

John C. Frieden\*  
Michael J. Unrein  
Randall J. Forbes\*  
Kevin M. Fowler



Brenda L. Head  
Matthew R. Bergmann  
Timothy D. Resner

1414 SW Ashworth Place, Suite 201 • Topeka, Kansas 66604 • [www.fuflaw.com](http://www.fuflaw.com)  
Tel: 785-354-1100 • Toll Free: 888-293-4916 • Fax: 785-354-1113

\*Also admitted in Missouri

[kfowler@fuflaw.com](mailto:kfowler@fuflaw.com)

**TESTIMONY OF KEVIN M. FOWLER IN OPPOSITION TO SB 455**  
**SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS**  
**APRIL 4, 2018**

Dear Chair Estes and Members of the Committee:

My name is Kevin Fowler and I am an attorney with the Topeka law firm of Frieden, Unrein & Forbes, LLP. I represent and appear on behalf of the managers of the Kansas Star Casino, Mulvane, Kansas (“Kansas Star”), the Boot Hill Casino & Resort, Dodge City, Kansas (“Boot Hill”), and the Kansas Crossing Casino, Pittsburg, Kansas (“Kansas Crossing”) (collectively “casinos”) in opposition to SB 455 (the “Bill”).

If current federal prohibitions against sports wagering are overturned by judicial or legislative action, my clients would welcome the opportunity to assist the Kansas Lottery in making state-owned and –operated sports wagering activities available to the gaming public under an appropriate regulatory framework modeled after the legislation recently enacted by the State of West Virginia. HB 2793, which was introduced and referred to the House Committee on Federal and State Affairs on March 28, 2018, merits your consideration since it follows the West Virginia model and incorporates best practices from the State of Nevada. However, the casinos are strongly opposed to SB 455.

As anyone who has filled out an NCAA basketball tournament bracket well knows, the outcome of sporting events involve elements of chance. Consequently, the Kansas Constitution prohibits any wagering on such sporting events within our borders (*see* KAN. CONST., art. 15, § 3) unless the activity is owned and operated by the State (*see id.*, art. 15, Article 15, § 3c). Although we have not had an opportunity to fully evaluate SB 455, it is not clear that the bill contains “substantial indicia of ownership by the state and concomitant operation” required to survive constitutional scrutiny under *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 570-571, 186 P.3d 183 (2008). While we have serious misgivings about the constitutionality of SB 455, we would harbor no such concerns if the Kansas Lottery was authorized to own and operate sports wagering activities under the sports wagering framework proposed in HB 2793.

**TESTIMONY OF KEVIN M. FOWLER IN OPPOSITION TO SB 455**  
**April 4, 2018 - Page 2 of 3**

SB 455 authorizes the Kansas Lottery to offer sports wagering through every lottery retailer in this State which signs an agreement to do so. Such authorization virtually guarantees that sports wagering will be available in every corner of the State that lottery tickets are sold, including convenience stores, grocery stores and similar retail locations (*See, e.g.*, New Section 1(b)(2)).

New Section 6 of the Bill requires each sports wagering operator to remit, as a so-called “sport betting right and integrity fee,” an amount equal to .25% of all amounts wagered to each sports governing body with authority over a sporting event on which bets were placed in the preceding quarter. Since the principal proponents of this Bill (*i.e.*, the major professional sports leagues: MLB, NFL, NBA) do not have any discernible presence in Kansas and have not made any significant investments in our economy, it is difficult to identify any reasonable justification for this mandatory exaction. The right to engage in otherwise lawful sports wagering in this State does not depend on permission from such out-of-state special interests and other states, such as Nevada and West Virginia, have refused to impose any such fees.

Each major professional sports league is a multi-billion dollar industry which must already maintain the integrity of its sporting events for economic reasons wholly unrelated to sports wagering (*e.g.*, ticket sales, broadcast revenues, merchandise sales and endorsements). Moreover, Section 13(a)(15)(D) of the Bill (p. 20, lns. 18-19) provides the Lottery Commission with rulemaking authority and responsibility for “ensuring the integrity of sports wagering conducted in this state.” It accordingly appears that the so-called “integrity fee” is an unwarranted giveaway to out-of-state major professional sports leagues which should be stricken from the Bill.

Under the rubric of “official league data” for determining the result of tier two wagers, Section 3(f) of the Bill inexplicably and unjustifiably grants each sports governing body monopoly authority to control and dictate the use of such otherwise readily available public information and data, provided that the sports wagering operator can also purchase a live feed of such “official league data” from the league. Because data is readily available in the public domain at present and derives no value from its secrecy, “official league data” is not confidential or proprietary under Kansas law and it should not be placed under the exclusive control of any sports governing body. The definition of “official league data” in Section 12(v) (p. 16, lns 49-43) makes it clear that professional leagues also intend to further monetize access to such public information through contracts with third-parties. These aspects of the Bill appear solely to generate additional revenue for each sports governing body in addition to the mandatory integrity fee.

The definitions of “sports wagering” (Section 12(ii), pp. 17-18, lns. 43-8), “Tier one sports wager” (Section 12(mm), p. 18, lns. 19-21 ) and “Tier two sports wager” (Section 12(nn), p. 18, lns. 22-23) do not require the placement of wagers prior to the start or finish of a sporting event and they do not prohibit wagering based on the results and/or statistics associated with completed sporting events. The Bill should be amended to make clear that

**TESTIMONY OF KEVIN M. FOWLER IN OPPOSITION TO SB 455**

**April 4, 2018 - Page 3 of 3**

no form of sports wagering shall be permitted based on the results or statistics of previously completed sporting events and/or participants. Otherwise, SB 455 could be improperly interpreted and applied to authorize an expansion of gaming in violation of the Kansas Expanded Lottery Act ("KELA") and the contracts of all lottery gaming facility managers.

This Bill is ill-considered and the measure should not be favorably considered as written. Absent substantial amendments that would authorized sports wagering in Kansas through existing casinos and racetrack gaming facilities under a regulatory scheme modeled after West Virginia, this bill should not be passed favorably out of this Committee or enacted into Kansas law.

Thank you for the opportunity to share these comments with you in opposition to SB 455. I will be happy to stand for questions.

Respectfully submitted,



Kevin M. Fowler  
FRIEDEN, UNREIN & FORBES LLP