SESSION OF 2017

SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR SENATE BILL NO. 120

As Recommended by House Committee on Judiciary

Brief*

House Sub. for SB 120 would amend the Kansas Code of Civil Procedure. The bill would provide the Code shall be employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. The law currently requires the Code to be liberally construed and administered for the same purpose.

The bill would also amend the law granting an additional three days for action after being served *via* certain kinds of service. The bill would clarify it applies to a party "after being served," rather than simply "after service." Additionally, the bill would remove service by fax and electronic service from the list of kinds of service that allow additional time to act.

In the statute listing matters on which the court must take appropriate action at a case management conference, the bill would add issues related to preservation of electronically stored information (ESI). Additionally, in determining issues related to claims of privilege or protection as trial-preparation material, the bill would require consideration of agreements made under state law controlling the effect of disclosure of information covered by the attorney-client privilege or work-product protection.

The bill would make several amendments to the statute governing discovery. Specifically, the bill would amend the scope of discovery to be any nonprivileged matter relevant to

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*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at http://www.kslegislature.org

any party's claim or defense and would revise language allowing courts to limit the scope of discovery based on the needs of the case considering the importance of the issues at stake; the amount in controversy; the parties' resources and relative access to relevant information; the importance of discovery in resolving the issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit. The bill would provide information need not be admissible if it falls within this scope of discovery. This language would replace current law defining the scope of discovery to include any nonprivileged matter relevant to the subject matter involved in the action, including the existence, description, nature, custody, condition, and location of any documents or other tangible things; the identity and location of persons who know of any discoverable matter; and inadmissible information if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

The bill would amend the subsection of the discovery statute governing protective orders to allow the court to specify in the order the allocation of expenses for disclosure or discovery. In another subsection, the bill would allow parties to stipulate to the sequence of discovery.

In the statute governing requests parties may serve on each other, the bill would amend the subsection concerning responses to require the response to state with specificity the grounds for objecting to the request. Further, the responding party could state it will produce copies of documents or of ESI instead of permitting inspection. The bill would then require production to be complete no later than the time for inspection specified in the request or another reasonable time specified in the response. In another subsection, the bill would require objections to state whether any responsive materials are being withheld on the basis of that objection.

The bill would amend the statute concerning failure to comply with disclosure or discovery to allow a motion to compel disclosure if a party fails to produce documents. Additionally, the bill would replace language concerning

sanctions when a party fails to preserve ESI with language outlining the courts options when ESI that should have been preserved in anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it and it cannot be restored or replaced. After making certain findings, the bill would allow the court to presume the information lost was unfavorable to the party, instruct the jury to presume the information lost was unfavorable to the party, or dismiss the action or enter a default judgment.

Concerning when a default judgment can be set aside, the bill would specify the court may set aside a "final" default judgment pursuant to current statutory provisions concerning relief from a final judgment, order, or proceeding and judgments entered on service by publication in a newspaper.

Finally, the bill would make technical amendments and would repeal KSA 2016 Supp. 60-268, which states forms provided by the Judicial Council suffice under the Code and illustrate the simplicity and brevity the Code contemplates.

Background

SB 120

As introduced and recommended by the Senate Committee on Judiciary and heard by the House Committee on Judiciary, SB 120 would have updated references to the Federal Securities Act.

The House Committee on Judiciary added the contents of SB 120 to SB 23, regarding the Office of the Securities Commissioner and prosecution of fraud and abuse, and recommended a substitute bill for SB 120 containing the original contents of SB 13, updating the Code. Further background information regarding SB 13 is provided below.

No fiscal note was available for the substitute bill at the time of the House Committee action. Fiscal note information for SB 13 is provided below.

SB 13

SB 13 was introduced at the request of the Kansas Judicial Council. At the Senate and House Committees on Judiciary hearings, a representative of the Judicial Council explained the amendments in the bill mirror changes made to the Federal Rules of Civil Procedure upon which the Kansas Code of Civil Procedure is based, which allows uniformity of practice in state and federal courts in Kansas and reliance on interpretation and analysis of the federal rules in construing the corresponding Kansas provisions. Additionally, the representative explained the federal rule comparable to KSA 2016 Supp. 60-268 was deleted as most of these forms are obsolete, and while the Judicial Council will maintain the forms on their website, the statute was found to no longer be necessary. No other testimony was provided.

According to the fiscal note prepared by the Division of the Budget, enactment of SB 13 would have a negligible impact on the Judicial Branch.