

SESSION OF 2009

**CONFERENCE COMMITTEE REPORT BRIEF
SENATE BILL NO. 44**

As Agreed to March 30, 2009

Brief*

The bill would create a civil cause of action for perpetrating a specified fraudulent claim on the state government or affected political subdivision under the newly created Kansas False Claims Act; amend current law on summary proceedings in a *habeas corpus* action; and amend the rules of evidence regarding the admission of prior acts or offenses in cases where a defendant is accused of a sex offense or of another criminal offense.

The bill would take effect upon its publication in the *Kansas Register*.

Kansas False Claims Act

The bill would create a civil cause of action for perpetrating a specified fraudulent claim on the state government or affected political subdivision under the newly created Kansas False Claims Act. The following actions, if intentional, would be defined as fraudulent claims under the Act:

- Making a false claim for payment or approval;
- Using false records or submitting a false statement for payment;
- Using false records or submitting a false statement to conceal, avoid, or decrease an obligation to pay;

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- Delivering less property or money than commissioned;
- Falsely certifying the receipt of property;
- Buying or accepting an obligation for public property from a person not authorized to sell or pledge the property;
- Benefitting from a fraudulent claim and failing to disclose the false claim; or
- Conspiring to commit any of the above violations.

Any person who makes a fraudulent claim to the state government or affected political subdivision would be liable for three times the amount of actual damages, a civil penalty between \$1,000 to \$11,000 for each violation, and reasonable costs and attorney fees associated with the civil litigation. The bill would allow a court to assess not more than two times the amount of actual damages and no civil penalty if the court finds the person committing the violation furnishes all known information within 30 days of the violation, fully cooperates with the investigation, and no legal action has commenced.

The bill excludes claims, records, or statements made under the State Revenue and Taxation Code.

The Attorney General would investigate and pursue civil action for violations of this Act. The Attorney General could utilize city attorneys, county attorneys, and private attorneys for violations at the local level when needed. A civil action could be pursued up to six years after the violation was committed; or up to three years after the date when material facts are known, or reasonably should have been known to the state; but in no event more than 10 years after the date the crime was committed, whichever occurs last. Also, civil action could be sought for activities committed prior to the effective date of this Act, if the limitation period has not lapsed.

Any employee who is retaliated against, in the terms and

conditions of employment, by an employer because of participating in a civil action under this Act would be entitled to all relief necessary to make the employee “whole.”

Of the monies recovered, amounts representing the fraudulent payment and any associated federal penalties would be remitted to the affected state agency or local government. Recoveries beyond these amounts would be deposited into the newly created False Claims Litigation Revolving Fund. The Fund would finance the Attorney General’s litigation costs. The Attorney General also could use the funds to finance any expenditures incurred outside its operations that assist with administering the Act.

The bill would allow an innocent mistake to be a defense under the Act. Various technical amendments were made to the bill.

Habeas Corpus Action

The bill would amend current law on summary proceedings in a *habeas corpus* action to restore the statute to current law except for the following:

- Allow the judge to appoint one instead of the original two competent physicians to make an examination of the person restrained because of an alleged infection or communicable disease; and
- Change “shall” to “may” (*i.e.*, a judge “may” appoint at least one competent physician).

Admission of Prior Acts or Offenses

The bill would amend the rules of evidence regarding the admission of prior acts or offenses in cases where a defendant is accused of a sex offense or of another criminal offense.

In a criminal action where a defendant is accused of a crime other than a sex offense as specified in the bill, evidence of a prior crime would be admissible to show the mode of operation is so similar that it is reasonable for a finder of fact to conclude the same individual committed both acts.

In a criminal action where a defendant is accused of a sex offense as specified in the bill, evidence of a prior act or sexual misconduct would be admissible if it is relevant and probative, *i.e.*, tending to prove or actually proving a fact. If the prosecution would intend to offer evidence under this rule, the prosecuting attorney must disclose the evidence to the defendant, including statements of witnesses at least 10 days prior to trial or at a later time when allowed by the court for good cause. This rule would not be construed to limit the admission or consideration of evidence under any other rule or to limit the admissibility of evidence of other crimes or civil wrongs in another criminal action.

Acts or offenses of sexual misconduct would be defined to include the following:

- Any conduct prescribed by article 35 of the Kansas statutes;
- The sexual gratification component of aggravated trafficking;
- Exposing another to a life-threatening communicable disease;
- Incest;
- Aggravated incest;
- Contact, without consent, of any part of the defendant's body or an object and the genitals, mouth, or anus of the victim;
- Contact, without consent, between the genitals, mouth, or anus of the defendant and any part of the victim's body;

- Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain to the victim;
- Attempts or conspiracy to engage in the conduct described above; and
- Any federal or other state conviction or violation of a city ordinance or county resolution that would constitute an offense described above.

The bill includes a severability clause which would preserve the other provisions of the bill in the event a provision or application of the provision is held to be invalid.

Conference Committee Action

The Conference Committee adopted the House amendments to the bill with the following changes:

- Amend the provision on the statute of limitations on the Kansas False Claims Act to clarify that a prosecution is barred if it is:
 - More than six years after the date the crime was committed;
 - More than three years after the date when material facts are known, or reasonably should have been known to the state; and
 - In no event more than 10 years after the date the crime was committed, whichever occurs last.
- Add the provisions of SB 154 relating to summary proceedings in a *habeas corpus* action, as amended by the House; and

- Add the provisions of HB 2250, relating to the rules of evidence regarding the admission of prior acts or offenses in cases where a defendant is accused of a sex offense or of another criminal offense, as amended by the Senate.

Background

Kansas False Claims Act (formerly SB 44): The proponents of the bill who testified at the Senate Committee were Randy Hearrell, Executive Director, Kansas Judicial Council; Patrick Hurley, Kansas Judicial Council, False Claims Advisory Committee; Loren Snell, Kansas Deputy Attorney General; and Jerry Slaughter, Executive Director, Kansas Medical Society.

There was no testimony in opposition to the bill.

Conferees presenting neutral testimony to the bill at the Senate Committee were Mark Dessetti, Kansas National Education Association; and Chad Austin, Vice President, Kansas Hospital Association.

The House Judiciary Committee inserted the provision to change the word “committed” to “discovered,” modified the bill regarding an innocent mistake, and made technical amendments.

The fiscal note from the Division of Budget states, according to the Office of Attorney General, SB 44 would allow civil prosecutions based in the Medicaid Fraud Division to be funded by the Medicaid Fraud Prosecution Revolving Fund, and not with any State General Fund dollars. In addition, civil prosecutions originating from the Civil Litigation Division of the Attorney General’s Office would be far less frequent and would ultimately be paid for from the False Claims Litigation Revolving Fund created by SB 44, not from the State General Fund. The agency also indicates that substantial amounts of taxpayer money are expected to be recovered with the passage of SB 44, based on similar legislation enacted in other states.

SB 44 has the potential to increase the amount of money recovered for fraudulent claims for state agencies and local governments. This bill also would give the state additional monies to pursue fraudulent claims, because it could recover three times the amount of the damages, civil penalties, and attorney fees. However, there are no data on which to make an accurate estimate. Therefore, a fiscal effect cannot be determined.

SB 44 has the potential for increasing litigation in the courts because of the new violation created by the bill. If it does, the Office of Judicial Administration indicates that there would be a fiscal effect on the operations of the court system. However, it is not possible to predict the number of additional court cases that would arise or how complex and time-consuming they would be. Therefore, a precise fiscal effect cannot be determined. Any fiscal effect associated with SB 44 is not reflected in *The FY 2010 Governor's Budget Report*.

Habeas Corpus Action (formerly SB 154): According to the Kansas Department of Health and Environment, KSA 65-129A through KSA 65-129e, concerning isolation and quarantine, were enacted in 2005 to modernize the procedure for isolating and quarantining persons who are alleged to suffer from or have been exposed to infectious and contagious disease. SB 154 represents a cleanup of a statute that was overlooked when the new isolation and quarantine statutes were adopted in 2005.

The proponents of the bill, as introduced, who presented testimony in the Senate Committee hearing were Daric Smith, Staff Attorney, Kansas Department of Health and Environment; Randy Mettner, Executive Officer to the Adjutant General; and Hon. James Vano, 10th Judicial District (Johnson).

There was no testimony in opposition to the bill in the Senate Committee hearing.

The House Committee on Judiciary amended the bill by

striking the original deletion and inserting the provisions allowing for the appointment of one competent physician and changing “shall” to “may.”

According to the fiscal note on the bill, as introduced, the Office of Judicial Administration states the bill would have no fiscal effect.

Admission of Prior Acts or Offenses (formerly HB 2550):

The case of *State of Kansas v. John Prine No. 93,345* decided by the Kansas Supreme Court on January 16, 2009, prompted the draft of HB 2250. Under the *Prine* decision, the Court held that before a district judge admits evidence of prior bad acts to prove plan or *modus operandi* under KSA 60-455, the evidence must be so strikingly similar in pattern or so distinct in method of operation to the current allegations as to be a signature.

Senator Terry Bruce and Representative Raj Goyle appeared in support of the bill in the House Committee. An Assistant Solicitor General, Kris Ailslieger, also spoke in favor of the bill. There was no opposition to the bill in the House Committee.

Ann Swegle, Deputy District Attorney, Eighteenth Judicial District, and also representing the Kansas County and District Attorneys Association, submitted neutral written comments on the bill.

The House Judiciary Committee amended the bill to:

- Include the provision under which evidence could not be limited regarding prior bad acts;
- Insert the sexual gratification provision;
- Insert the provision regarding exposing another person to a life-threatening communicable disease;
- Add incest to the list of proscribed conduct;

- Add aggravated incest to the list of proscribed conduct;
- Add federal or other state, city, or county offenses to the list of sexual misconduct;
- Add the sexual gratification component of aggravated trafficking;
- Change the effective date to publication in the *Kansas Register*; and
- Make certain technical and clarifying changes.

Senator Terry Bruce and Representative Raj Goyle appeared in support of the bill in the Senate Committee. Kris Ailslieger, Assistant Solicitor General; and Christine Ladner, Chief Deputy Shawnee County District Attorney on behalf of the Kansas County and District Attorneys Association also spoke in favor of the bill.

Tom Barte, Kansas Association of Criminal Defense Lawyers appeared before the Senate Committee in opposition to the bill.

The Senate Committee amended the bill to:

- Clarify that in a criminal action where a defendant is accused of a crime other than a sex offense as specified in the bill, evidence of a prior crime would be admissible to show the mode of operation is so similar that it is reasonable for a finder of fact to conclude the same individual committed both acts;
- Clarify that in a criminal action where a defendant is accused of a sex offense as specified in the bill, evidence of a prior act or sexual misconduct would be admissible if it is relevant and probative, i.e., tending to prove or actually proving a fact; and

- Add a severability clause to the bill.

The fiscal note on the original bill indicated that HB 2250 has the potential for increasing litigation in the courts because of the new violation created by the bill. If it does, the Office of Judicial Administration indicates that there would be a fiscal effect on the operations of the court system. However, it is not possible to predict the number of additional court cases that would arise or how complex and time-consuming they would be. Therefore, a precise fiscal effect cannot be determined. In any case, the fiscal effect would most likely be accommodated within the existing schedule of court cases and would not require additional resources. Any fiscal effect resulting from the enactment of this bill has not been included in *The FY 2010 Governor's Budget Report*.

Kansas Fraudulent Claims Act; habeas corpus; evidence of prior acts