

House Committee on Federal and State Affairs

February 11, 2021

House Bill 2224

Written Testimony of Kansas Association of Criminal Defense Lawyers

Opponent

Dear Chairman Barker and Members of the Committee:

The Kansas Association of Criminal Defense Lawyers supports curbing the spread of COVID-19 and other infectious diseases. However, the potential effect of HB 2224 goes beyond the scope that the statute originally entailed and vastly broadens liability. In Part A we will discuss the issues in ordering restitution for someone who is merely arrested for a crime. In Part B of this testimony we will expand on the issues in broadening the definition of “infectious diseases” in this manner.

A: HB 2224 Allows Restitution Without a Finding of Guilt

Restitution is a mechanism for a person convicted of a crime to reimburse the victim for the pecuniary effects of the crime. In most cases, this is done by paying for damages to property or for lost or stolen property. The court finds the person guilty either by trial or by plea agreement or some finding of responsibility. HB2224 however provides that a person “arrested or convicted”¹ shall be ordered to pay restitution not to the victim but to KDHE. The closest analogue is the KBI lab fee in K.S.A. 28-176. In pertinent part the law provides:

“The court shall order **any person convicted or diverted, or adjudicated or diverted under a preadjudication program** ... of a misdemeanor or felony contained in chapters 21, 41 or 65 of the Kansas Statutes Annotated, and amendments thereto, or a violation of K.S.A. 8-2,144 or 8-1567, and amendments thereto, or a violation of a municipal ordinance or county resolution prohibiting the acts prohibited by such statutes, unless the municipality or county has an agreement with the laboratory providing services that **sets a restitution amount to be paid by the person that is directly related to the cost of laboratory services, to pay a separate court cost of \$400 for every individual offense** if forensic science or laboratory services or forensic computer examination services are provided, in connection with the investigation...” (emphasis added).

The KBI Lab fee requires a conviction, diversion or adjudication not merely an arrest. As currently written, a person can be wholly acquitted of a crime and still be responsible for paying for a test regardless of their culpability or lack thereof.

Finally, there is no statutorily defined limit on how many tests may be ran and how much this will cost the accused. The cost of laboratory tests for infectious diseases may vary.

¹ HB 2224 Page 3 Line 24

B: HB 2224 Does Not Adequately Define Infectious Disease

The statute as originally written applied to two viruses. HIV and Hepatitis B. Both Viruses are transmitted by blood, semen, or other bodily fluids. In both cases, the viruses are also marked by their long term health complications and the ability to intervene during the lengthy incubation period. Notice to the victim of a potential exposure and getting timely access to prophylactic antiviral medication has been shown to vastly limit the effect or minimize the risk of an infection.

HB 2224 vastly expands the definition of “infectious disease” from HIV and Hepatitis B to include “those diseases designated by the secretary through rules and regulations adopted pursuant to K.S.A. 65-128, and amendments thereto, as infectious or contagious in their nature.”² K.S.A 65-128 gives the Secretary of Health and Environment the authority to “designate such diseases as are infectious or contagious in their nature.”³

One such regulation, KAR 28-1-1 defines infectious or contagious disease as having the meaning specified in K.S.A. 65-116a which in turn refers to the definition in K.S.A. 65-128 which leads to a cyclical non-definition.

KAR 28-1-2 could be used as a definition for infectious disease as it has a list of diseases with reporting requirements. The definition includes:

- Anthrax
- Botulism
- Cholera
- Diphtheria
- Measles
- Meningococcal disease
- Mumps
- Novel influenza A virus infection
- Plague (*Yersinia pestis*)
- Poliovirus
- Rabies, human
- Rubella
- Severe acute respiratory syndrome associated coronavirus (SARS-CoV)
- Smallpox
- Tetanus
- Tuberculosis
- Vaccinia, postvaccination infection or secondary transmission
- Viral hemorrhagic fevers including:
 - Ebola
 - Marburg virus
 - Crimean-Congo hemorrhagic fever
 - Lassa virus
 - Lujo Virus
 - Any of the new world arena viruses
- **Any exotic or newly recognized disease**

This first definition is vague — simultaneously all encompassing and undefined. It allows changes to the effect of this statute without any action by the legislature. This would require the charging prosecutor to check the KDHE regulations whenever there is an inkling that the arrestee could have a communicable disease. The second is too wide spread. It does cover many communicable and dangerous diseases but also covers diseases where someone may not have visible symptoms or may inadvertently publish that they are unvaccinated.

Due to the ever changing nature of viruses and the non-legal goals of KDHE, there are due process issues involved in defining “infectious diseases” in this way. Procedural due process requires notice and opportunity to be heard. These vague definitions do not provide adequate notice to a person that they may be required to pay restitution for infectious disease testing.

² HB 2224 Page 2 Lines 8-10

³ KSA 65-128(a)

Many diseases included in the KAR 22-1-2 definition are not spread by bodily fluids but are airborne. Coronavirus is transmitted by infinitesimally tiny droplets suspended in the air. If someone is arrested while coughing will the court order them to be tested for every conceivable virus? Will this encourage the Orwellian response of requiring everyone arrested to be tested? Will we then charge everyone arrested for the tests?

Conclusion:

KACDL opposes HB 2224 as currently written. It has a vague definition of what is considered an “infectious disease” which does not give adequate notice. It currently applies to people merely arrested for a crime and requires restitution without a conviction. KACDL could support HB 2224 if the following changes were made.

1. A finding of guilt or other adjudication of culpability must be required before restitution can be ordered.
2. The amount of restitution should be fixed and limited to the number of offenses, not the number of tests run.
3. Adequate notice of what diseases are included in HB 2224 must be provided. Either in the text of the statute or by regulation.
4. New diseases must be added to the bill or regulation not merely included in the residual clause.
5. Restitution should only be ordered if there is a finding of need for the testing. A proposed finding of need could be: (1) that chronic and debilitating injury may result and (2) early intervention and testing would mitigate or prevent such chronic and debilitating injury.

Thank you for your consideration,

Max Iverson
Kansas Association of Criminal Defense Lawyers
max.iverson@icloud.com