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TO: HOUSE JUDICIARY COMMITTEE
FROM: F. JAMES ROBINSON, JR.
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DATE: February 20, 2013

RE: HB 2224; HB 2225; HB 2275

Chairman Kinzer, members of the committee, we thank you for this opportunity to submit written testimony about HB 2224, HB 2225, and HB 2275. I am a past president of Kansas Association of Defense Counsel (KADC), a statewide association of lawyers who defend civil lawsuits and business interests. I am unable to appear in person because I will be out of the state in depositions.

Competition policy is not a subject that most people, even lawyers, spend much time debating. It is an area of law that is based on statutes and legal precedents that have been in place for over 100 years. In recent history, the discussion has tended to focus on fairly esoteric issues.

With the 2012 decision in *O'Brien v. Leegin Creative Leather Products, Inc.*, the debate in Kansas has become more tangible and real. We are not here to comment on the merits of that decision. It is, however, apparent from the ensuing debate that even though markets have changed and become more complex, basic principles long enshrined in antitrust law remain relevant today, which is a testament to the underlying principle of free and unfettered competition and its application over the years by the courts.

A bedrock principle of antitrust law generally is that not every "restraint of trade" is illegal. Courts often apply a reasonableness analysis to determine if a specific restraint is unreasonable. If it is, the restraint is illegal. In applying that standard, courts commonly go through a detailed analysis of the relevant market to determine whether the pro-competitive justifications for the conduct outweigh its anticompetitive effects. Many forms of "horizontal" conduct involving concerted activity between competitors are deemed devoid of competitive virtue. "Vertical" non-price restraints—those imposed from a manufacturer down—are often subjected to a reasonableness standard because they have been found to have "real

potential to stimulate interbrand competition." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977).

In *O'Brien*, the Kansas Supreme Court held that resale price maintenance agreements are illegal *per se* under Kansas antitrust law. O'Brien brought a class action under the Kansas Restraint of Trade Act on behalf of consumers who had purchased Brighton luggage and fashion accessories. The complaint was that Brighton required retailers to sell its products at set prices, which O'Brien contended was illegal vertical price-fixing. On appeal, the issue was whether the Kansas Act required a reasonableness analysis. The Supreme Court considered the statutory language and concluded that a reasonableness standard is nowhere to be found in the statute.

For companies in this state that had assumed based on older Kansas decisions—*Heckard v. Park* (1948) and *Okerberg v. Crable* (1959)—that there was a reasonableness standard in Kansas law, the *O'Brien* decision created the possibility that unintended violations could lead to state enforcement actions or civil lawsuits.

We believe that, in view of the Court's interpretation of the Kansas Act, the statute must be changed, to make it clear that certain types of competitive conduct, particularly vertical price agreements, must be viewed against a standard of reasonableness. The options include inserting a reasonableness standard in the Kansas Restraint of Trade Act or repealing that Act so that federal antitrust law controls.

The bills which amend the Kansas Act diverge over the extent to which "horizontal" activity should be illegal *per se*. HB 2224, the Judicial Council Subcommittee's bill, prohibits "horizontal price-fixing," whereas HB 2275 prohibits "horizontal conduct." We are comfortable with the Subcommittee's choice of words. The term "horizontal conduct" is largely undefined in antitrust law and therefore creates uncertainty about the scope of the prohibition. "Horizontal price-fixing" on the other hand has a well-accepted legal meaning.

KADC, therefore, believes that the law should be changed, but takes no position, other than the choice of words discussed above, as to which of the options presented in HB 2224, HB 2225, and HB 2275 is best for Kansas. Each bill provides more certainty for Kansas businesses than the current law.