Kansas Rules of Civil Procedure
Key Statutory and Case Law Developments

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Overview
1. Federal Rules Amendments
2. U.S. Supreme Court Opinions of Note
3. Kansas Chapter 60 Statutory Amendments
4. Kansas Civil Procedure Cases
1. Federal Rules Amendments

- Fed. R. Civ. P. 77, dealing with hours of operation, was amended to clean up cross-references to R. 6.

1. Pending Federal Rules Amendments

- Three broad sets of Rules changes likely to come into effect this December
  - Eliminating Rule 84 and the official forms following therewith
  - Reforms concerning evidentiary spoliation under R. 37(e)
  - Numerous reforms stemming from the 2010 conference at Duke university
- These amendments are through the advisory committee, before the standing committee, and highly likely to be promulgated by the Supreme Court this fall, with congressional approval likely in December.
1. Pending Federal Rules Amendments

- Proposed Rule 37(e).
  - Current Rule 37(e) provides protection against sanctions “under these rules” for loss of electronically stored information due to the “routine, good-faith operation of an electronic information system.” But litigation holds are not directly addressed.
  - Proposed Rule 37(e) preferences curative measures over sanctions.
  - It makes it clear that — in all but very exceptional cases in which failure to preserve “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation” — sanctions (as opposed to curative measures) could be employed only if the court finds that the failure to preserve was willful or in bad faith, and that it caused substantial prejudice in the litigation.

- Alter Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.

- They form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May 2010.

- Participants urged the need for
  - Early, active judicial case management;
  - Proportionality in using procedural tools, most particularly discovery;
  - and increased cooperation.
2. SCOTUS Opinions

  » Facts: Wrongful seizure of property in GA of NV residents’ cash.
  » Issue: P.J. in NV?
  » Holding: No. (1) Only the defendant’s contacts with the forum state—not those of the plaintiff or third parties—may be considered as part of the International Shoe contacts analysis.
  » (2) Defendant’s contacts must be with the forum state itself, not merely with a person who resides in the forum state.

• Admission of Juror Evidence per FRE 606(b); Warger v. Shauers, 135 S.Ct. 521 (2014).
  » Facts: After verdict, juror proffers fellow juror lied in voir dire.
  » Issue: Is the proffer admissible as part of a JNOV/new trial motion?
  » Holding: No. Plain language of 606(b) provides that juror testimony regarding what occurred in a jury room is inadmissible “[d]uring an inquiry into the validity of a verdict.”
  » Limited applicability to KS R. Evid. KSA 60-444 by its plain text offers a wider scope for the taking of juror evidence than does the federal rule. “This article shall not be construed to (a) exempt a juror from testifying as a witness to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment . . .”
2. SCOTUS Opinions

• Pleadings, Johnson v. City of Shelby, 135 S.Ct. 346 (2014)
  » Facts: Police bring retaliation claim against city council members.
  » Issue: Must a complaint affirmatively state the legal theory upon which plaintiffs rely?
  » Holding: No. An express statement of a legal theory is not needed in the complaint to survive a motion to dismiss.
  » Interesting implication for Twombly/Iqbal line of cases and the “plausibility standard,” by cabining this standard to factual allegations only.

  » Facts: Class action D in Kansas seeks removal under CAFA.
  » Issue: Must the removal notice be coupled with evidence of CAFA amount in controversy?
  » Holding: No. Removal notices under CAFA governed by FRCP 8(a) and Twombly/Iqbal. D need only make plausible allegation re amount in controversy. Evidence to support the allegation is not required.
2. SCOTUS Opinions

  » Holding: The Federal Tort Claims Act, which provides that a tort claim against the United States "shall be forever barred" unless it is presented to the appropriate federal agency for administrative review within two years after the claim accrues and, if it is denied, the claimant files suit in federal court within six months of the denial, are subject to equitable tolling.

  » Holding: An order denying confirmation of a bankruptcy plan is not appealable when debtor retains the ability to introduce a new plan to the bankruptcy court, because it is not a final order.
2. SCOTUS Opinions

  » Holding: When a district court dismisses the only claim in a case that has been consolidated with other actions for pretrial proceedings in multidistrict litigation, the district court’s order is a final, and therefore appealable order, even if other claims remain in other actions which were included in the MDL.

- Pending Habeas Corpus; Davis v. Ayala, No. 13-1428 [argued Mar. 3, 2015]
  » Issues: (1) Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an "adjudicat[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision;
  » and (2) whether the Court of Appeals properly applied the standard articulated in Brecht v. Abrahamson.
2. SCOTUS Opinions

• Pending Confrontation Clause; Ohio v. Clark, No. 13-1352 [argued Mar. 2, 2015]
  » Issues: (1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause;
  » and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as “testimonial” statements subject to the Confrontation Clause.

3. Kansas Statutory Amendments

• KSA 60-456; Expert Witness Rule Changed to Adopt Daubert Standard
  (b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if:
    (1) The testimony is based on sufficient facts or data;
    (2) the testimony is the product of reliable principles and methods; and
    (3) the witness has reliably applied the principles and methods to the facts of the case.
3. Kansas Statutory Amendments

• Daubert Test
  » SCOTUS rejects Frye’s “generally accepted in the scientific community” test.
  » Intended when written to be more permissive in admitting expert testimony, but has become a much more rigorous test. Rule in Federal Courts and most states.
  » Court as gatekeeper, 2-part test

  **Relevance**
  1. Empirical testing
  2. Peer review and publication
  3. Error rate
  4. Standards and controls
  5. Generally accepted by scientific community.

  **Reliability**

• Daubert Standard
  » Under federal practice, not limited to just scientific matters.
  » All experts are subject to the Daubert test. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
  » This would prima facie appear to be the rule under the Kansas amendment.
3. Kansas Statutory Amendments

- Daubert Hearings
- KSA 60-457 & 458 also amended to facilitate pre-trial hearings of expert witnesses and use by experts of background facts prevalent in the field.
- In particular, 60-457(b): “upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the witness's testimony satisfies the requirements of subsection (b) of K.S.A. 60-456.” No federal analogue.
  » It is at least an open question whether counsel may still voir dire a putative expert witness at trial or whether the failure to call a pre-trial hearing waives objection to status as an expert.

3. Pending Kansas Statutory Amendments

- HB 2005. Passed the Senate. In Conference committee, seems likely to pass.
- Cuts several provisions that had placed one-year time limits on the ability of the courts to charge fees for garnishment proceedings et. al.
- The ill-fated charge for filing a summary judgment motion, in 60-256(h), is repealed by HB 2005. But wait .....
3. Pending Kansas Statutory Amendments

HB 2005 Sec. 4.

(a) On and after the effective date of this act, any party filing a dispositive motion shall pay a fee in the amount of $195 to the clerk of the district court. A poverty affidavit may be filed in lieu of payment of such fee, as established in K.S.A. 60-2001, and amendments thereto. The fee shall be disbursed in accordance with K.S.A. 20-362, and amendments thereto. The fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect such fee. Such fee shall be an item allowable as a cost pursuant to K.S.A. 60-2003, and amendments thereto.

(b) As used in this section, "dispositive motion" means a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment or partial summary judgment or a motion for judgment as a matter of law. "Dispositive motion" also shall include any motion determined by a judge to be seeking any disposition described in this subsection, regardless of the title assigned to such motion at the time of filing.

(c) The state of Kansas and all municipalities in this state, as defined in K.S.A. 12-105a, and amendments thereto, shall be exempt from paying such fee.

(d) The provisions of this section shall not apply to an action pursuant to the code of civil procedure for limited actions.

(e) This section shall be part of and supplemental to the code of civil procedure.
4. Kansas Procedure Opinions

  - A class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. The district court granted summary judgment after 12 years of discovery and motion practice, holding that the complaint only spoke to wholesale price fixing, a claim not supported with sufficient evidence.

- Holdings from Smith v. Phillip Morris
  - 60-208: On appeal, plaintiffs contended that their complaint reached non-price-fixing conspiracies as well and that Kansas law did not support summary judgment as to the wholesale claims. Affirming, the court of appeals held that a petition is not intended to govern the entire course of the case. In fact, the nature of the claims presented in some cases may not be clear merely from the pleadings, requiring the courts to look to other filings in the case to fully elaborate the range of the claims and defenses made. Nevertheless the district court in this case fairly limited the complaint to wholesale price fixing given that (1) the first amended petition focused solely on allegations of conspiratorial price-fixing by defendants and (2) the notice of class certification was limited to wholesale price fixing solely.
4. Kansas Procedure Opinions

• Holdings from Smith v. Phillip Morris
  » 60-215: Plaintiffs then moved to amend, which by now was more than 10 years after they filed their first amended petition. Their motion followed on the heels of the trial judge’s ruling that plaintiffs had raised but a single claim for a wholesale price-fixing conspiracy. The motion was denied. The court of appeals affirmed. The court noted that the Kansas supreme court has recognized at least five valid justifications for denying a motion to amend a pleading: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. In this case, the motion to amend was in violation of all of these reasons, excepting number 3.

• Holdings from Smith v. Phillip Morris
  » 60-223: Further, the court emphasized that how claims are defined at the class certification stage is critical to satisfy due process requirements. Thus the court concluded that while principles of notice pleading control at the pleading stage, a plaintiff must necessarily more closely define the claim or claims when seeking class certification. Such definiteness serves to properly define the class, to determine whether the filing plaintiff is a proper class representative, to define the question on which class certification is sought, and to adequately inform potential class members of what claim or claims are involved so they can determine whether to opt out of class membership as provided under 60–223(c)(2). Moreover, if the plaintiffs materially alter the claims or relief sought in the certification order, as is allowed under 60-223(c)(1)(C), amended notice must be sent to the class.
4. Kansas Procedure Opinions

• Holdings from Smith v. Phillip Morris
  » 60-255: Defendants, in a class action suit that had gone on for over a decade, responded to a set of partial motions for summary judgment with a motion to “defer briefing.” Believing these not a sufficient response, plaintiff class moved for default judgment for $7.5 billion. The district court declined to grant summary judgment, holding that while not perfect defendant's motion is best construed as a motion under 256(f) and that default judgments are not favored. The court of appeals affirmed.
  » 60-256: Affirming, the court of appeals held that in a Kansas Restraint of Trade Act case to establish a material question of fact and thereby survive summary judgment, plaintiffs must come forward with evidence that Defendants' wholesale pricing practices resulted from something more than legal conscious parallelism.

• KSA 60-211
  » The failure to sign a notice of appeal, as required by K.S.A. 60-211(a), does not deprive the Kansas Court of Tax Appeals of jurisdiction. In Protest of Lyerla, 336 P.3d 882 (Kan. App. 2014).
4. Kansas Procedure Opinions

• KSA 60-217
  » The asset manager for the owner of an apartment complex, Curo Enterprises, brought an action to remove Dunes Residential Services, Inc. as the property manager. The owner of the apartment complex was never formally listed as a party. Following Dune’s resignation on eve of trial and settlement, Curo sought attorney’s fees pursuant to the management agreement between the complex owner and Dune. The district court denied the fee request.
  » Reversing, the court of appeals held that, by contract, Curo was both an agent of the owner and a third-party beneficiary of the management agreement. The court ruled that despite the fact that it sued Dune in Curo’s name and not the owner’s name, in violation of K.S.A. 60-217(a)(1), the case need not be dismissed. “The purpose of the real party in interest rule is to protect a defendant from being repeatedly harassed by a multiplicity of suits for the same cause of action so that if a judgment be obtained it is a full, final and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party.” Curo Enterprises, 342 P.3d at 954 (internal quotations and citations omitted). In this case, it was clear to all parties, including the defendant Dunes, that Curo was acting solely on behalf of the owner. Dunes itself treated Curo as the owner’s agent throughout the dispute. As such, Curo functioned as the agent for the real party in interest for purposes of 60-217.

• K.S.A. 60-225
  » In Hollister v. Heathman, 344 P.3d 390 (Kan. App. 2015), former client brought legal malpractice action against his former attorney pro se. The client died while the case was pending. The former attorney filed a “Suggestion of Death” pursuant to 60-225(a)(1). The former attorney served notice of the suggestion of death on the decedent’s wife, who was a non-party, by delivery to wife’s former attorney. The wife’s former attorney was not then representing the wife or her late husband in any manner. The Court of Appeals held that such service of a non-party violated 60-225(a)(3), which requires that notice of a suggestion of death to a non-party be served like a summons pursuant to 60-303 and 60-304. Moreover, the court stated in what is dicta, that if the wife had been a party, including the defendant Dunes, that Curo was acting solely on behalf of the owner. Dunes itself treated Curo as the owner’s agent throughout the dispute. As such, Curo functioned as the agent for the real party in interest for purposes of 60-225.
4. Kansas Procedure Opinions

- **K.S.A. 60-254**
  - In *Garcia v. Ball*, 50 Kan. App. 2d 197, 323 P.3d 872 (2014), the plaintiff sued his former attorney for malpractice, seeking over $500,000. The former attorney failed to answer the complaint for more than 4 months. The plaintiff then requested, and was awarded, a default judgment under K.S.A. 60-254. The defendant attorney moved the district court to set aside the default judgment, claiming excusable neglect pursuant to 60-260(b)(1) or for "any other reason" under 60-260(b)(6). The motion to set aside the default did not, however, provide any factual basis to support the defendant’s excusable-neglect claim. Nevertheless, the district court granted that motion. On appeal, the appellate court held first that 60-260(b)(6) was not an available grounds for relief because “when a party’s claim for relief is covered by subsection (b)(1), the catch-all provision of subsection (b)(6) does not apply.” Id. at 201. Second, the court ruled that the trial court abused its discretion in setting aside the default judgment because the defendant’s motion “failed either to explain what facts constituted excusable neglect or to provide any evidence to support that claim.” Id. at 197. Judge Pierron dissented. He acknowledged that the delay in answering was not excusable. Nevertheless, he concluded that the trial court did not abuse its discretion here because the delay could have been inadvertent within the meaning of 60-260(b)(1), falls within the catch-all provision of 60-260(b)(6), and that good policy preferences decisions on the merits over default judgments.

- **K.S.A. 60-303**
  - In *Hollister v. Heathman*, 344 P.3d 390 (Kan. App. 2015), the court held that service of notice of suggestion of death upon a non-party must comply with the rules for service of a summons under 60-303 and 60-304.
4. Kansas Procedure Opinions

• Service by Facebook?
  » Given the rise of social media, some courts are beginning to explore whether service by social media may constitute service by publication, or by “other means.” For example, a New York trial court in a divorce case allowed service by Facebook of an out-of-state defendant who was otherwise impossible to locate. See Baidoo v. Blood-Dzraku, 2015 NY Slip Op. 25096 (Sup. Ct. New York County Mar. 27, 2015). Whether this same means of service complies with Kansas law will likely be a question of importance soon.

All Done!

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