ALAN WILSON
ATTORNEY GENERAL

May 19, 2016

The Honorable Jeffrey A. Bradley, Member
South Carolina House of Representatives
P.O. Box 142
Columbia, SC 29211

Dear Representative Bradley:

You have asked our opinion regarding Senate Bill 229. You note you have "received several emails from constituents regarding this bill" and you enclose several emails. You further state:

> [i]n particular, I would like your office to provide me with some understanding of the idea introduced in SECTION 1 of the bill that says "that no private right of action exists" under the Pollution Control Act. What are the ramifications of this bill as it regards individual state residents right to seek redress of offending polluters? What are the ramifications of this bill as it regards individual state residents right to sue offending polluters in the absence of appropriate state management of pollution? What action is available to individual citizens in the absence of effective management of offending polluters? What constitutes an inadequate response on the part of the state agency responsible for managing polluters and stopping offenders from discharging harmful effluent.

Law/Analysis

Our Supreme Court has made it clear on numerous occasions that the issue of whether a statute confers a "private right of action" upon citizens is a matter for the General Assembly. The Court noted in Georgetown County League of Women Voters v. Smith Land Co., 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) the following:

> "In determining whether a statute creates a private cause of action, the main factor is legislative intent[.]" Doe v. Marion, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007). Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute.

(emphasis added).

The Court has also addressed on several occasions whether a private right of action is "implied" from the particular legislation. See Pippin v. Burkhalter, 276 S.C. 438, 279 S.E.2d 603 (1981); DEMA, et al. v. Tenet Physician Services-Hilton Head, 383 S.C. 115, 678 S.E.2d 430 (2009); Linder v. Insurance Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002). In Linder, the Court held that while "there are statutes which prevent the unauthorized practice of law, and while they state such activity will be a crime, they do not sanction a private cause of action." 348 S.C. at 496, 560 S.E.2d at 623. And, in DEMA, the Court stated:

> [w]here not expressly provided, a private right of action may be created by implication if the legislative was enacted for the special benefit of the private party. Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992). If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the benefit of a private party. Adkins v. South Carolina Dept. of Corr., 360 S.C. 413, 419, 602 S.E.2d 51, 54 (2004).
>
> We hold that no private right of action may be implied from the CON Act. The purpose of the Act is:
>
> > to promote cost containment, prevent unnecessary duplication of health care facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State.
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> S.C. Code Ann. § 44-7-120 (Supp. 2008). In our view, this expressly-stated purpose clearly indicates than in enacting the CON Act, the Legislature intended to advance the quality of healthcare provided in this State for all people receiving the care, not for a particular individual. The fact that the Act considers violations a misdemeanor and imposes fines as well as license denial, revocation, or suspension further supports the conclusion that the CON Act does not create a private cause of action by implication. See Adkins, 360 S.C. at 419, 602 S.E.2d at 51 (acknowledging that a violation of the Prevailing Wage Statute is considered a misdemeanor and thus finding that nothing in the statute indicated a legislative intent to create civil liability for a violation). In other words, the enforcement mechanism of the CON Act is DHEC's authority to impose sanctions and not civil liability. 383 S.C. at 121, 678 S.E.2d at 433.

Where the Legislature expressly states that no private right of action exists pursuant to a particular statute, courts uniformly heed such express provision. For example, as the Court stated in Williams v. State Farm Mut. Auto Ins. Co., 2010 WL 2573196 (E.D. Ark. 2010):

> . . . the Arkansas General Assembly has expressly stated that the Trade Practices Act in the insurance code does not create a private right of action. Ark. Code Ann. § 23-66-202(b). To hold that insurance carriers are subject to private causes of action brought pursuant to the ADTPA would be contrary to the statutory scheme established by the Arkansas General Assembly.

As you note, S. 229 provides in SECTION 1 as follows:

> [i]t is the intent of the General Assembly that no private right of action exists under the Pollution Control Act, as contained in Chapter 1, Title 48. Except as set forth in Section 48-1-90(A)(4), no claim or cause of action alleging a violation of the act may be filed in a court or administrative tribunal by any person other than the department or an agency, commission, department, or political subdivision of the State on or after June 6, 2012.

Apparently, the purpose of SECTION 1 of S. 229 is to reverse the Supreme Court's ruling in Georgetown League of Voters, supra. There, the Court found that a private cause of action is created by § 48-1-250 of the Pollution Control Act. Justices Hearn and Kittredge dissented. According to the dissent,

> . . . the majority's misplaced reliance on Section 48-1-250 improperly accords controlling weight to a general statute where there is a narrow, more specific statute that permits only State entities to pursue the very remedy sought by the League in this case.

393 S.C. at 356, 713 S.E.2d at 290. The dissent also recognized that "scholarly interpretations of the Act" had concluded that no implied private right of action exists under the Pollution Control Act. 393 S.C. at 357, 713 S.E.2d at 291.

Conclusion

The determination of whether a particular statute forecloses a private right of action is a matter for the General Assembly. While our courts may be called upon to determine whether a private right of action is implied, our Supreme Court has concluded that legislative intent controls. In this instance, SECTION 1 of S. 229 expressly states that no private right of action exists under the Pollution Control Act. That is a matter for the Legislature to determine and this Office possesses no role in that decision.

Of course, the absence of a private right of action does not mean that governmental agencies and regulators do not diligently and vigorously enforce the laws. See § 48-1-90(b) [action to be brought in name of the State or in name of DHEC]. Civil penalties are provided by the Act. See § 48-1-330. Moreover, the Pollution Control Act contains criminal penalties which provide as follows:

> [a] person who willfully or with gross negligence or recklessness violates a provision of this chapter or a regulation, permit, permit condition, or final determination or order of the department is guilty of a misdemeanor and upon conviction, must be fined not less than five hundred dollars for each day's violation or be imprisoned for not more than two years, or both.

This Office has on staff a prosecutor devoted to environmental crimes, including violations of the Pollution Control Act. The Attorney General would be happy to set up a meeting to discuss this issue with you regarding the process for reporting criminal violations to that prosecutor.

Sincerely,

Robert D. Cook
Solicitor General