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## Judiciary

### O-1 Tort Claims Act

#### Background

The enactment of the Kansas Tort Claims Act (KTCA) in 1979 ended more than a decade of sparring between the judicial and legislative branches of state government over the issue of governmental immunity. The Kansas Supreme Court rendered five decisions between 1969 and 1979 on the issue of governmental immunity, four of which abrogated governmental immunity, either partially or completely. Several of these court opinions were countered or negated by legislative action reestablishing governmental immunity either for the state or for municipalities.

One legal commentator noted after the passage of the KTCA in 1979 that the Act was “so sweeping” that old rules of immunity and liability did not apply.

#### Scope of Liability

The KTCA incorporates an “open-ended” approach, where liability is the rule and immunity is the exception. KSA 75-6103(a) provides “subject to the limitations of the act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable . . . .”

It is clear the law covers acts of negligence. Plaintiffs also have asserted a variety of other tort actions under this law including, among others: defamation, invasion of privacy, abuse of process, malicious prosecution, trespass, and nuisance.

#### Cap on Damages—\$500,000

The KTCA contains a \$500,000 cap on damage awards for any number of claims arising out of a single occurrence or accident (KSA 75-6105(a)). When the amount awarded or settled on involves multiple claimants and exceeds the statutory cap, then any party may apply to the district court for apportionment in proportion to the ratio of the award or settlement to the aggregate awards and settlements. See KSA 75-6105(b). The \$500,000 cap is waived where the governmental entity has

purchased insurance or has entered into a pooling arrangement which provides coverage exceeding this \$500,000 liability limit. See KSA 75-6111.

### **What Governmental Entities Are Covered?**

The Act lists those government entities it covers, including:

- The State (KSA 75-6102(c)):
  - The State of Kansas;
  - Any department or branch of state government; or
  - Any agency, authority, institution, or other instrumentality thereof.
- Municipalities (KSA 75-6102(c)):
  - Counties;
  - Townships;
  - Cities;
  - School districts;
  - Other political or taxing subdivisions of the state; or
  - Any agency, authority, institution, or other instrumentality thereof.

### **What Employees Are Covered?**

The Act defines “employee” to include the following:

- Any officer, employee, servant, or member of a board, commission, committee, division, department, branch, or council of a governmental entity, including the following:
  - Elected or appointed officials;
  - Persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation (the Kansas Supreme Court has held the members of a local Jaycees, Inc. organization administering a city softball league were considered city employees); and
- Charitable health care providers, as defined in KSA 75-6102(e).
- Any steward or racing judge appointed pursuant to KSA 74-8818, regardless of whether the services of such steward or racing judge are rendered pursuant to contract as an independent contractor.
- Employees of the U.S. Marshals Service engaged in the transportation of inmates on behalf of the Secretary of Corrections.
- Employees of a nonprofit independent contractor, other than a municipality, under contract to provide educational or vocational training to inmates in the custody of the Secretary of Corrections and who are engaged in providing such service (so long as the employees do not otherwise have coverage for such acts and omissions).
- Employees or volunteers of a nonprofit program, other than a municipality, who have contracted with the Commissioner of Juvenile Justice or another nonprofit program that has contracted with the Commissioner of Juvenile Justice to provide a juvenile justice program for juvenile offenders in a judicial district (so long as the employees or volunteers do not otherwise have coverage for such acts and omissions).
- An employee of an indigent health care clinic, as defined in KSA 75-6102(g).
- Former employees for acts and omissions within the scope of employment during their former employment with the governmental entity.
- Any member of a regional medical emergency response team, created under the provisions of KSA 48-928 in connection with authorized training or upon activation for an emergency response.

- Medical students enrolled at the University of Kansas Medical Center who are in clinical training, on or after July 1, 2008, at the University of Kansas Medical Center or at another health care institution.

Note: Independent contractors, except as noted above, are excluded from the definition of employee.

## Key Immunity Provisions

Presently, there are 24 different exceptions to liability that are listed in the basic immunity section of the KTCA (KSA 75-6104) compared to 15 exceptions in the original Act. The immunity provisions apply equally to a governmental entity or to an employee acting within the scope of employment. There are, however, four key exceptions to liability, i.e., legislative function, judicial function, enforcement of the law, and discretionary function. See KSA 75-6104(a)-(c) and (e). These exceptions are the most important, and arguably are broad enough to encompass most of the other, more specific exemptions. They codify the traditional notion that it cannot be a tort for government to govern. The additional exemptions, arguably, are codified primarily to give the courts direction in applying the four general exceptions, as the Act does not contain definitions of several key terms, e.g., “discretion,” in these basic exceptions.

### Key Immunity Provisions

- Legislative Functions (KSA 75-6104(a)). The exemption covers “legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution.” You cannot sue a city for failure to enact a noise ordinance or, on the other hand, sue the city for adopting a ban on smoking in public places.
- Judicial Functions (KSA 75-6104(b)). The second exception provides immunity for government entities and employees exercising judicial functions. You cannot sue a judge for wrongly deciding your civil lawsuit.

- Enforcement of a Law (KSA 75-6104(c)). This exception immunizes actions that involve the “enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, rule and regulation, ordinance, or resolution.” You cannot sue a county for failing to enforce its speed limits on county roads.
- Discretionary Functions (KSA 75-6104(e)). This exception covers “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee whether or not the discretion is abused and regardless of the level of discretion involved.”

The discretionary exception from liability is the single most encompassing immunity provision of the KTCA. It provides the broadest scope of immunity of any of the 25 exceptions. Further, many of the other KTCA exceptions contain a discretionary ingredient. A classic example of discretionary function exception is illustrated by the case of *Robertson v. City of Topeka*, 231 Kan. 358, 644 P.2d 458 (1982), which found the actions of police officers who removed a homeowner from his own property but allowed another intoxicated individual to remain on the premises, who then burned the house, fell within the discretionary function exception. The court said that absent guidelines, which would be virtually impossible to formulate in anticipation of every situation an officer might encounter, police officers should be vested with the necessary discretionary authority to act without the threat of potentially large tort judgments against their employers.

### Notice of Claims Against Municipalities— Not the State

KSA 12-105b(d) requires that a notice of claim be filed with the clerk or governing body prior to the filing of a claim against a municipality defined basically as any unit of local government. The notice of claim law does not apply to the state and its agencies.

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