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TESTIMONY OF REP. JOHN RUBIN IN SUPPORT OF HB 2224 AND HB 2225

BEFORE THE HOUSE JUDICIARY COMMITTEE FEBRUARY 20, 2013

Chairman Kinzer and fellow committee members, I appreciate this opportunity to testify today as a proponent of HB 2164 and HB 2225, alternative legislative fixes to a May 2012 Kansas Supreme Court decision that are urgently needed to protect both Kansas businesses and consumers.

On May 4, 2012, in *O'Brien v. Leegin Creative Leather Products, Inc.*,(2012), the Kansas Supreme Court issued an opinion interpreting the Kansas antitrust law, known as the Kansas Restraint of Trade Act ("KRTA"), K.S.A. 50-101 and following. This Supreme Court decision expressly overruled over 65 years of well-established Kansas case law on which Kansas businesses have heavily relied and under which they have operated. It has the potential of rendering void most business arrangements, agreements and contracts in Kansas, severely disrupting and economically harming a myriad of business operations and activities benefiting Kansas consumers, from agricultural cooperatives and franchise agreements, to heretofore perfectly legal and non-harmful price arrangements between manufacturers and their retailers, territorial agreements, and covenants not to compete. This uncertain business climate has,since last May, and will continue to make Kansas a much less business-friendly state. The *O'Brien* decision literally pulled the rug out from under Kansas businesses.

The KTRA was originally enacted in 1897 to render unlawful and void any combination, arrangement, agreement, contract, trust or understanding between Kansas businesses that restricts trade or commerce, fixes prices, or prevents competition. This is what we commonly understand to be, and what we call, the Kansas antitrust law. It is parallel but not identical to federal antitrust law codified in the Sherman Act and other legislation. And case law interpreting both the state and federal antitrust laws have of course proceeded on separate tracks, in state and federal court, respectively.

Specifically, in Kansas, the KRTA has been interpreted by the courts since 1948 not to prohibit, or render void, almost all kinds of business activity, agreements, arrangements or contracts, as

the *O'Brien* decision has done, but only those that created an unreasonable restraint on trade and were inimical to the public welfare. *Heckard v. Park,* 164, Kan. 216 (1948). As stated in the *Heckard* case: "The real question is never whether there is any restraint of trade, but always whether the restraint is reasonable in view of all the facts and circumstances and whether it is inimical to the public welfare." *Heckard* applied this so-called "reasonableness" standard to hold that an exclusive agency relationship at issue in that case was reasonable and therefore lawful and enforceable, even though such an arrangement was clearly a restraint on the ability to freely engage in business, because it was not harmful to competition under all the circumstances of the case and therefore was not inimical to the public welfare. This "reasonableness" standard was reaffirmed and again applied in *Okerberg v. Crable* to find that a territorial restriction on milk routes was reasonable under the circumstances of that case as not being harmful to the public welfare.

It is this fundamental principle of business fairness in Kansas antitrust law, the so-called "reasonableness" standard – which is similar but not identical to the "rule of reason" standard developed by the federal courts under the Sherman Act -- that was thrown out in its entirety by the *O'Brien* court when it expressly overruled *Heckard* and *Okerberg*. It is this reasonableness standard, on which Kansas businesses have relied for over 65 years, which HB 2224 seeks to reinstate. And the *O'Brien* court has invited us, the Legislature, to do so. It wrote: "There is another, more basic reason not to apply the reasonableness rubric of *Heckard* and *Okerberg* to this price-fixing case: Under the pattern for interpretation of statutes that this court has now firmly established, we are loathe to read unwritten elements into otherwise clear legislative language.... If the legislature had wanted to make such a showing part of an antitrust action, it certainly was capable of doing so. In the absence of the policy message such a legislative addition would send, we have no confidence in the soundness of the *Heckard* language...." I strongly urge the Legislature to send just that message to the Kansas judiciary by explicitly adding into the KRTA the reasonableness standard that has long been the benchmark of Kansas business activity and conduct. This will prevent the voiding pursuant to *O'Brien* of virtually all existing business arrangements, agreements and contracts in Kansas, and the economic uncertainty and damage that would inevitably result.

That is what HB 2224 does. It is similar in intent to 2012 HB 2797 which was introduced on May 10, 2012, and referred to and heard by the House Judiciary Committee. 2012 HB 2797 differed from this year's HB 2224, however, in this respect: it essentially incorporated into the KRTA the construction and interpretation of the "rule of reason" standard established by federal antitrust law under the Sherman Act. Rep. Kinzer, then and now the Chair of the Judiciary Committee, appointed a subcommittee on which I served to study and recommend action on 2012 HB 2797. The subcommittee's work resulted in a report recommending a substitute for 2012 HB 2097, which eliminated the reliance on the Sherman Act as construed and interpreted by the federal courts, and instead proposed amending the KRTA to codify the "reasonableness" standard established by *Heckard* and *Okerberg*. This 2012 Sub. HB 2797, similar in both content and intent to the current HB 2224, was subsequently incorporated into 2012 House Sub. SB 291, passed out of committee, passed out of the House on May 18, 2012, but was never taken up by the Senate before adjournment.

Rep. Kinzer thereafter asked the Judicial Council to study this issue and advise the Legislature on what if any revisions to the KRTA should be considered in light of the *O'Brien* decision. I was a member of the Judicial Council committee that worked on this issue over the summer and fall of 2012. The committee differentiated between the the federal "rule of reason" standard developed and applied by the federal courts in interpreting and applying the Sherman Act, and the "reasonableness" standard applied to state antitrust actions under the KRTA pursuant to the precedent established by *Heckard* and *Okerberg*. A majority of the committee concluded that the federal "rule of reason" standard under the Sherman Act should not be incorporated into the KRTA, but the subcommittee split on the questions of whether and to what extent *O'Brien* changed Kansas antitrust law, and whether specifically the "reasonableness" standard of *Heckard* and *Okerberg* should be explicitly codified in the KRTA. We agreed that the ultimate decision on the second question was a policy decision within the province of the Legislature, but that we should provide as much analysis and information as possible to assist the Legislature in making this decision.

So our Judicial Council committee was divided into two subcommittees, one espousing little or no change to the KRTA in light of *O'Brien,* and the other, larger subcommittee advocating explicit incorporation of the *Heckard/Okerberg* "reasonableness" standard into the KRTA for the reasons expressed above. I served on the latter subcommittee. Our subcommittee concluded that we should recommend to the Legislature that the KRTA should be amended to make clear that, except in limited circumstances, the *Heckard/Okerberg* "reasonableness" standard should be explicitly incorporated into the KRTA. The subcommittee concluded, however, that there should be a distinction drawn between vertical price restraints or conduct (e.g., minimum and maximum pricing agreements between manufacturers and their retailers), to which the "reasonableness" standard should apply, and horizontal price restraints or conduct (e.g., price fixing between or among competitors in a given manufacturing, retailing or service industry), to which the "reasonableness" standard should not apply. Our subcommittee also agreed to recommend exclusions from the reach of the KRTA for certain types of agreements and arrangements widely viewed as beneficial to competition and consumers, and often recognized as such in other federal or state laws: agreements under the Kansas cooperative marketing act, the federal Capper-Volstead Act, the federal Packers and Stockyards Act, and any franchise agreements or covenants not to compete. The subcommittee proposed a bill for the Legislature's approval encompassing all of the foregoing.

HB 2224 is identical in all respects to this legislation proposed by our Judicial Council subcommittee, except only horizontal price-fixing agreements, rather than all horizontal conduct, is excluded from application of the "reasonableness standard." In other words, I believe that the only per se violations of the KRTA that should be codified in statute are horizontal price-fixing agreements, which are almost universally recognized to constitute antitrust violations. Other types of horizontal conduct should be analyzed by the courts under the "reasonableness" standard. That is not to say that any such conduct might not still be found to be an unlawful and therefore void restraint of trade. It is to say, however, that such a determination should be left to the trier of fact, and if the conclusion is that any such horizontal conduct (other than price fixing) is reasonable under all of the circumstances and is not harmful to, or in fact may aid, competition and consumers, it should not be found unlawful.

For all the foregoing reason, I urge the committee to report HB 2224 favorable for passage. As an alternative, however, HB 2225 would repeal the KRTA altogether. Such action would not eliminate antitrust law and litigation in Kansas, but would make federal antitrust law under the Sherman Act, as interpreted and applied by the federal courts, the exclusive antitrust remedy in our state. This would reflect both the intention behind the original 2012 HB 2797 and the suggestions and recommendations of several of the Judicial Council antitrust committee members that we should mirror or apply only federal law under the Sherman Act and federal court decisions to Kansas antitrust litigation. It would also satisfy the concerns and difficulties caused by the *O'Brien* decision.

Thank you, and I would be pleased to stand for questions.