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Testimony before the House Judiciary Committee
HB 2224, HB 2225, and HB 2275 Kansas Restraint of Trade Act
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I am appearing to respectfully request your opposition to HB 2224, HB 2225, and HB 2275. The amendments to the KRTA in the proposed legislation are unnecessary and are detrimental to Kansas businesses and consumers.

Trusts, conspiracies, and monopolies raise prices (or stop them from falling by locking out competition). The Kansas Restraint of Trade Act (KRTA) protects small, local businesses and Kansas consumers from anti-competitive practices that drive up prices and drive out Kansas-based businesses. The proposed legislation weakens the KRTA and will harm Kansas consumers and business by permitting conduct that has been considered anti-competitive and illegal for years under current law. Eliminating the KRTA altogether is a step in the wrong direction because federal law does not regulate all intra-state conduct. For all these reasons, HB 2224, HB 2225, and HB 2275 should not be passed.

Antitrust laws are the bedrock of free enterprise. Without them, big businesses with market power can squeeze out small businesses and drive up costs to consumers. Kansas antitrust cases are almost always directed at out-of-state big companies and foreign multi-national companies that take advantage of Kansas businesses and consumers.

Federal and Kansas antitrust law have never been and should not be alike. First, Kansas antitrust law preceded federal antitrust law. The Kansas Legislature enacted K.S.A. 50-112 in 1889, one year before Congress enacted the Sherman Antitrust Act, 15 U.S.C. § 2 *et seq.*, so it is no surprise that Kansas antitrust law has developed independently of the federal law.

Second, federal law does not protect Kansas small businesses or consumers (indirect purchasers). Under federal law, only direct purchasers, i.e. those who purchase directly from the manufacturer, can sue for antitrust violations. *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (barring indirect purchaser suits). In Kansas's Unfair Trade and Consumer Protection statutes, the Kansas Legislature, along with 25 other states, expressly rejected the *Illinois Brick* holding that denied indirect purchasers standing to sue for harms caused by anticompetitive conduct. K.S.A. 50-161(b); *In re Vitamin Antitrust Litig*., 2006 WL 4058904 at p.2, n.1 (Kan. Dist.Ct. Dec. 22, 2006); Karon, *Undoing the Otherwise Perfect Crime,* 108 W. Va .L. Rev. 395, 402-403 n. 42 (2005) (summarizing the statutes, including K.S.A. 50-161,

and noting other states rejecting *Illinois Brick*). Without the Kansas Restraint of Trade Act (KRTA), Kansas indirect purchasers, *i.e.*, consumers, would lack standing to bring a claim for violation of antitrust law, no matter how egregious.

Third, federal courts have almost unlimited resources to do their job—magistrate judges who work full time for almost every judge, research clerks who work full time for every judge, nationwide reach for subpoena power. Unless Kansas pours funds into our state courts the same way, we cannot expect the state courts to handle the battle of the experts in a rule-of-reason trial where huge panels of economists discuss what is and is not anti-competitive conduct. The current law—the per se rule--best fits Kansas markets and best protects Kansans from anti-competitive market conduct.

Fourth, federal law does not protect free enterprise for in-state conduct. The KRTA regulates in-state conduct, and the KRTA is the best standard.

The "Reasonableness" standard is actually vague and will increase litigation. There is no room for "reasonable restraints" that could tie state courts (and litigants) in knots for years. Instead *all* restraints are "against public policy, unlawful and void". K.S.A. 50-112. *Any* trust, combination, or restraint, *is illegal*. K.S.A 50-101. The current law is simple and easy to apply.

On the other hand, "reasonableness" is in the eye of the beholder.

Kansas has used the bright line, per se rule, to provide clear guidance to businesses and consumers, thereby reducing the need for litigation and government enforcement actions.

Kansas Antitrust Law Is Not Overkill. Antitrust crime still pays, even with the combined efforts of the U.S. Department of Justice, the State Attorneys General, federal direct purchaser class actions, and state indirect purchaser class actions. *See* Connor and Helmers, Statistics on Modern Private International Cartels, 1990-2005 (Nov. 2006) (noting high recidivism rates among cartel participants and low payout of combined government fines or penalties and class action settlements compared to overall economic effect of cartel).

Kansas has about 1% of the U.S. population and (and market). Without clear and simple-to-apply antitrust law, no one would protect 1% of the market using federal law. Litigation is too costly and risky to pursue against foreign companies and multi-nationals.

The KRTA's provisions are straight-forward, protect Kansas consumers, and deter anticompetitive conduct within our State's borders. Coupling the strong substantive law with the class action procedure under Kansas law provides a practical method for antitrust enforcement.

HB 2224, HB 2225, and HB 2275 catapult Kansas into uncharted waters. No state has allowed *all* intra-state restraints of trade like HB 2225 would do. HB 2225 repeals the KRTA and stands the law (and common sense, if you are a free market conservative) on its head by permitting

price-fixing and other anti-competitive activities across the board within Kansas. HB 2225 is completely inconsistent with other state laws as well as federal law.

HB 2275 allows "reasonable restraints" (defined with a 4 factor test used in no other state, or in federal law) if the restraint also does not "contravene public welfare" (an undefined term, which could mean anything depending on whether you are a liberal Democrat or a conservative Republican).

HB 2275 also exempts a variety of huge economic power groups by giving them special treatment—why? Once upon a time, co-ops were an aggregation of powerless farmers, but not anymore. The Dairy Farmers of America is the largest business in the Kansas City Metro area, dwarfing such Fortune 500 companies such as Sprint, Garmin, and Cerner. Why do co-ops need the ability to monopolize or conspire to set food prices? It smacks of cronyism at a time when the special treatment of certain industries in the federal tax code is being phased out.

Like HB 2275, HB 2224 permits "reasonable restraints" of trade. As noted previously, "reasonableness" is in the eye of the beholder. By replacing Kansas' common sense per se rule with a reasonableness standard, the Legislature will increase lengthy and expensive litigation related to determining what a "reasonable restraint" is. The Legislature also opens the door to anti-competitive activity that has been prohibited for years in Kansas. Such activity is to the detriment of Kansas consumers and small businesses.

The amendments to the Kansas Restraint of Trade Act (KRTA) in HB 2224, HB 2225, and HB 2275 are unnecessary and are detrimental to Kansas businesses and consumers. A strong KRTA is necessary to protect small, local businesses and Kansas consumers from anti-competitive practices that drive up prices and drive out Kansas-based businesses. I respectfully request that the Senate Commerce Committee not pass HB 2224, HB 2225, and HB 2275.

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[1] The logic of *Leegin* is hardly compelling in a 5-4 decision which has been roundly criticized. Martin, *The American Consumer Is Not Well: Where Is Dr. Miles*? 47 Wash. L. J. 581 (2008).