana

In Borne v. N.W. Allen Cty School Corp.,[11] an Indiana Court of Appeals also found that the Indiana reporting statute did not support a private cause of action. The court noted a lack of legislative intent to support a civil action and was concerned due to difficult questions raised concerning causation:

> "When the provisions of the act are considered as a whole, there is no apparent intent to authorize a civil action for failure of an individual to make the oral report that may be the means of initiating the central procedures contemplated by the act. Furthermore, such an action is not authorized at common

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[8] Id.
[9] 202 Ga. App. 255; 414 S.E.2d 282 (1991).
[10] 37 F. Supp. 2d 1099 (N.D. Ill. 1999).
[11] 532 N.E.2d 1196 (Ind. App.3 Dist. 1989).

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> law and its maintenance would raise substantial questions of causation since the failure would not in the direct sense be a proximate cause of the injury to the child. It would, we believe, misdirect judicial time and attention from the very real problems of children in need of services in favor of pursuing collateral individuals, who are presumably capable of responding with money damages, on the ground that they knowingly failed to make an oral report. We conclude that was not within the legislative purpose[12] of the act."[13]

Kansas

The Supreme Court of Kansas has also ruled that no private cause of action exists for violation of its child abuse reporting statute:

> "The purpose[14] of the reporting statute is to provide for the protection of children who have been abused by encouraging the reporting of suspected child abuse and by insuring the thorough and prompt investigation of such reports. There is no express indication of legislative intent to impose any liability for failure to report. The decision to report suspected abuse should be based on something more than suspicion.
>
> …"If the legislature had intended to grant a private right of action in K.S.A. 38-1522 it would have specifically done so. The statute was revised in 1983, 1985, 1986, 1987, and 1988. The legislature has not utilized the amendment opportunities to add a private cause of action. No private cause of action exists under K.S.A. 1990 Supp. 38-1522."[15]

However, in Doran v. Priddy,[16] the federal district court indicated that it might be willing to follow California's Landeros analysis had the issue been raised.

Minnesota

The Minnesota Court of Appeals refused to impose a civil remedy in Valtakis v. Putnam,[17] where the legislature had failed to provide a civil remedy for violation of a

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[12] The purpose section of the Indiana statute is similar to that of the Oregon statute (ORS 419B.005 et seq.):

> "It is the purpose of this chapter to encourage effective reporting of suspected or known incidents of child abuse or neglect, to provide in each county an effective child protection service to quickly investigate reports of child abuse or neglect, to provide protection for such a child from further abuse or neglect and to provide rehabilitative services for such a child and his parent, guardian or custodian."

[13] 532 N.E.2d 1196, 1203.

[14] The purpose of the Kansas statute, K.S.A. 38-1522, is stated as follows:

> "It is the policy of this state to provide for the protection of children who have been subject to physical, mental or emotional abuse or neglect or sexual abuse by encouraging the reporting of suspected child abuse and neglect, insuring the thorough and prompt investigation of such reports and providing preventive and rehabilitative services when appropriate to abused or neglected children and their families so that, if possible, the families can remain together without further threat to the children."

[15] Kansas State Bank v. Specialized Transp. Svcs, Inc., 819 P.2d 587, 604 (Kan. 1991); 249 Kan. 348, 373.

[16] 534 F. Supp. 30, 33 (D. Kan. 1981).

[17] 504 N.W.2d 264 (Minn. App. 1993).

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statute requiring reports of suspected child abuse and had provided a criminal remedy for violations. Failure to report is a misdemeanor offense. The court relied on Larson v. Dunn,[18] where the Supreme Court of Minnesota ruled that a statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by a clear implication.

In a later case before the same court,[19] the Court of Appeals relied on Valtakis in refusing to find a negligence cause of action for failure to report possible child abuse and also looked to legislative intent to back its finding.

> "Although CARA (the Child Abuse Reporting Act) imposes a duty on certain individuals to report abuse, the plain and clear language of the statute does not create civil liability for the failure to do so. CARA makes the failure to report a misdemeanor offense and also creates civil liability for making false reports, but contains no language to suggest that the legislature intended to create civil liability for the negligent transmission of information received about possible abuse. We may not disregard the clear meaning of the statute in order to uncover the "spirit" of the law. Given the specificity of this statute, if the legislature had also intended to create a civil cause of action, it would have so stated. Principles of judicial restraint forbid us from creating a new cause of action where the legislature has not explicitly or implicitly expressed the desire that such liability exists."[20]

Missouri

In Doe "A" v. Special School Dist. of St. Louis Cty,[21] a federal district court found no private cause of action existed because the purpose of the Missouri reporting statute was to benefit the general public, not individual plaintiffs. Previously, another Missouri federal district court came to the same finding of no private cause of action because the statute involved "created only a duty to the public and not to individuals, and therefore cannot be said to support a cause of action in favor of individuals."[22] The federal district court for the Western District seemed to think Letlow v. Evans[23] a compelling case to find a private cause of action implied in the reporting statute as viewed in light of the statute's purpose to "encourage the reporting of suspected cases of child abuse." However, as Missouri state courts had yet to expressly address the matter at issue, and "unless clearly established by the state legislature, it is inappropriate for a court, particularly a federal court, to create a large and new field of state tort liability beyond what existed at common law."[24]

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[18] 460 N.W.2d 39 (Minn. 1990).
[19] S.L.D. v. Kranz, 1996 Minn. App. LEXIS 368. Interestingly enough, Oregon's own Benton County appeared as appellants and third-party plaintiff in the action.
[20] Id. at 7.
[21] 637 F. Supp. 1138, 1148 (E.D. Mo. 1986).
[22] Nelson v. Freeman, 537 F. Supp. 602, 607-610 (W.D.Mo. 1982).
[23] 857 F. Supp. 676 (W.D.Mo. 1994).
[24] Id.

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The Court of Appeals of Minnesota finally addressed the issue a few years later in Bradley v. Ray.[25] As a case of first impression, the Court looked to the stated purpose of the Child Abuse Reporting Act,[26] the federal court cases applying Missouri law, and Missouri Supreme Court decisions addressing the issue of whether a private cause of action might be found where the legislature had remained silent on the issue.[27] The court refused to find a private cause of action for failure to report "because the Act makes individuals who do not report abuse subject to criminal penalties but does not provide a civil remedy" and because there was no evidence of a clear legislative intention to provide for civil remedies.[28]

New Hampshire

In Marquay v. Eno,[29] the Supreme Court of New Hampshire held there was no private right of action for violation of the New Hampshire child abuse reporting statute. The Court first noted the difference between:

(1) cases in which liability would be imposed based on violation of a statutory duty *where there is also an underlying common law cause of action* (in which case the statutory duty might modify the common law cause of action), versus
(2) cases in which liability would be based on violation of a statute *when there is no underlying common law cause of action* (as with child abuse reporting statutes).

In the latter case, civil liability will only be implied if it appears there was *explicit* or *implicit* legislative intent that liability would follow from a statutory violation (*citing* the Oregon case of Bob Godfrey Pontiac, Inc. v. Roloff).[30]

In Marquay, the Court found there was no private right of action, stating:

> "We hold that the reporting statute does not support a private right of action for its violation because we find no express or implied legislative intent to create such liability. First, we note that where the legislature has intended that civil liability flow from the violation of a statute, it has often so provided. Where, as here, civil liability for a statutory violation would represent an abrupt and sweeping departure from a general common law rule of nonliability, we would expect that if the legislature, which is presumed to recognize the common law, intended to impose civil liability it would expressly so provide. Here there was no expressed intent. Nor can we divine any implied intent. The reporting statute was originally enacted in 1965, applying only to physicians. It was amended in 1971 to extend the reporting requirement to all persons and to provide a $200 fine for its violation. In 1973, the penalty section was amended to provide that a violation

[25] 904 S.W.2d 302 (Mo. App. 1995).
[26] The purpose of the Missouri statute's child protection system as stated in 210.109(2) is:
" …to promote the safety of children and the integrity and preservation of their families by conducting investigations or family assessments in response to reports of child abuse or neglect."
[27] *See* Johnson v. Kraft Gen. Foods, 885 S.W.2d 334 (Mo. 1994) *en banc*; Missouri v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. App. 1984).
[28] *Supra* note 25.
[29] 662 A.2d 272 (N.H. 1995).
[30] 291 Or. 318 (1981).

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> would constitute a misdemeanor. Despite specific amendment of the penalty section, nothing in the legislative history suggests that civil liability was contemplated, let alone intended. In sum, considering that imposition of civil liability for all reporting violations would represent a sharp break from the common law and neither the statute nor the legislative history directly reveal any such intent, we are unwilling to say that violation of the child abuse reporting statute supports a private right of action."[31]

New York

In Mark G. v. Sabol,[32] the Court of Appeals of New York, in determining whether a private right of action for money damages exists for violation of a New York State statute, follows a three-part test: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) and whether creation of such a right would be consistent with the legislative scheme."[33] Looking to the relevant statute, Title 4 of Article 6 of the Social Services Law (the Child Welfare Reform Act of 1979), the Court determined that the plaintiffs were members of the class for whom Title 4 was enacted and that a private right of action for money damages could arguably promote the statute's goals. However, the Court placed the most emphasis on the third prong of the analysis, finding that recognition of a private right of action would not be consistent with the legislative scheme.

> "The legislative approach centered on improved monitoring and on penalizing local social services districts with a loss of state reimbursement of funds for their failure to provides services or meet the standards mandated by the statute. The Legislature specifically considered and expressly provided for enforcement mechanisms. …The statute's goals are advanced by legislative action in providing and allocating appropriate funding. If the statute were opened to private causes of action for money damages the funding scheme would be affected, perhaps significantly. Allocations of money and government resources would be rechanneled, no longer to be based on administrative judgments, but driven, at least in part, by tort law principles. …Considering that the statute gives no hint of any private enforcement remedy for money damages, we will not impute one to the lawmakers."[34]

Tennessee

In Ham v. Hosp. of Morristown,[35] a federal district court, in addressing whether T.C.A. 37-1-403 created a private cause of action (mandatory child abuse reporting statute), looked to Tennessee case law. While no Tennessee Supreme Court case had yet been on point, the federal court looked to a state court of appeals case, Doe v. Coffee Cty.

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[31] 662 A.2d at 278.
[32] 93 N.Y.2d 710; 717 N.E.2d 1067 (N.Y. 1999).
[33] This test was established in Sheehy v. Big Flats Community Day, 73 N.Y.2d 629, 633, 541 N.E.2d 18.
[34] *Supra* note 32.
[35] 917 F. Supp. 531 (E.D. Tenn. 1995).

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Bd. of Educ.,[36] for its analysis of the failure to report a claim of abuse. Interestingly, the federal court appeared determined in its resolve to find a private cause of action for failure to report, making it the only court outside of California to find such liability.

> "In sum, while the court acknowledges that the defendants have raised many forceful arguments in support of their position that the reporting statute does not create a private cause of action, the court concludes that these arguments do not circumvent the clear import of the Coffee County case: the reporting statute creates a legal obligation to report suspected brutality, neglect, or physical or sexual abuse of children and the failure to report 'can therefore give rise to liability…'"[37]

Virginia

In Ominski v. Tran,[38] a federal district court of Virginia refused to find that state child abuse reporting statute created a private cause of action. The court also held that Federal Tort Claims Act liability did not attach by virtue of the statutory duty to report. (Whether a state employee's breach of a state law to act gives rise to FTCA liability is a question of federal law, not state law.)

PRIVATE CAUSE OF ACTION—THIRD PARTY LIABILITY ARISING FROM STATUTORY DUTY OTHER THAN CHILD ABUSING REPORTING

Negligence is a common law tort generally defined as conduct that "falls below the standard established by law for the protection of others against unreasonable risk of harm."[39] An element of negligence is a duty or standard of care owed by the actor to the victim. Statutory enactment is one of the means by which such duty or standard of care may be created. A statutory duty or standard may thus establish an essential element for a negligence action. However, it does not provide the cause of action. The cause of action itself is a creation of the common law inherent in the tort of negligence. The duty or standard of care, statutory or otherwise, is merely an element of proof that comes into play after an action has been rightfully commenced pursuant to the preexisting common law cause of action.

Colorado

In Parfrey v. Allstate Ins. Co.,[40] after an automobile accident involving an underinsured motorist, the plaintiffs filed an action against their insurer, claiming defendant was negligent in failing to offer them higher uninsured/underinsured (UM/UIM) coverage as required by Colo. Rev. Stat. 10-4-609(1)[41] and (2). The trial court granted summary judgment to the defendant on the grounds that it fulfilled its duty by

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[36] 852 S.W.2d 899 (Tenn. Ct. App. 1992).
[37] Id.
[38] 1997 U.S. Dist. LEXIS 13177.
[39] Restatement (Second) of Torts § 282 (1965).
[40] 815 P.2d 959 (Colo. Ct. App. 1991).
[41] Under this section, an insurer must offer uninsured motor vehicle coverage. The minimum amount of uninsured coverage will be automatically extended to the insured unless this offer is rejected in writing.

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offering this coverage to plaintiffs when they originally purchased their policy. On appeal, the Court of Appeals of Colorado found the statute gave plaintiffs a private right of action and that the statute imposed a duty upon insurers to offer optional UM/UIM coverage in definite and specific terms to allow the insured to make an intelligent decision regarding this coverage.

In determining whether a private cause of action is impliedly authorized in a statute which does not expressly create such a remedy, the Court looks to three factors: "(1) Whether the plaintiff is within the class of persons for whose benefit the statute was enacted; (2) whether the legislature intended to create, either explicitly or implicitly, a private cause of action; and (3) whether an implied private cause of action would be consistent with the purpose of the legislative scheme."[42] The Court found plaintiffs to be persons within the class the statute was designed to protect. The Court also noted that the statute did not provide any remedies in the event the duties imposed by the statute were breached. Finally, the Court determined that implying a private cause of action under the statute would be consistent with the legislative intent and purpose underlying C.R.S. 10-4-609.

In Gerrity Oil & Gas Corp. v. Magness,[43] the Supreme Court of Colorado considered whether 14 C.R.S. §34-60-114 of the Oil and Gas Conservation Act provided surface owners with a private right of action for an oil and gas operator's violation of statutes or commission rules governing the operator's use of the surface. The Court looked to the test created by Parfrey, but found no legislative intent to create a private cause of action.

> "…we will not infer a private right of action based on a statutory violation unless we discern a clear legislative intent to create such a cause of action.[44] …When the legislature decides to provide a for administrative remedies to enforce a statute's provisions, this decision is consistent with a legislative intent to preclude a private civil remedy for breach of the statutory duty. …Section 34-60-114 is not totally silent on the matter of remedy. …This language clearly permits a private party to seek injunctive relief… [this] demonstrates that the legislature considered whether to allow private causes of action in the Act, and chose to allow them only in the form of injunctive relief and only when the commission has received written notice of the violation and a request that it bring suit. …When statutory language indicates that the legislature considered the issue of remedies for violations of the statute or regulations issued thereunder, and chose not to include a private remedy in damages, we will not infer such a remedy."[45]

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[42] 815 P.2d 959 *citing* Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n, 620 P.2d 1051 (Colo. 1981); Minnick v. City & Cty of Denver, 784 P.2d 810 (Colo. App. 1989).
[43] 946 P.2d 913 (Colo. 1997).
[44] Id. *citing* Quintano v. Industrial Comm'n, 178 Colo. 131, 135-136; 495 P.2d 1137, 1139 (Colo. 1972).
[45] Id.

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Connecticut

In Swaney v. Pfizer, Inc.,[46] a Superior Court of Connecticut addressed the issue of whether plaintiff could maintain a private cause of action for sexual harassment, wrongful discharge, and negligence against her employer for an alleged violation of Conn. Gen. Stat. 31-49 (regarding safe workplace).[47] The court refused to find a private cause of action.

Illinois

In Rodgers v. Hospital of Decatur,[48] the Supreme Court of Illinois addressed whether the X-Ray Retention Act granted the plaintiff a private cause of action by implication. Under Illinois case law, implication by a statute of a private right of action is appropriate when: "(1) plaintiff is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff's injury is one the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act."[49] After applying this test, the Court determined that the plaintiff did indeed have a private cause of action.

> "The [defendant] argues that the statute is merely an administrative regulation to be enforced exclusively by the Department of Public Health. We disagree. As in Corgan, nothing in the statute suggests that the legislature intended to limit the available remedies to administrative ones. Indeed, the statute enumerates no specific administrative remedies and administrative remedies would not provide an adequate remedy to those injured by violations of the Act. Additionally, the threat of liability is a much more efficient method of enforcing the regulation than requiring the Public Health Department to hire inspectors to monitor the compliance of hospitals with the provisions of the Act. Thus, it is reasonable to believe that the legislature intended that those persons protected by the Act have a right to bring a private action against the offending hospital for damages caused by a breach of the statute. We therefore conclude that a private cause of action is necessary to provide an adequate remedy for violations of the Act, and that it is consistent with the underlying purpose of the Act."[50]

Iowa

In Seeman v. Liberty Mutual Insur. Co.,[51] the Supreme Court of Iowa addressed the question of whether section 507B.4(9)(f) of the Iowa Code creates a cause of action for damages in the individual entitled to the insurance proceeds when the insurance

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[46] 1999 Conn. Super. LEXIS 757.
[47] The statute provides: "It shall be the duty of the master to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work and fit and competent persons as his colaborers and to exercise reasonable care in the appointment or designation of a vice-principal and to appoint as such vice-principal a fit and competent person. The default of a vice-principal in the performance of any duty imposed by law on the master shall be the default of the master."
[48] 149 Ill. 2d 302; 597 N.E.2d 616 (Ill. 1992).
[49] Id. *citing* Corgan v. Muehling, 143 Ill. 2d 296, 312-313; 574 N.E.2d 602 (Ill. 1991).
[50] Id.
[51] 322 N.W.2d 35 (Iowa 1982).

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carrier has violated that section. Chapter 507B did not specify whether an individual cause of action is authorized for the violation of the statute. The Court's threshold inquiry was the appropriate test for determining when a cause of action may and should be judicially implied from a statute that does not expressly provide for private suits. The Court applied the test formulated by the United States Supreme Court in Cort v. Ash.[52]

> "We believe the basic analytical approach of the Supreme Court is correct. As in all matters of statutory construction, the question whether a private cause of action exists under a statute that does not expressly provide for one is a matter of legislative intent. The Supreme Court decisions addressing the issue after Cort indicate that when legislative intent is otherwise clear, it is not necessary to resort to the four-factor test.[53] …We also believe that when legislative intent is not otherwise clear the Cort test should be utilized to determine that intent."[54]

Because the fourth factor of the test as applied by the Iowa Supreme Court concerns federal jurisdiction, the court altered its inquiry to: Will the implication of a private cause of action intrude into an area over which the federal government has exclusive jurisdiction or which has been delegated exclusively to a state administrative agency? The Court applied a modified Cort test. The Court would have found a private cause of action to be consistent with the underlying purposes of the Act, but concluded instead that the legislature intended administrative sanctions to be the exclusive enforcement mechanism for the statute. To judicially imply a cause of action would have overridden the legislative intent. The statute did not provide a private cause of action.

Several years later in Marcus v. Young,[55] the Iowa Supreme Court again visited the private cause of action arising from breach of a statutory duty issue. A state university medical student attempted to bring a negligence suit for damages under the Confidential Records section of Iowa Code 22.7. After applying the test used in Seeman, the Court refused to find an explicit or implicit private cause of action because the plaintiff failed to show that the legislature intended to create an implied cause of action or that such a remedy would be consistent with the underlying purposes of the statute.

Kansas

The Supreme Court of Kansas, in Greenlee v. Board of Cty Comm'rs of Clay Cty,[56] considered whether the plaintiff, as a former county employee, had a personal cause of action in tort against the defendant board of county commissioners because the commissioners violated the cash-basis law (K.S.A. 10-1101) and the budget law (K.S.A. 79-2935) and, as a result, plaintiff was terminated as a county employee. The issue presented required the Court to consider the question of when a personal right of action arises as a result of a breach of a statutory duty.

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[52] 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975). The four factors of this test have been elaborated in previously mentioned state cases and have been widely accepted by many state courts.
[53] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed. 2d 82 (1979)—legislative intent ascertained without resort to the Cort test.
[54] 322 N.W.2d 35 (Iowa 1982).
[55] 538 N.W.2d 285 (Iowa 1995).
[56] 241 Kan. 802; 740 P.2d 606 (Kan. 1987).

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> "The legislative intent to grant or withhold a private cause of action for a violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute. The nature of the evil sought to be remedied and the purpose the statute was intended to accomplish may also be taken into consideration. The generally recognized rule is that a statute which does not purport to establish a civil liability but merely makes provision to secure the safety or welfare of the public as an entity is not subject to construction establishing a civil liability."[57]

Previous Kansas decisions, as well as federal courts, have followed the Cort analysis or one similar to it. After reading the relevant statutes, the Court deduced that the intent of the legislature was not to provide county employees job security but rather was to protect the public from the consequences of financial overspending and deficits. In addition, the legislature had specifically provided remedies for violations of the statutes and its failure to provide a private cause of action was found intentional. The Court refused to find a private cause of action in plaintiff as that would be inconsistent with the underlying purpose of the laws.

In St. Mary of the Plains College v. Higher Educ. Loan Prog. of Kansas, Inc.,[58] the federal district court of Kansas examined whether the plaintiff had a private cause of action under the federally guaranteed Stafford Student Loan Program.[59]

> "Merely because a federal statute has been violated and some person or entity harmed does not necessarily mean a private cause of action exists in favor of those harmed.[60] The focal point in determining whether to infer a private cause of action from a federal statute is Congress' intent at the time of enacting the statute.[61] Congress' intent is discerned with the aid of statutory construction and the four factor identified in Cort."[62]

After applying the Cort test, the Court found no private cause of action existed.

Michigan

The Court of Appeals of Michigan, in General Aviation, Inc. v. Capital Region Airport Auth'y,[63] concluded that there existed no private cause of action for violation or enforcement of the Michigan Aeronautics Code.

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[57] Id.
[58] 724 F. Supp. 803 (D. Kan. 1989).
[59] 20 U.S.C. § 1071.
[60] *Supra* note 58, *citing* Cannon v. Univ. of Chicago, 441 U.S. 677, 688; 99 S.Ct. 1946; 60 L.Ed. 2d 560 (1979).
[61] Id., *citing* Thompson v. Thompson, 484 U.S. 174; 108 S.Ct. 513; 98 L.Ed 2d 512 (1988).
[62] Id.
[63] 224 Mich. App. 710; 569 N.W.2d 883 (1997).

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Minnesota

In Flour Exchange Bldg. Corp. v. Minnesota,[64] the Court of Appeals of Minnesota determined that a landlord may not sue the state pursuant to Minn. Stat. § 16B.24(6)(c), as the statute does not create a private cause of action. The Court applied the Cort test.

New Jersey

The Supreme Court of New Jersey, in In re State Comm'n of Investigation,[65] addressed the issue of whether the plaintiffs, subjects of an investigation by the SCI, could sue for an injunction to enforce the confidentiality obligations imposed on the Commission by N.J.S.A. 52:9M-15(a). The Court concluded, after applying the Cort factors, that equitable relief would be inappropriate as the statute did not provide a private cause of action.

New York

In Earsing v. Nelson,[66] the Supreme Court of New York, Appellate Division, the Court found that a private cause of action could be fairly implied from Penal Law § 265.10 (5), which prohibits the sale of air guns to children under 16, and General Business Law § 399-s, which requires the posting of a sign to that effect in stores where air guns are sold. In ascertaining whether a private action may be applied, the Court said the essential factors were: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme."[67] However, the Court dismissed the action for other reasons.

North Carolina

In Lovelace v. City of Shelby,[68] the Court of Appeals of North Carolina determined that the Public Safety Telephone Act, N.C.G.S. § 62A-2, contains no provision for a private cause of action and that any violation by a slow 911 response does not create an exception to the public duty doctrine for purposes of governmental immunity to a negligence action.

Ohio

In Nichols v. St. Luke Center of Hyde Park,[69] an Ohio federal district court found that the Medicaid Act[70] does not confer a private right of action whereby individual Medicaid recipients can proceed against a private nursing care facility for failure to provide mandated services or for improper discharge. The Court looked to legislative history to support its finding.

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[64] 524 N.W.2d 496 (Minn. App. 1994).
[65] 108 N.J. 35; 527 A.2d 851 (1987).
[66] 212 A.D.2d 66; 629 N.Y.S.2d 563 (N.Y. App. Div. 1995).
[67] Id.
[68] 133 N.C. App. 408; 515 S.E.2d 722 (1999).
[69] 800 F. Supp. 1564 (S.D. Ohio, 1992).
[70] 42 U.S.C. § 1396r(b)(4)(A)(i)(vii).

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Oregon

In Bob Godfrey Pontiac, Inc. v. Roloff,[71] the Supreme Court of Oregon considered the question of whether violation by an attorney of an ethical duty imposed by statute or by a Code of Professional Responsibility gives rise to a new and private cause of action for damages independent of the common law. In its analysis, the Court looked to several Oregon cases:

> Miller v. City of Portland[72]—created an initial distinction between (1) cases in which liability would be based upon violation of a statutory duty when there is also an underlying common law cause of action, and (2) cases in which liability would be based upon violation of a statute when there is no underlying common law cause of action. In the latter case, when the court is called upon to "create" or "recognize" a new tort, it must be determined whether the plaintiff is a member of the class protected by the statute and whether the harm inflicted is the type intended to be protected against. The court must also determine whether there exists any explicit or implicit legislative intent that a violation of the statute should give rise to a tort cause of action. If no intent is evident from the statute then the court must attempt to ascertain how the legislature would have dealt with the problem had it been considered. This is done by "looking at the policy giving birth to the statute and determining whether a civil tort action is needed to carry out that policy."[73] In Miller, the court declined to "create" a new and private cause of action for damages for violation of the statute.
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> Burnette v. Wahl[74]—added the Miller analysis the question of whether a new tort action was "necessary and desirable to further vindicate the right [of the aggrieved party] or to further enforce the duty created by statute."[75] In order to avoid invasion into the legislature's realm of responsibility in establishing appropriate remedies for breach of a statutory duty, the court declined to create or recognize a new private cause of action.
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> Farris v. United States Fidelity & Guaranty Co.[76]—the Court held that violation of Insurance Code provisions prohibiting certain conduct did not give rise to a tort action. Other code provisions provided for civil penalties payable to the state for code violations and this indicated that the legislature did not intend a private cause of action.

In deciding Bob Godfrey Pontiac, the Court applied both the Miller and Burnette tests. The court declined to create or recognize a new private cause of action for conduct by attorneys who violate duties imposed by ORS 9.460(4) for the recovery of damage to reputation or attorney fees resulting from or incurred in the defense of a civil action. The

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[71] 291 Or. 318, 630 P.2d 840 (1981).
[72] 288 Or. 271, 604 P.2d 1261 (1980).
[73] Id.
[74] 284 Or. 705, 588 P.2d 1105 (1978).
[75] Id.
[76] 284 Or. 453, 587 P.2d 1015 (1978).

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court specifically did not hold that an attorney who intentionally violates duties imposed by the statute has no liability for damages, but rather that such an attorney has no liability as contended by the plaintiff in the specific case. The court failed to reach the question whether there can be recovery for other damages suffered by a litigant as the result of an attorney's deliberate misconduct.

In a later case, the Oregon Supreme Court, in Scovill v. City of Astoria,[77] looked at the issue of whether a statutory tort arises from failure to follow the commands of ORS 426.460 (statute which requires peace officers to take person in custody whose intoxication threatens his or her health to an appropriate treatment facility). In looking at the statute, the Court determined that the statute does not address failure to carry out the statutory duty imposed. The Court looked to Bob Godfrey Pontiac and its application of prior Oregon decisions to the matter and found that recognition of a statutory tort is governed by the weight that a court finds reasonable to give to the protective purpose spelled out in the legislation. In the immediate case, the Court found that permitting a tort action was consistent with and served to enforce the legislated duty imposed by ORS 426.460(1), which did not specify other means for its enforcement. The Court found that a private cause of action did indeed arise from failure to carry out the statutory duty.

Pennsylvania

In Witthoeft v. Kiskaddon,[78] the issue before the Supreme Court of Pennsylvania was whether a physician may be held liable for injuries suffered by a third party in an automobile accident caused by the physician's patient. More specifically, would an ophthalmologist be held liable to a third party where the doctor failed to inform his patient or the Pennsylvania Department of Transportation (PennDOT) of the patient's poor visual acuity, and subsequently, the patient injured the third party while driving her automobile? The statute at issue required physicians and others to report to the PennDOT information on persons diagnosed as having a disorder or disability that PennDOT's Medical Advisory Board had determined affects their ability to drive. Such a report triggers investigation and possible further action to suspend the subject driver's license. In addressing the issue, the Court adopted the Cort analytical framework. The Court did not find a private cause of action based on the reporting requirements under the Motor Vehicle Code because the state General Assembly had not so expressly provided and because there was no statutory basis to imply a cause of action.

South Carolina

In Whitworth v. Fast Fare Markets of S.C., Inc.,[79] the Supreme Court of South Carolina addressed the issue of whether S.C. Code Ann. §§ 16-17-490 and 16-17-500 (making it a criminal offense to knowingly and willfully encourage the delinquency of a minor and to sell cigarettes to minors under the age of 18) created an implied private cause of action. The Court found that the statutory prohibition against contributing to the delinquency of a minor and supplying minors with cigarettes is primarily for the protection of the public and not for the protection of private rights.

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[77] 324 Or. 159, 921 P.2d 1312 (1996).
[78] 557 Pa. 340, 733 A.2d 623 (1999).
[79] 289 S.C. 418, 338 S.E.2d 155 (1985).

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> "A primary consideration in deciding whether a private cause of action should be implied under this type of statute is the legislature's intent.
>
> 'The legislative intent to grant or withhold a private right of action for the violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute…In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.'"[80]

Tennessee

In Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.,[81] the Supreme Court of Tennessee refused to find that the state bar's Code of Professional Responsibility created a private cause of action for damages. Following the path of similar states' decisions, including Oregon's, the Court found that:

> "It is clear that the purpose of the Code is to state when a lawyer will be subject to disciplinary action and not to define standards whereby he may be held civilly liable for damages. Conduct that violates the Code may not breach a duty to the client and therefore will not constitute actionable malpractice."[82]

Texas

The Court of Appeals of Texas, in Walton-Floyd v. United States Olympic Comm'ee,[83] looked at whether the Amateur Sports Act of 1978[84] created an implied right of action for damages for the USOC's failure to comply with the duties imposed upon it by Congress. The Court looked to federal case law. Federal courts that have interpreted the Act and its legislative history have held no private cause of action exists against the Committee.[85]

In analyzing the legislative history of the Act, these courts have looked to four factors in determining that Congress did not intend to imply a private cause of action: (1) There is a strong preference that athletes resolve their disputes through the internal mechanisms provided by the USOC rather than the judicial system; (2) there are express provisions for causes of actions for certain violations set out within the Act; (3) the right to a private cause of action against the USOC is set out in the USOC Constitution, which is not part of the Act and is not what Congress approved; and (4) the original Act was designed to settle disputes between organizations seeking recognition as NGB's for a particular sport and shield amateur athletes from suffering harm because of these internal

[80] Id. *citing* 73 Am. Jur. (2d), *Statutes* § 432 (1974).
[81] 813 S.W.2d 400 (Tenn. 1991).
[82] Id.
[83] 965 S.W.2d 35 (Tex. App. 1998).
[84] 36 U.S.C. §§371-396 (1988).
[85] Oldfield v. The Athletic Congress, 779 F.2d 505 (9th Cir. 1985); Michels v. United States Olympic Comm'ee, 741 F.2d 155 (7th Cir. 1984); DeFrantz v. United States Olympic Comm'ee, 492 F. Supp. 1181 (D.D.C. 1980); Martinez v. United States Olympic Comm'ee, 802 F.2d 1275 (10th Cir. 1986).

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conflicts—when it was rechartered in 1978, the Act outlined internal grievance procedures for athletes.

> "The legislative history of the Act indicates that Congress did not intend to provide individual athletes a private cause of action. If Congress had, then it would not have removed the bill of rights from the original version of the Act. Moreover, if Congress desired to differentiate between claims and injunctions, then it could have so provided in the Act."[86]

West Virginia

In Anderson v. Moulder,[87] the Supreme Court of Appeals of West Virginia found that the sale of beer to a person under 21 years of age in violation of W.Va. Code 11-16-18(a)(3), gives rise to a cause of action against the licensee in favor of a purchaser or a third party injured as a proximate result of the unlawful sale.

Another section of the Code, 55-7-9 (1923), expressly authorizes civil liability based on violation of statute: "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

A prior case, Bailey v. Black,[88] the same Court found that "W.Va. Code, 55-7-9 [1923], recognizing a cause of action in tort for the violation of statute, and W.Va. Code, 60-7-12 [1986], making it illegal for a licensee to sell alcohol to intoxicated persons, read together, create a tort action against a licensee for personal injuries caused by the licensee's selling alcohol to anyone who is 'physically incapacitated' from drinking."[89]

Wyoming

In Herrig v. Farmers Insurance Exch.,[90] the plaintiffs, a family injured in a car accident, tried to assert a private action under Wyo. Stat. Ann. §§ 26-13-124 and 26-15-124, against their insurance company for its failure to respond to their settlement demand. The Supreme Court of Wyoming determined that the legislature did not intend to create a private right of action under the statutes.

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[86] 965 S.W.2d 35 (Tex. App. 1998).
[87] 183 W.Va. 77, 394 S.E.2d 61 (1990).
[88] 183 W.Va. 74, 394 S.E.2d 58 (1990).
[89] Id.
[90] 844 P.2d 487 (Wyo. 1992).