

Approved: 4-6-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:00 a.m. on March 16, 1993 in Room 514-S of the Capitol.

All members were present except: All present.

Committee staff present: Michael Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Bill Sneed, Kansas Civil Law Forum

HB 2475 - Uniform declaratory judgment act

Bill Sneed, appearing on behalf of the Kansas Civil Law Forum, provided a letter of introduction from Brad Smoot and the Kansas Civil Law Forum (Attachment 1). Mr. Sneed testified in support of HB 2475 which recodifies the Kansas declaratory judgments law by incorporating most of the provisions of the Uniform Declaratory Judgments Act (UDJA) (Attachment 2). The purpose of the act is to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status, and other legal relations and should be liberally construed and administered to achieve that purpose. Mr. Sneed stated the House Judiciary Committee requested that any language changes needed to update the act be brought to the Senate Committee and he provided a balloon incorporating the needed language changes with his written testimony.

Chairman Moran turned to subcommittee reports and final action on bills previously referred to Committee.

Senator Emert explained that HB 2009 would remove the homestead forfeiture provision from the Uniform Controlled Substances Act, as forfeiture of a homestead was ruled unconstitutional by the Kansas Supreme Court. Senator Emert moved that HB 2009 be recommended favorably for passage and placed on the consent calendar. Senator Petty seconded. Motion carried.

HB 2462 would extend to counties the same exemption for posting security costs for bonds during an appeal that cities currently enjoy. Senator Emert moved that HB 2462 be recommended favorably for passage. Senator Feleciano seconded. Motion carried.

Senator Emert advised that HB 2448 would allow a sentencing judge to require a defendant to repay reward money used in the apprehension or conviction of the defendant and to order repayment of public funds used to buy drugs from the defendant during the investigation which leads to a conviction. The subcommittee recommends amending the bill to require any repaid money to be placed in the fund from which it was originally paid. Senator Feleciano moved to adopt the subcommittee report and to recommend HB 2448, as amended, favorably for passage. Senator Emert seconded. Motion carried.

HB 2100 would create the new crime of unlawful sexual relations to include: engaging in consensual sexual intercourse or sodomy with an inmate who is not married to the offender if the offender is an employee of the DOC, an employee of a contractor providing services to a correctional institution, or between a parole officer and an inmate under his or her direct supervision. Senator Bond moved to amend HB 2100 by striking lines 23-27 and lines 33-37 in effect limiting the bill only to incarceration situations. Senator Martin seconded. Senator Feleciano made a substitute motion to amend HB 2100 by adding the word "direct" in line 27 of the bill and to recommend HB 2100, as amended, favorably for passage. Senator Ranson seconded. Substitute motion carried.

Senator Emert enumerated several amendments to HB 2411 recommended by the Criminal Law subcommittee. The Subcommittee recommends amending provisions of SB 170 and SB 300 into HB 2411; amending HB 2411 to change aggravated incest from a Class D felony to a Class C felony for sixty days until July 1, 1993 when this change would be effective by other legislation; and including in HB 2411 an amendment making the crimes of rape and sodomy two crimes that cannot be expunged. Senator Ranson moved to amend HB 2411

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on March 16, 1993.

by adopting the subcommittee report and to recommend HB 2411, as amended, favorably for passage. Senator Emert seconded. Motion carried. Senator Emert provided a written report of the subcommittee's decisions on these bills (Attachment 3).

Senator Vancrum presented a balloon of proposed amendments to SB 293 in effect to delineate what constitutes a taking (Attachment 4). He noted the attorney general is directed to circulate guidelines to state agencies to assist them in identification of governmental actions that have constitutional taking implications. The subcommittee recommends deleting Section 2, lines 13 through 42 which were an attempt to define takings. Senator Bond moved adoption of the Subcommittee report which would be the proposed amendments in the balloon on SB 293. Senator Emert seconded. Motion carried. Senator Vancrum moved to recommend SB 293, as amended, favorably for passage. Senator Brady seconded. Motion carried.

Senator Bond reported that the Family Law subcommittee recommends no action on SB 280 this session.

Regarding SB 243 concerning victim's right to be heard, Senator Emert moved to amend SB 243 in Section 1. (4) (c) to read "allow the victim or such members of the victim's family as the court deems appropriate to address the court...". Senator Vancrum seconded. Motion carried. Senator Emert moved to recommend SB 243, as amended, favorably for passage. Senator Brady seconded. Motion carried.

Taking up SB 266, Senator Emert explained the bill pertains to victim's presence at juvenile offender proceedings. The Criminal Law subcommittee recommended amendments to SB 266 as listed in Attachment 3 which would allow victims and their families to be present at juvenile proceedings when the crime would have been a felony if the offender were an adult. Other recommendations of the subcommittee are that victims be allowed in and notified of adjudication and disposition hearings and that they be excluded from that portion of the disposition hearing that includes a report of the social history of the offender. The definition of family is expanded to include legal guardian or siblings per the subcommittee recommendation. Senator Emert moved to amend SB 266 by adopting the subcommittee report. Senator Parkinson seconded. Motion carried. Senator Oleen moved to amend SB 266 to include stepparents in the definition of family. Senator Petty seconded. Motion carried. Senator Oleen moved to further amend SB 266 to include grandparents in the definition of family. Senator Petty seconded. Motion carried. Senator Emert moved to recommend SB 266, as amended, favorably for passage. Senator Ranson seconded. Motion carried.

Senator Bond moved to amend HB 2475 updating the language as proposed by the Kansas Civil Law Forum and to recommend HB 2475, as amended, favorably for passage. Senator Emert seconded. Motion carried.

The meeting was adjourned at 11:05 a.m. The next meeting is scheduled for March 17, 1993.

KANSAS CIVIL LAW FORUM

**A Coalition of Professionals and Businesses
Interested in the Kansas Court System**

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**Statement to the Senate Judiciary Committee
by Brad Smoot, Coordinator, Kansas Civil Law Forum
Regarding House Bill 2475**

March 16, 1993

Mr. Chairman, Members of the Committee:

The Kansas Civil Law Forum is an association of businesses and professional groups interested in the Kansas civil court system.

We wish to express our support for House Bill 2475 concerning the Kansas Declaratory Judgment Act. We believe our statutes are in need of updating and we would support additional amendments to modernize the terminology used in the Uniform Declaratory Judgment Act.

Bill Sneed, a member of the Kansas Civil Law Forum, appears today on behalf of our organization. Thank you for consideration of our views.

SJ
3-16-93
Attachment 1

MEMORANDUM

TO: The Honorable Jerry Moran
Chairman, Senate Judiciary Committee

FROM: William W. Sneed

DATE: March 16, 1993

RE: House Bill 2475

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I am an attorney here in Topeka, Kansas and have been asked by the Kansas Civil Law Forum to speak to you on behalf of H.B. 2475.

During 1992 the Kansas Civil Law Forum was approached about a concern regarding the use of declaratory judgments within the Kansas civil law system. Brad Smoot, coordinator, asked me to research this particular issue and report back to the coalition. While researching the issue I became aware of the Uniform Declaratory Judgment Act.

Through several contacts I ultimately got in touch with Mr. Dick Hite, an attorney in Wichita, Kansas, who also serves as a member of the Uniform Laws Commission. During our conversation Mr. Hite gave me a general overview of the Uniform Declaratory Judgment Act ("UDJA") and explained that in his opinion it is a bill that should be looked at by the Kansas Legislature. As you and members of your Committee are aware, Kansas is known as being very progressive in the enactment of uniform laws. It is interesting to note that forty other states, including all of Kansas' neighbors, have adopted

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Attachment 2

the UDJA. Thus, because of the current situation in Kansas, it is the opinion of the Kansas Civil Law Forum that the Legislature should enact the UDJA.

Our current problem in this state deals with case law interpreting two areas of civil law and the conflict that these cases give, and ultimately, the limiting effect they provide to district court judges in certain situations. The obvious legislative intent in adopting the Kansas Declaratory Judgment Act (K.S.A. 60-1701, et seq.) was to promote an expeditious means by which legal questions concerning the interpretation of contract provisions, statutory provision and other similar matters could be obtained in an attempt to avoid full-blown lawsuits. Unfortunately, it would appear that the legislative intent has been significantly eroded by various Supreme Court cases, principally *State Farm Fire and Casualty Company v. Finney*, 244 Kan. 545, 770 P.2d 460 (1989) (copy attached). In that case, the Kansas Supreme Court grappled with several issues involving declaratory judgment actions as they relate to the determination of insurance coverage. The Court in that decision set forth the following rules:

1. Declaratory judgment actions may not be used to determine the existence of insurance coverage in advance of a final disposition of a tort lawsuit involving the potentially insured tortfeasor unless there are no key factual issues relating to coverage that need to be determined in the tort lawsuit.

2. If a liability insurance carrier disclaims coverage to an insured in a tort lawsuit, the insured is collaterally estopped from litigating any factual issues involving

coverage in a subsequent garnishment action if the factual issues have already been decided in the tort action.

The upshot of this twin pronouncement is that most insurance coverage issues cannot be resolved by way of declaratory judgment since there are very few coverage defenses that do not involve some degree of factual interplay between the tort lawsuit and the declaratory judgment action. This, coupled with the Supreme Court decisions regarding duty to defend, place a burdensome procedure on our civil justice system. The major problem with this is that by the time the coverage issue is resolved both the plaintiff and the defendant have incurred the expense of prosecuting the tort litigation, which might very well have been settled had the parties known the posture of the insurance coverage issue.

The present declaratory judgment mechanism with its judicial appendages is a drain on the economy since it forces cases to proceed to trial and exhausts substantial resources when the case would probably not otherwise have ever seen the courtroom. The current state of the law upsets the well-balanced principle that settlement is to be encouraged. Moreover, the current system foster re-litigation of insurance coverage issues which wastes precious judicial time. Thus, it is our opinion that all parties would be much better served by a reinstitution of a legislative intent to promote an expeditious means through declaratory judgments.

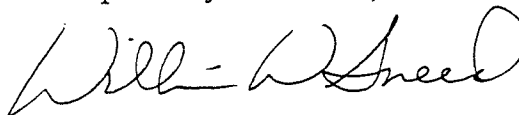
Therefore, based upon the discussions we have had with the Uniform Law members, it would appear to us that by implementing the Uniform Declaratory Judgment

Act we would be giving district court judges more flexibility in this area. It has been our experience that in many instances judges would like to utilize the Declaratory Judgment Act, but because of the *Finney* decision, they believe they are stifled in utilizing the declaratory judgment procedure in quickly resolving these types of issues.

During the hearings in the House, the Committee requested that we review the uniform language and provide any changes needed to "modernize" the bill. Inasmuch as the House was moving quickly to meet its deadline, the Committee moved favorably on this bill and requested us to present any clean-up changes to the Senate. Attached to my testimony are what we believe to be said changes. It is also important to note that H.B. 2475 passed the House 124-0.

Thus, on behalf of the Kansas Civil Law Forum, I respectfully request that the Committee look favorably on H.B. 2475. Further, we appreciate the opportunity to present testimony, and if we can answer any questions or provide any additional information, please feel free to contact Mr. Smoot.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Will - W. Sneed".

William W. Sneed

State Farm Fire & Casualty Co. v. Finney

No. 62,711

No. 62,712

STATE FARM FIRE AND CASUALTY COMPANY, An Insurance Corporation, *Appellant*, v. GORDON FINNEY and DEAN JOHNSON, *Appellees*, and GORDON FINNEY, *Appellee*, v. DEAN JOHNSON, *Defendant*, v. STATE FARM FIRE AND CASUALTY COMPANY, Proposed Intervenor, *Appellant*.

(770 P.2d 460)

SYLLABUS BY THE COURT

1. **INSURANCE—Defense of Insured by Insurer's Attorney—Insurer Not Estopped from Asserting Policy Defense in Subsequent Civil Proceeding.** Where an insurance company provides an attorney to defend its insured against a pending action while reserving its policy defenses, that attorney's defense of the action does not estop the insurance company from asserting its policy defenses in a subsequent civil proceeding. *Bell v. Tilton*, 234 Kan. 461, 674 P.2d 468 (1983).
2. **SAME—Declaratory Judgment—Insurer Has No Absolute Right to Maintain Action to Determine Coverage Issue.** An insurer has no absolute right to maintain a declaratory judgment action to determine the issue of coverage. *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 531 P.2d 9 (1975).
3. **JUDGMENTS—Declaratory Judgment—Key Factual Issues in Civil Action May Not Be Determined through Declaratory Judgment Action.** Under the Kansas rule, declaratory judgment actions may not be maintained to decide key factual issues in underlying civil actions. *U.S. Fidelity and Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 531 P.2d 9 (1975); and *State Automobile & Casualty Underwriters v. Gardiner*, 189 Kan. 544, 370 P.2d 91 (1962).

Appeal from Leavenworth district court; DAVID J. KING, judge. Opinion filed March 3, 1989. Affirmed.

Jerome V. Bales, of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, argued the cause and *Kevin Bennett*, of the same firm, was with him on the briefs for appellant.

John L. White, of Norton, White & Norton, P.C., of Leavenworth, argued the cause and was on the brief for appellee.

David P. Troup, of Weary, Davis, Henry, Struebing & Troup, of Junction City, was on the *amicus curiae* brief for Kansas Trial Lawyers Association.

The opinion of the court was delivered by

LOCKETT, J.: *State Farm Fire & Casualty Co. v. Gordon Finney and Dean Johnson*, Case No. 62,711, and *Gordon Finney v. Dean Johnson v. State Farm and Casualty Company, Proposed Intervenor*, Case No. 62,712, are consolidated for appeal. In the first action, State Farm Fire & Casualty Co. (State Farm) appeals the

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district court's finding that an insurer may not maintain a declaratory judgment action to determine if there is coverage for the acts of its insured if the declaratory judgment also decides key factual issues in an underlying tort suit brought against the insured. In the second action, State Farm appeals the district court's denial of its motion to intervene in the underlying tort suit to stay that action until the declaratory judgment action was decided.

On January 22, 1988, Gordon Finney brought an action in Leavenworth County District Court against Dean Johnson claiming that on July 2, 1987, Johnson shot him with a gun either (1) willfully, wantonly, maliciously, and intentionally or (2) negligently. At the time of the incident, Johnson was insured under a homeowners policy issued by appellant, State Farm. The policy provided coverage for personal liability and medical payments under "coverages L and M," but contained the following exclusion:

- "1. Coverage L and Coverage M do not apply to:
a. Bodily injury or property damage which is expected or intended by an insured."

After being notified that Finney had filed suit against its insured, State Farm provided Johnson with an attorney. Pursuant to a reservation of rights, State Farm also notified Johnson that, under the policy exclusion, it was denying coverage for intentional or expected acts.

On February 24, 1988, State Farm filed a declaratory judgment action asking the district court to determine that there was no coverage under the policy for the acts alleged in the civil tort suit and, therefore, State Farm had no contractual duty to defend Johnson. At a discovery conference, counsel provided for Johnson requested that State Farm's declaratory judgment action be stayed pending the outcome of the civil tort suit. The district court requested briefs and oral argument. At a subsequent hearing, State Farm argued that the declaratory judgment action should not be stayed because, under its interpretation of our holding in *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 732 P.2d 741 (1987), it would be collaterally estopped to raise its policy defense (non-coverage for intentional acts) by a judgment in the civil tort suit.

The district court disagreed with State Farm's interpretation of

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Patrons and held that, under *Bell v. Tilton*, 234 Kan. 461, 674 P.2d 468 (1983), where an insurer provides an attorney to defend its insured in a pending action, while reserving its policy defenses, that attorney's defense of the action does not estop the insurer from asserting its policy defense in a subsequent civil proceeding. Counsel for Johnson then orally moved to dismiss the declaratory judgment action, contending that a declaratory judgment action cannot be maintained to decide key factual issues to be determined in the underlying tort suit, citing *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 531 P.2d 9 (1975), and *State Automobile & Casualty Underwriters v. Gardiner*, 189 Kan. 544, 370 P.2d 91 (1962). The district court sustained Johnson's motion and dismissed the declaratory judgment action. State Farm appealed.

State Farm then filed a motion seeking to intervene in the tort action to stay the civil action and to allow the declaratory judgment action to proceed to trial first. Noting that the declaratory judgment action had been dismissed prior to State Farm's motion to intervene and that, under *Bell*, a judgment in the civil tort action would not impede State Farm's right to protect its interest in a subsequent action, the district judge denied the motion. Despite the district court's favorable ruling that State Farm would not be estopped to litigate its policy defenses in the civil tort action, State Farm appeals the dismissal of the declaratory judgment and the denial of its motion to intervene in the civil tort action. Although the denial of its motion to intervene in the civil action was originally an issue on appeal, State Farm has abandoned that issue since it was neither addressed in the briefs nor at oral argument. *Feldt v. Union Ins. Co.*, 240 Kan. 108, 112, 726 P.2d 1341 (1986).

It is State Farm's position that its declaratory judgment action is necessary because our holding in *Patrons* reversed *Bell* and precluded State Farm from having its day in court. State Farm framed its first issue as "[w]hether an insurance carrier who is defending an individual in a lawsuit pursuant to a reservation of rights is collaterally estopped to assert policy defenses in a subsequent action when such policy defenses raise essentially the same factual issues decided in the underlying litigation."

Rejecting State Farm's position, the district court held *Patrons* did not overrule *Bell*. Therefore, we must first review *Bell* and

Patrons. In *Bell*, plaintiff sued for injuries suffered as a result of a gunshot wound inflicted by an insured. The defendant made a demand on his insurer to defend under his homeowners policy. The insurer provided counsel for the defendant, but informed the insured that, pursuant to a policy exclusion for intentional acts, it was reserving its rights to assert its policy defenses at a later time.

In the tort case, the jury found that the insured had negligently shot and injured the plaintiff and awarded the plaintiff money damages. At a subsequent garnishment proceeding, the insurer disclaimed liability under the policy exclusion for intentional acts of its insured. The plaintiff contended that the insurer was collaterally estopped to assert this defense in the garnishment action. The trial court ruled in favor of the insurer and we affirmed, holding that where an insurance company provides an attorney to defend its insured against a pending action, while reserving its policy defenses, that attorney's defense of the action does not estop the insurance company from asserting its policy defenses in a subsequent garnishment proceeding. *Bell v. Tilton*, 234 Kan. 461, Syl. ¶ 1.

The facts were different in *Patrons*. There, a husband fatally shot his wife. A jury found that the husband had intentionally caused the death of his wife and returned a verdict of voluntary manslaughter. Meanwhile, their son filed a wrongful death action against his father, claiming that the father had negligently caused the death of the mother. The father/husband requested his insurer, *Patrons*, to defend him under his homeowners policy. *Patrons* refused to provide an attorney to defend the husband in the civil action and filed a declaratory judgment action denying coverage on three grounds, including a policy exclusion for intentional acts. Prior to a determination in the declaratory judgment action, the wrongful death action proceeded to a jury trial and the judge found as a matter of law that the shooting was negligent. Later, in the declaratory judgment action, the trial court found *Patrons* had failed to provide its insured an attorney to defend the civil action and to reserve its rights under its policy, and was collaterally estopped by the judgment in the civil action from relitigating the issue of its insured's intent in a subsequent action. We agreed, finding:

"Because *Patrons* was in privity with a party, [the insured], in the wrongful death

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action, it was bound by that judgment. An exception to the rule would allow Patrons, the insurer, to refuse to defend its insured in the original action and, if the insured lost, would allow the insurer to relitigate the same issue against its insured in a subsequent action." 240 Kan. at 711.

State Farm claims that this statement overruled *Bell*. This claim ignores our subsequent language in *Patrons*, which limited that holding to cases where the insurance company *refuses to defend its insured*. After observing that the interest of the insured and the insurer were adverse in *Patrons*, we stated:

"In *Bell v. Tilton*, [citation omitted], there was a conflict of interest between the insured and the insurer in a civil action. The insurance company hired independent counsel to defend the insured in the civil action and notified the insured that it was reserving its rights under the policy. This procedure protects both the insured's and the insurer's interests and rights and eliminates the necessity of multiple suits to determine the same issues. *We believe this is the proper procedure to protect the rights of both parties under their contract.*" 240 Kan. at 712. (Emphasis added.)

In *Bell*, because there was a potential of liability, we found it proper that the insurance company honored its contractual duty to defend its insured while it retained the right to raise the policy defenses later. Any other rule would create an ethical conflict for the insurer by allowing the insurer to defend its insured, and, in the same action, to claim that the insured's act was excluded from coverage under the insurance contract. *Bell* and *Patrons* encourage insurers to fulfill their contractual duty to defend the insured where there may be a legitimate question of coverage. This procedure protects the interest of the insured and the insurer because it does not bind the insurer to the factual determination of the underlying tort action and allows a subsequent action to determine if the insured's act is covered by the policy. *Patrons* clearly approves our holding in *Bell*. Therefore, the trial court properly found that our determination of the collateral estoppel issue in *Patrons* was limited to those cases where the insurance company refuses to defend its insured in the civil tort action. Here, since State Farm provided an attorney to defend its insured and reserved its policy defenses, the declaratory judgment action is not necessary to preserve its day in court.

For its second issue, State Farm argues that the district court erred in dismissing its declaratory judgment action. State Farm concedes that there is no absolute right to maintain a declaratory

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judgment action and that the granting of declaratory relief usually rests in the trial court's discretion. See *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 9, 531 P.2d 9 (1975).

When ruling that a declaratory judgment action may not be maintained to decide key factual issues in an underlying action, the district court relied on two cases: *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 9, and *State Automobile & Casualty Underwriters v. Gardiner*, 189 Kan. 544. *Gardiner* involved an underlying tort and wrongful death action filed as a result of an automobile accident where the driver of the insured vehicle, Gardiner, was a friend of the insured, Mulder. The insurance policy provided coverage for the insured and anyone driving the car with the insured's permission.

Denying coverage, the insurer filed a declaratory judgment action alleging Gardiner had driven the insured vehicle without Mulder's permission. The district court held for the insurance company and we reversed, stating we would not permit the company to obtain by declaratory judgment a predetermination of at least one very cogent issue of the tort actions, since this is not the purpose for seeking relief by a declaratory judgment action. 189 Kan. at 547.

U.S. Fidelity involved a declaratory judgment action seeking determination of insurance coverage between two insurance companies for damages resulting from an automobile accident. The vehicle in question was driven by a friend of the owner's son. *U.S. Fidelity* had issued a policy covering a vehicle owned by the driver's parents. *Continental* had issued a policy to the owners of the vehicle involved in the accident which excluded coverage for persons driving without the insured's permission. After the driver of the other car involved in the accident filed a tort action to recover for his injuries, *Continental* denied coverage pursuant to the policy exclusion.

Subsequently, *U.S. Fidelity*, the driver, and the driver's father brought a declaratory judgment action against *Continental* and the owner of the vehicle. The trial court dismissed the declaratory judgment action, refusing to determine a factual issue which was also a key issue in the underlying tort suit (whether the driver had permission to drive the car), especially since the insurers could be impleaded in the tort action. We affirmed,

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holding that *ordinarily* declaratory judgment actions should not be maintained where a question of fact is the main issue or where the object of the action is to try such fact as a determinative issue. 216 Kan. at 10.

In oral argument of the case at bar, State Farm acknowledged that, under the Kansas rule, declaratory judgment actions may not be maintained to decide key factual issues in underlying actions. State Farm argues that, in a proper case, allowing the declaratory judgment to proceed first would promote judicial economy, citing *Stout v. Grain Dealers Mutual Insurance Company*, 307 F.2d 521 (4th Cir. 1962), and *Metro. Property & Liability Ins. Co. v. Kirkwood*, 729 F.2d 61 (1st Cir. 1974). In *Kirkwood*, the First Circuit reasoned that the litigation will proceed with significantly greater efficiency if the declaratory judgment action is tried first. Because the basic issue in the declaratory judgment is not whether there is liability, but whether the insurer's contractual liability flows from a negligent act or is excluded because the insured's act was intentional, that issue can be tried directly in the declaratory judgment action. The court noted that trial by jury is available and a decision binds all parties. 729 F.2d at 63. Without commenting on the constitutional right of the insured not to testify in a declaratory judgment action during the pendency of a criminal action or on the fact that in either situation there are two lawsuits—(1) a declaratory judgment to determine coverage under the policy and (2) a civil suit to determine liability of the insured to the plaintiff—the First Circuit found no disadvantage to the plaintiffs in the underlying tort action by maintenance of the declaratory judgment suit.

A more persuasive analysis of this issue is found in *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975). *Brohawn* involved an underlying tort suit for injuries suffered in an assault. The complaint alleged in the alternative that the defendant acted either intentionally or negligently. The defendant's insurance policy contained an exclusion for intentional acts. Subsequently, the insurer filed a declaratory judgment action alleging that the insured's acts were intentional and requesting the court to relieve it from its obligation to defend.

After the circuit court denied declaratory relief and ordered the insurer to defend, the insurer appealed. The Court of Special

Appeals reversed, holding that the issue of intent should be decided first in the declaratory judgment suit and that the determination of this issue would be res judicata in the pending tort suit, leaving only the question of damages to be decided in the tort suit. The Maryland Court of Appeals granted the insured's writ of certiorari and reversed.

Initially, the court noted that, in certain circumstances, maintenance of a declaratory judgment action prior to trial of the underlying tort action could be a valuable means of resolving policy questions "where those questions are independent and separable from the claims asserted in the pending suit." For example, where an insurer claims lack of coverage because of the insured's failure to comply with contract provisions or to pay premiums, a declaratory judgment action would ordinarily be appropriate. 276 Md. at 405.

The court distinguished the cases where the issues to be resolved in the declaratory judgment action would be fully resolved in the tort action and elaborated on factors for a court to consider when deciding whether to grant declaratory relief in a particular case. It determined that, if the granting of the judgment in the declaratory judgment action would unduly inconvenience or burden the parties, or allow one party to wrest control of the litigation from another and cause a confusing alteration of the burden of proof, the court should refuse to grant the relief sought. By determining the question of whether the injuries were intentionally inflicted in the declaratory judgment action, the court would allow the defendant's insurer, not the plaintiff in the tort action, to control the litigation. 276 Md. at 406.

Hartford Ins. Group v. District Court, 625 P.2d 1013 (Colo. 1981), is also instructive. In *Hartford*, the underlying tort suit involved a vehicular accident between two tractor-trailer trucks. After suit alleging negligence was filed by the driver of one of the trucks against the other driver and his employer, Hartford, the employer's insurer, indicated it would provide a defense pursuant to a reservation of rights. The policy in question excluded intentional acts and acts by an employee outside the scope of the employer's permission.

Subsequently, Hartford filed a declaratory judgment action asserting it was not obligated under the policy since the driver's acts were intentional and outside the scope of authority or

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permission as extended by the employer. The trial judge ordered a stay of the declaratory judgment action, pending the outcome of the underlying tort suit. Hartford then filed an original proceeding in the Supreme Court of Colorado requesting an order prohibiting the stay. The Supreme Court denied the request. Rejecting Hartford's argument that maintenance of the declaratory judgment action would promote judicial economy, the Colorado Supreme Court agreed that an insurer could, in some cases, seek a declaration of its contractual responsibility of defense and indemnification in connection with a claim filed against a person arguably qualifying as an "insured." However, here, the resolution of the declaratory action first might well place the insured in the dilemma of defending the coverage issue by establishing that the conduct, at most, amounted to simple negligence. Defending the declaratory action on that basis would pose a substantial risk that the insured would unduly compromise its defense in the negligence action. In addition, a finding in the declaratory action that the insured's action was willful and wanton could cause the plaintiff in the negligence action to amend his complaint to assert willful and wanton conduct against the defendant and invoke the doctrine of collateral estoppel. 625 P.2d at 1016.

Brohawn and *Hartford* demonstrate that prejudice to the insured may result by requiring the insured to litigate the key issues in the underlying suit in a declaratory judgment action against his own insurance company. First, the insured may be bound by the declaratory judgment suit by principles of collateral estoppel. Second, since the issue in the declaratory judgment action is whether the insured's acts were intentional or negligent, the insured may be prejudiced by being forced into claiming the acts were *merely* negligent to insure coverage under the insurance policy.

State Farm argues that a factual determination of the issues in a declaratory judgment action does not prejudice the insurer or the insured. We disagree. The duty to defend and the duty to cover are not necessarily coextensive. The duty to defend arises whenever there is a "potential of liability" under the policy. *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 512 P.2d 403 (1973). The insurer determines if there is a potential of liability under the policy by examining the allega-

tions in the complaint and considering any facts brought to its attention or which it could reasonably discover. Where a petition alleges an act that is clearly not covered, for example, that the defendant acted willfully and intentionally, a declaratory judgment would then be proper to determine the issue of coverage, since there would no "potential of liability" under the policy for intentional acts. Where the complaint alleges both a negligent and intentional act, these alleged facts give rise to the potential for liability and the duty to defend arises. 212 Kan. at 686.

Here, if it is determined in the underlying civil tort suit that the insured acted neither negligently, willfully, nor intentionally, there would be no need for a second action to determine if there was coverage under the policy. If the tort suit determines that the insured acted negligently, the insurer would not be collaterally estopped to litigate the intent issue in a subsequent proceeding. The trial court correctly held this procedure protects the rights of all parties.

Affirmed.

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Session of 1993

HOUSE BILL NO. 2475

by Committee on Judiciary

AN ACT enacting the uniform declaratory judgments act; amending K.S.A. 60-1701 and 60-1703 and repealing the existing sections; also repealing K.S.A. 60-1702.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-1701 is hereby amended to read as follows: 60-6701. ~~In cases of actual controversy, courts~~ Courts of record within the scope of their respective jurisdictions shall have power to ~~make~~ declare the rights, status, and other legal relations whether or not ~~consequential~~ further relief is, or at the time could be, ~~sought, claimed and~~. No action or ~~proceedings~~ proceeding shall be dismissed or stayed for the sole reason that only declaratory relief has been sought. ~~shall be open to objection on the ground that only a declaratory judgment or order merely declaratory of right is the only relief requested. Controversies involving the validity or interpretation of deeds, wills, or other instruments of writing, express trusts, statutes, municipal ordinances, and other government regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right. decree is prayed for. The declaration~~ declaratory judgment may be either affirmative or negative in nature form and effect; and such declarations shall have the force and effect of a final judgment or decree.

New Sec. 2. Any person having an interest ~~interested~~ under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may seek determination of ~~have determined~~ any question of construction or validity arising under that enactment, document or agreement ~~the instrument, statute, ordinance, contract, or franchise~~ and may obtain a declaration of rights, status or other legal relations thereunder.

New Sec. 3. Any court proceeding under this Act may construe ~~A contract may be construed a contract in the event of an actual or~~

1 ~~threatened breach thereof, either before or after there has been a~~
2 ~~breach thereof.~~

3 New Sec. 4. Any ~~Any person interested as or through an~~
4 executor, administrator, trustee, guardian or other fiduciary, creditor,
5 devisee, legatee, heir, next of kin, or beneficiary ~~estui-que-trust~~, in
6 the administration of a trust, or of the estate of a decedent, an
7 insolvent, a person under 18 years of age or other person for whom a
8 guardian has been appointed, or any person holding an interest in
1 such trust or estate, may seek and obtain ~~have a~~ declaration of rights
2 or legal relations ~~in respect to~~:

3 (a) Ascertain any class of creditors, devisees, legatees, heirs, next
4 of kin or others:

5 (b) direct the executors, administrators, or trustees to do ~~or abstain~~
6 ~~from doing~~ any particular act in their fiduciary capacity or to refrain
7 from doing any act in such capacity; or

8 (c) determine any question arising in the administration of the
9 estate or trust, including questions of construction of wills and other
10 writings.

11 New Sec. 5. The enumeration in sections 2, 3 and 4 does not
12 limit or restrict the exercise of the general powers conferred in section
13 1, in any proceeding where declaratory relief is sought, in which a
14 judgment ~~or decree~~ will terminate the controversy or remove an
15 uncertainty.

16 New Sec. 6. The court may decline ~~refuse~~ to render or enter a
17 declaratory judgment ~~or decree~~ where such judgment ~~or decree~~, if
18 ~~rendered or entered~~, would not terminate the uncertainty or controversy
19 giving rise to the proceeding.

20 New Sec. 7. All orders and judgments ~~and decrees~~ under this
21 act may be reviewed as other orders and judgments as provided in
22 K.S.A. 60-2101 through 2103, and amendments thereto. ~~and~~
23 ~~decrees.~~

24 Sec. 8. K.S.A. 60-1703 is hereby amended to read as follows:
25 60-1703. Further relief based on a declaratory judgment ~~or decree~~
26 may be granted whenever necessary or proper. The application shall
27 be by petition to a court having jurisdiction to grant the relief.
28 If the application ~~is deemed~~ sufficient, the court ~~shall~~, on reasonable
29 notice, shall require any adverse party whose rights have been
30 adjudicated by the ~~declaration of right declaratory judgment or decree~~,
31 to show cause why further relief should not be granted
32 forthwith.

33 New Sec. 9. When a proceeding under this act involves the
34 determination of an issue of fact, such issue may be tried and
35 determined in the same manner as issues of fact ~~are tried and~~
36 ~~determined~~ in other civil actions in the court in which the proceeding
37 is pending.

38 New Sec. 10. In any proceeding under this act the court may
39 make such award of costs as may seem equitable and just.

1 New Sec. 11. When declaratory relief is sought, all persons who
2 have or claim any interest which would be affected by the
3 declaration shall be joined as ~~made~~ parties, and no declaration shall
4 be binding against ~~shall prejudice the rights of persons not so joined~~
5 as parties to the proceeding. In any proceeding which challenges
6 involves the validity of a municipal ordinance or franchise, such
7 municipality shall be made a party, ~~and shall be entitled to be heard.~~
8 If the statute, ordinance or franchise is alleged to be unconstitutional,
9 the attorney general or an assistant attorney general ~~of the state~~ shall
10 also be served with a copy of the proceeding and be entitled to be
11 heard.

12 New Sec. 12. This act is ~~declared to be~~ remedial in nature and
13 its. ~~The act's~~ purpose is to settle and ~~to provide~~ afford relief from
14 uncertainty and insecurity with respect to disputed rights, status and
15 other legal relations and should. ~~The act is to be~~ liberally construed
16 and administered to achieve that purpose.

17 New Sec. 13. As used in this act, "person" means any person,
18 partnership, limited partnership, joint venture, joint stock company,
19 unincorporated association, or society, or municipal or other
20 corporation of any character whatsoever.

21 New Sec. 14. The several sections and provisions of this act
22 except K.S.A. 60-1701 and section 2, and amendments thereto, are
23 hereby declared independent and severable, and the invalidity, if any,
24 of any part or feature thereof shall not affect or render the remainder
25 of the act invalid or inoperative.

26 New Sec. 15. This act shall be so interpreted and construed as
27 to effectuate its general purpose to make uniform the law of those
28 states which enact similar provisions of the Uniform Declaratory
29 Judgments Act ~~it~~; and to harmonize, as far as possible, with federal
30 laws and regulations on the subject of declaratory judgments and
31 decrees.

32 ~~New Sec. 16. This act shall be known and may be cited as the~~
33 ~~uniform declaratory judgments act.~~

34 ~~Sec. 167.~~ K.S.A. 60-1701, 60-1702 and 60-1703 are hereby
35 repealed.

36 ~~Sec. 178.~~ This act shall take effect and be in force from and
37 after its publication in the statute book.

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Session of 1993

HOUSE BILL NO. 2475

by Committee on Judiciary

AN ACT enacting the uniform declaratory judgments act; amending K.S.A. 60-1701 and 60-1703 and repealing the existing sections; also repealing K.S.A. 60-1702.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-1701 is hereby amended to read as follows: 60-6701. ~~In cases of actual controversy, courts~~ Courts of record within the scope of their respective jurisdictions shall have power to ~~make binding adjudications of right, declare the rights, status, and other legal relations~~ whether or not ~~consequential~~ further relief is, or at the time could be, ~~sought~~. No action or ~~proceedings~~ proceeding shall be dismissed or stayed for the sole reason that only declaratory relief has been sought. ~~order merely declaratory of right is the only relief requested. Controversies involving the validity or interpretation of deeds, wills, or other instruments of writing, express trusts, statutes, municipal ordinances, and other government regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right. The declaratory judgment may be either affirmative or negative in nature; and such declarations shall have the force and effect of a final judgment.~~

New Sec. 2. Any person having an interest under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may seek determination of any question of construction or validity arising under that enactment, document or agreement and may obtain a declaration of rights, status or other legal relations thereunder.

New Sec. 3. Any court proceeding under this Act may construe a contract in the event of an actual or threatened breach thereof.

New Sec. 4. Any executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *beneficiary*, in the administration of a trust, or of the estate of a decedent, an insolvent, a person under 18 years of age or other person for whom a guardian has been appointed, or any person holding an interest in such trust or estate, may seek and obtain a declaration of rights or legal relations to:

(a) Ascertain any class of creditors, devisees, legatees, heirs, next of kin or others:

1 (b) direct the executors, administrators, or trustees to do any
2 particular act in their fiduciary capacity or to refrain from doing any
3 act in such capacity; or

4 (c) determine any question arising in the administration of the
5 estate or trust, including questions of construction of wills and other
6 writings.

7 New Sec. 5. The enumeration in sections 2, 3 and 4 does not
8 limit or restrict the exercise of the general powers conferred in section
9 1, in any proceeding where declaratory relief is sought, in which a
10 judgment will terminate the controversy or remove an uncertainty.

11 New Sec. 6. The court may decline to enter a declaratory
12 judgment where such judgment, if entered, would not terminate the
13 uncertainty or controversy giving rise to the proceeding.

14 New Sec. 7. All orders and judgments under this act may be
15 reviewed as other orders and judgments as provided in K.S.A. 60-2101
16 through 2103, and amendments thereto.

17 Sec. 8. K.S.A. 60-1703 is hereby amended to read as follows:
18 60-1703. Further relief based on a declaratory judgment may be
19 granted whenever necessary or proper. The application shall be by
20 petition to a court having jurisdiction to grant the relief.
21 If the application is sufficient, the court shall, on reasonable notice,
22 shall require any adverse party whose rights have been adjudicated by
23 the ~~declaration of right~~ declaratory judgment to show cause why further
24 relief should not be granted.

25 New Sec. 9. When a proceeding under this act involves the
26 determination of an issue of fact, such issue may be tried and
27 determined in the same manner as issues of fact in other civil actions
28 in the court in which the proceeding is pending.

29 New Sec. 10. In any proceeding under this act the court may
30 make such award of costs as may seem equitable and just.

31 New Sec. 11. When declaratory relief is sought, all persons who
32 have or claim any interest which would be affected by the declaration
33 shall be joined as parties, and no declaration shall be binding against
34 persons not so joined as parties to the proceeding. In any proceeding
35 which challenges the validity of a municipal ordinance or franchise,
36 such municipality shall be made a party. If a statute, ordinance or
37 franchise is alleged to be unconstitutional, the attorney general or an
38 assistant attorney general shall also be served with a copy of the
39 proceeding and be entitled to be heard.

40 New Sec. 12. This act is remedial in nature and its purpose is
41 to settle and provide relief from uncertainty and insecurity with respect
42 to disputed rights, status and other legal relations and should be
43 liberally construed and administered to achieve that purpose.

44 New Sec. 13. As used in this act, "person" means any person,
45 partnership, limited partnership, joint venture, joint stock company,
46 unincorporated association, or society, or municipal or other
47 corporation of any character whatsoever.

1 New Sec. 14. The several sections and provisions of this act
2 except K.S.A. 60-1701 and section 2, and amendments thereto, are
3 hereby declared independent and severable, and the invalidity, if any,
4 of any part or feature thereof shall not affect or render the remainder
5 of the act invalid or inoperative.

6 New Sec. 15. This act shall be so interpreted and construed as
7 to effectuate its general purpose to make uniform the law of those states
8 which enact similar provisions of the Uniform Declaratory Judgments
9 Act, and to harmonize, as far as possible, with federal laws and
10 regulations on the subject of declaratory judgments and decrees.

11 Sec. 16. K.S.A. 60-1701, 60-1702 and 60-1703 are hereby
12 repealed.

13 Sec. 17. This act shall take effect and be in force from and after
14 its publication in the statute book.

MEMORANDUM

TO: Senator Jerry Moran
FROM: Senator Tim Emert
DATE: March 15, 1993
RE: Judiciary Criminal Law Subcommittee

Your Judiciary Criminal Law Subcommittee met at 3:00 p.m. on Thursday, March 11, 1993 to consider bills which were assigned to that committee.

Conferees appearing before the subcommittee were:
Representative Jene Vickrey,
Gary Stotts, Secretary of Corrections
Helen Pedigo, Sentencing Commission
Ron Smith, Kansas Bar Association
Kyle Smith, KBI
Helen Stephens, Kansas Peace Officers
David Van Parys, Leavenworth County Counselor

The following bills were considered and the recommendations indicated are made:

BP consent cal.

House Bill 2029 - This bill would remove the homestead forfeiture provision from the Uniform Controlled Substances Act. Recently, the Kansas Supreme Court held that the forfeiture of a homestead was unconstitutional.

Recommendation: The committee recommends the bill favorably for passage.

BP

House Bill 2462 - This bill would extend to counties the same exemption for posting security costs for bonds during an appeal that cities currently enjoy.

Recommendation: The committee recommends the bill favorably for passage.

BPA

House Bill 2448 - The bill would grant to a sentencing judge the option to order a convicted defendant to repay the amount of any reward made by a crime stoppers chapter, individual, corporation or public entity which materially aided in the apprehension or conviction of the defendant; and also to repay the amount of any public funds utilized by a law enforcement agency to purchase controlled substances from the defendant.

Amended to have drug money paid to the fund from which it was paid.

Recommendation: The committee recommends the same for passage as amended.

SJ

3-16-93

Attachment 3

BPA

House Bill 2100 - This bill by the Department of Corrections would create the new crime of unlawful sexual relations; engaging in consensual sexual intercourse or sodomy with a person who is not married to the offender, between an employee of the Department of Corrections and an inmate, an employee of a contractor providing services to a correctional institution and an inmate or between a parole officer and a released inmate.

Recommendation: The committee recommends the bill favorably for passage.

BPA

House Bill 2411 - The committee extensively reviewed the provisions of House Bill 2411. A Bill dealing with the references in sentencing statute dealing with sexually violent crimes. Through a lengthy discussion and numerous proposed amendments the committee did amend the bill extensively as follows:

1. The committee chose to include numerous provisions of Senate Bill ³⁰⁰~~300~~; Those provisions that shift the issue of showing whether the parties were married at the time of the crime from the prosecution to the defense.

2. Changed aggravated incest from a class ^D~~B~~ felony to a class C felony.

3. Provided that on page 3, following line 16, that all the provisions prior to this line would become effective upon publication in the Register.

Section 5. Amend KSA 1992 Supp. 21-4619 to include rape and sodomy as crimes for which the conviction thereof shall not be expunged.

Recommendation: The committee recommends this bill favorably for passage as amended.

amended SB 300 registration of sex offenders.

SB 293- BPA Morawally

BPA

Senate Bill 266 - This bill regards rights of victim where victim's family is to be present at juvenile offender proceedings. The committee recommends the following amendments to that bill:

1. This right for the victim or victim's family to be notified and be present at any hearings would only apply in cases where juvenile is charged with an act which would ~~be~~ have been a felony if the juvenile were an adult.

2. On line 19 of the bill should be amended so that following the word "testifying" insert a coma, strike the word "and." On line 21 after the word thereto strike "or victim's family" and insert "and such members of the victim's family as the court deems appropriate."

3. → The right to attend these hearings by the victim and/or victim's family should be limited to the adjudication hearing and the disposition hearing except that this right shall not extend to a portion of the disposition hearing which is described in KSA 38-1661 and pertains to the social history of the offender and his family.

4. → In line 42 insert a coma after the word "children." On line 43 strike the word hear after the word "parents" insert a coma, and add the words "legal guardian, ~~hear~~, siblings."

Recommendation: The committee, with these amendments recommend the bill favorably for passage.

"or"

Step-parent
Grandparents

SENATE BILL No. 293

By Committee on Judiciary

Proposed Amendments to S.B. No. 293

2-11

8 AN ACT relating to agencies of the executive branch of state gov-
9 ernment; concerning actions by such agencies which may consti-
10 tute a taking of private property; and imposing certain duties upon
11 such agencies and the office of the attorney general in relation
12 thereto.

13
14 *Be it enacted by the Legislature of the State of Kansas:*

15 Section 1. As used in this act unless the context requires
16 otherwise:

17 (a) "Constitutional taking" or "taking" means due to a govern-
18 mental action private property is taken such that compensation to
19 the owner of that property is required by either the fifth or four-
20 teenth amendment of the constitution of the United States;

21 (b) (1) "governmental action" or "action" means:

22 (A) Proposed rules and regulations by a state agency that if
23 adopted and enforced may ~~limit the use of private property;~~

24 (B) proposed or implemented licensing or permitting conditions,
25 requirements or limitations ~~to the use of private property;~~ and

26 (C) required dedications or exactions from owners of private
27 property by a state agency.

28 (2) "Governmental action" or "action" does not include:

29 (A) Activity in which the power of eminent domain is exercised
30 formally;

31 (B) repealing rules and regulations discontinuing governmental
32 programs or amending rules and regulations in a manner that lessens
33 interference with the use of private property;

34 (C) law enforcement activity involving seizure or forfeiture of
35 private property for violations of law or as evidence in criminal
36 proceedings; and

37 (D) orders that are authorized by statute, that are issued by a
38 state agency or a court of law and that were the result of a violation
39 of state law.

40 (c) "Private property" means any real or person property in this
41 state that is protected by ~~either~~ the fifth or fourteenth amendment
42 of the constitution of the United States.

43 (d) "State agency" means an officer or unit of the executive

or section 18 of the bill of rights of the constitution of the
state of Kansas

which constitutes a constitutional taking

constitute a constitutional taking

which constitute a constitutional taking

or section 18 of the bill of rights of the constitution of the
state of Kansas

3-16-93
SJ
Attachment 4

1 branch of state government that is authorized by law to adopt rules
2 and regulations. "State agency" does not include the legislative or
3 judicial branches of state government.

4 Sec. 2. (a) The attorney general shall adopt guidelines to assist
5 state agencies in the identification of governmental actions that have
6 constitutional taking implications. In formulating the guidelines, the
7 attorney general shall ~~observe the following principles:~~

8 (1) ~~State agencies shall be~~ sensitive to, anticipate and account
9 for the obligations imposed by the fifth and fourteenth amendments
10 of the constitution of the United States ~~in planning and carrying out~~
11 governmental actions ~~to avoid imposing unanticipated or undue ad-~~
12 ~~ditional burdens on the state treasury.~~

13 (2) governmental actions that are taken by state agencies and that
14 result in a physical invasion or occupancy of private property and
15 actions that affect value or use may constitute a taking of private
16 property;

17 (3) governmental action may amount to a taking even though the
18 action constitutes less than a complete deprivation of all use or value
19 or of all separate and distinct interests in the same private property
20 or the action is only temporary in nature;

21 (4) state agencies whose governmental actions are specifically to
22 protect public health and safety are ordinarily given broader latitude
23 by courts before their actions are considered to be takings; however,
24 the mere assertion of a public health and safety purpose is insufficient
25 to avoid a taking; therefore, actions that are purportedly to protect
26 the public health and safety shall be:

27 (A) Taken only in response to real and substantial threats to
28 public health and safety;

29 (B) designed to advance significantly the health and safety pur-
30 pose; and

31 (C) no greater than necessary to achieve the health and safety
32 purpose.

33 (5) although normal governmental processes do not ordinarily
34 constitute takings, undue delays in decision making that interfere
35 with private property use carry a risk of being held to be a taking;
36 in addition, a delay in processing may increase significantly the size
37 of compensation due if a constitutional taking is later found to have
38 occurred;

39 (6) the constitutional protections against taking private property
40 are self-executing and require compensation regardless of whether
41 the underlying authority for the action contemplated a taking or
42 authorized the payment of compensation.

43 (b) The attorney general shall:

or any political or taxing subdivision of the state

formulate principles that ensure that

are

and section 18 of the bill of rights of the constitution of the
state of Kansas

4-2

- 1 (1) Complete the guidelines on or before January 1, 1994; and
- 2 (2) review and update the guidelines at least on an annual basis
- 3 to maintain consistency with court rulings.

4 Sec. 3. (a) ~~The attorney general shall determine whether a pro-~~
 5 ~~posed governmental action has constitutional taking implications and~~
 6 ~~who is responsible for ensuring compliance with this act.~~

7 ~~(b) Using the guidelines prepared under section 2, a~~ state agency **A**
 8 shall prepare an assessment of constitutional taking implications that
 9 includes an analysis of at least the following elements:

10 (1) The likelihood that the governmental action may result in a
 11 constitutional taking, ~~including a description of how the taking affects~~
 12 ~~the use or value of private property;~~

13 (2) alternatives to the proposed governmental action that may:

14 (A) Fulfill the government's legal obligations of the state agency;

15 (B) reduce the impact on the private property owner; and

16 (C) reduce the risk of a constitutional taking; and

17 (3) an estimate of financial cost to this state for compensation,
 18 and the source of payment within the agency's budget if a consti-
 19 tutional taking is determined.

20 ~~(c)~~ In addition to the guidelines prepared under section 2, each **(b)**
 21 state agency shall adhere, to the extent permitted by law, to the
 22 following criteria if implementing or enforcing governmental actions
 23 that have constitutional taking implications:

24 (1) If an agency requires a person to obtain a permit for a specific
 25 use of private property, any conditions imposed on issuing the permit
 26 shall directly relate to the purpose for which the permit is issued,
 27 shall substantially advance that purpose and shall be expressly au-
 28 thorized by law;

29 (2) any restriction imposed on the use of private property shall
 30 be proportionate to the extent the use contributes to the overall
 31 problem that the restriction is to redress;

32 (3) if an action involves a permitting process or any other decision
 33 making process that will interfere with, or otherwise prohibit, the
 34 use of private property pending the completion of the process, the
 35 duration of the process shall be kept to the minimum necessary;

36 (4) before taking an action restricting private property use for
 37 the protection of public health or safety, each state agency, in internal
 38 deliberative documents, shall:

39 (A) Clearly identify, with as much specificity as possible, the
 40 public health or safety risk created by the private property use;

41 (B) establish that the action substantially advances the purpose
 42 of protecting public health and safety against the specifically iden-
 43 tified risk;

1 (C) establish, to the extent possible, that the restrictions imposed
 2 on the private property are proportionate to the extent the use
 3 contributes to the overall risk; and

4 (D) estimate to the extent possible, the potential cost to the
 5 government if a court determines that the action constitutes a con-
 6 stitutional taking. (c)

7 ~~(d)~~ If there is an immediate threat to health and safety that
 8 constitutes an emergency and requires an immediate response, the (a)
 9 analysis required by subsection ~~(b)~~ of this section may be made when
 10 the response is completed.

11 ~~(e)~~ Before any state agency implements a governmental action (d)
 12 that has constitutional taking implications, the state agency shall
 13 submit a copy of the assessment of constitutional taking implications
 14 to the governor, the attorney general and the legislative budget
 15 committee.

16 Sec. 4. This act shall take effect and be in force from and after
 17 its publication in the statute book.

(e) The provisions of this section shall be effective on and
 after July 1, 1994.

Nothing in this act shall be construed to grant any person a
 private right of action for damages or to eliminate any right of
 action pursuant to other statutes or at common law.

Sec. 5.

7-2