

Approved March 16, 2000
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:14 a.m. on March 14, 2000 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Derek Schmidt, Legislative Liaison and Special Counsel, Office of the Governor
Rex Beasley, Assistant Attorney General, Consumer Protection/Antitrust Division
Leslie Kaufman, Kansas Farm Bureau
Allie Devine, Kansas Livestock Association
Terry Leatherman, Kansas Chamber of Commerce and Industry

Others attending: see attached list

The minutes of the March 13th meeting were approved on a motion by Senator Bond, seconded by Senator Petty. Carried.

HB 2855—concerning the restraint of trade

Conferee Schmidt testified as a proponent of **HB 2855**. He detailed the Governor's proposals in the bill which would revise, update and strengthen the antitrust provisions that are currently part of Kansas law. (attachment 1 and 2) Discussion followed.

Conferee Beasley testified in support of **HB 2855**. He presented a brief history of anti-trust laws in Kansas and discussed the amendments to current law, detailing the amendment which gives more authority to the attorney general to properly investigate anti-competitive conduct. Discussion followed. (attachment 3)

Conferee Kaufman testified in support of **HB 2855** discussing several provisions which she stated "will allow the state to have additional, appropriate oversight through our antitrust laws while still maintaining a productive, open business market in Kansas." She also discussed a provision which allows the attorney general to allocate 20% of moneys recovered from successful litigation to an "antitrust special revenue fund" the proceeds of which would fund enforcement of the act. (attachment 4)

Conferee Devine testified in support of **HB 2855** with the exception of the provision on page 7, lines 4-7. She discussed her concern with the language in this section which she stated "is overly broad and exposes business to what could be political investigations versus factual investigations" and "lessened the thresholds for investigation or prosecution to levels that allow the attorney general to initiate an investigation or prosecution without a clear showing that the laws have been violated." (attachment 5)

Conferee Leatherman testified as neutral on **HB 2855** and offered comments regarding the Kansas House amendment to the bill concerning attorney general powers to initiate investigations regarding business competition and monopolies. He urged Committee to "carefully review the potentially broad investigatory powers that might be unleashed by this amendment and consider removing it from the bill." (attachment 6)

Written testimony in support of **HB 2855** was offered by Jim Clark, Office of the Kansas Securities Commissioner. (attachment 7)

The meeting adjourned at 11 a.m. The next scheduled meeting is March 15, 2000.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 14, 2008

NAME	REPRESENTING
Nancy Lindberg	AA
Bill Denny	Ks Gov't Consulting
Terry Leatherman	KCCI
Stephanie Stettelman	KDA
1 Terenda Mitchell	KDA
Lynette Galloway	ARA
Don Repas	KCA
KEVIN GRAHAM	KSC
Bob Jones	KSP
Jim W. Clark	Kansas Securities (Commission)
Paul Davis	Kansas Bar Assn.
Jeff Boltberg	State Farm Ins Company
Allie Devine	Ks Livestock Association
Tom FNU	✓ ✓
Kristin Kay	
Lydia Roberts	
Jean Barber	KA Defense Counsel
Dennis McKinney	self
Lindy McKinney	

STATE OF KANSAS

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BILL GRAVES, Governor
State Capitol, 2nd Floor
Topeka, Kansas 66612-1590



(785) 296-3232
1-800-748-4408
FAX: (785) 296-7973

OFFICE OF THE GOVERNOR

**Testimony of Derek Schmidt
Legislative Liaison and Special Counsel
Office of the Governor**

**Presented To Senate Judiciary Committee
March 14, 2000**

In Support of HB 2855

Chairman Emert and members of the Committee, thank you for the opportunity to testify today in support of HB 2855. My name is Derek Schmidt, and I serve in the Office of the Governor as Legislative Liaison and Special Counsel.

As you know, there has been considerable discussion this year of issues relating to antitrust and similar types of regulation of the marketplace. There are numerous proposals pending in the Legislature to impose new standards that certain businesses must meet if they operate in Kansas. From your hearings on Senate Bill 590, which proposes new regulations on the marketing of livestock, this Committee knows the strong passions on all sides of this debate. There is other legislation pending that would replicate certain provisions of federal law, such as the Packers and Stockyards Act, and enact them in state law. And there are still other proposals that would rewrite Kansas antitrust law in an attempt to impose new standards of conduct for many large businesses operating in our state.

Each of these proposals reflects a broader concern in our society about economic consolidation and how the power of large corporations can affect small businesses, including but not limited to small agricultural producers. There is an anxiety among some on Main Street, and among some on the farm, that we all are aware of.

Mr. Chairman, the challenge for this Legislature, and for the State of Kansas, is to ensure that our reaction to that anxiety is thoughtful, balanced and appropriate. We must be particularly cautious to ensure that any changes we make in the law of the State of Kansas do not harm our people by operation of the law of unintended consequences.

No law of this State can change the fact that we all live in a dynamic global economy, which contains forces beyond the control of any one country, much less the control of any one or any few states. There is great opportunity for Kansans as we develop new markets around the world that support our jobs here at home. We must remember that although some Kansans are struggling under competition from large corporations, other Kansans benefit greatly from the presence in our state of the aircraft industry, the beef packing industry, the telecommunications industry, the engineering services industry, the e-commerce merchandising industry, and many

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other industries that rely on their corporate and economic strength to compete successfully in global markets. We must ensure that any actions we take do not make Kansas a hostile environment for these and similar businesses.

To seek the right balance among our State's many interests and certain concerns about the global economy, world markets, and corporate power, Governor Graves has proposed HB 2855, which the House has approved on a vote of 120 to 4. This proposal would significantly revise, update and strengthen the antitrust provisions that currently are part of Kansas law. In a phrase, the Governor is proposing to make our 19th Century antitrust laws relevant and useful in our 21st Century economy.

In crafting this proposal, the administration was guided by five principles:

- First, we should ensure that when market abuses and illegal acts occur – when there is collusion, conspiracy, or other unlawful action to manipulate the market in Kansas to the detriment of consumers or of competitors – then there is an effective legal mechanism in place by which the State can act to protect its citizens.
- Second, we should not single-out specific industries for additional market regulation. Our antitrust laws should be generally applicable, to the maximum extent possible.
- Third, Kansas antitrust law should not needlessly duplicate federal efforts. Kansas taxpayers already pay for significant antitrust protection from federal agencies that include the U.S. Department of Justice, the Federal Trade Commission, and the U.S. Department of Agriculture. We should not ask the same taxpayers to pay again for new, redundant efforts by the State of Kansas – particularly when federal enforcement is more appropriate and more effective in opposing most illegal, anti-competitive practices.
- Fourth, we should, as a matter of policy, seek to minimize State intrusion into the marketplace. We must take care to ensure that State action is narrowly tailored to oppose illegal acts of market manipulation, not merely used as a method for the Legislature, the Governor, the Attorney General, or any other official or subdivision of the State to impose its political will or to attempt to determine market outcomes.
- Fifth, as the Governor said in his State-of-the-State address, “We cannot spend money we do not have.” The administration has not proposed adding State General Fund money to expand antitrust enforcement, although the House did amend the legislation to allow the Attorney General to retain certain fee-generated funds. That is a budgetary decision made in light of other priorities, including programs to help the frail elderly, K-12 and Regents education, and others.

Guided by those five principles, we began the crafting of HB 2855 by reviewing the current antitrust law that is on the books in Kansas. The Governor believes that sound public policy in this instance requires us to build upon existing law, not to create new statutes out of whole cloth. The administration believes the *standards* established in current law are sufficient to prevent illegal market manipulation. For example:

- It is already illegal in this State “to create or carry out restrictions in trade or commerce. . .or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.” K.S.A. 50-101.
- It is illegal in this State “to prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities...” K.S.A. 50-101.
- It is illegal in this State to fix prices. K.S.A. 50-101.
- It is illegal in this State to collude to control supplies. K.S.A. 50-101.
- It is illegal in this State to agree or arrange to “...advance, reduce or control the price or the cost to the producer or to the consumer” of certain articles imported into Kansas or grown in Kansas.” K.S.A. 50-112.
- It is illegal in this State to make any agreement by which “any shipper of seeds, grains, hay or livestock is defrauded out of any portion of the net weight of any consignment of grain, seeds, hay, or livestock...” K.S.A. 50-131.
- It is illegal in this State to conspire to monopolize any line of business. K.S.A. 50-132.
- It is illegal in this State to conspire “for the purpose of preventing the producer of grain, seeds or livestock or hay, or the local buyer thereof, from shipping or marketing the same without the agency of any third person, firm or corporation...” K.S.A. 50-132.
- It is illegal in this State to discriminate in commodity prices “between the different sections, communities, or cities of this state” for the purpose of destroying competition. K.S.A. 50-149.

In short, Mr. Chairman, market manipulation and anti-competitive activities are already declared by law to be illegal in this state – and that has been the case for more than a century.

At the same time, it became apparent to us that although the *standards* in current law are sufficient, the enforcement mechanisms, the remedies, and certain other provisions of current law are woefully inadequate. Current Kansas antitrust law is best described as a “hodgepodge” of specific provisions that were enacted over a period of years. The earliest portion of the law dates from 1889 (*See, e.g.*, K.S.A. 50-112), and most of the law has not been updated since 1923. Frequently, new provisions were piled atop older provisions without reconciling the old with the new. The result is a statute that contains many antiquated, archaic, ill-coordinated and burdensome provisions, including but not limited to the following:

- Any Kansas corporation found in violation of Kansas antitrust law automatically forfeits its charter. Non-Kansas corporations face no such mandatory forfeiture. K.S.A. 50-103.
- If the attorney general or any county attorney becomes aware of any violation of Kansas antitrust law but does not prosecute the violation, the prosecuting attorney forfeits his or her office and shall be fined \$100 to \$1,000. K.S.A. 50-109. If it is a *county attorney* who fails to prosecute, the county attorney may also face a jail sentence of at least ten (10) but not more than ninety (90) days. K.S.A. 50-118.

- Peace officers have a specific duty to report violations of this act, and any failure results in a \$100 to \$500 fine and forfeiture of office. K.S.A. 50-119.
- If any other state or county official gains knowledge of any violation of this act, and fails to report it to the appropriate prosecuting attorney along with the names of witnesses to the violation, that official forfeits his office and faces a fine of \$100 to \$1,000. K.S.A. 50-109.
- The attorney general can compel testimony to investigate violations of this act only by conducting an “inquisition,” which requires the immunizing of the witness prior to gaining the testimony. K.S.A. 50-153.

Therefore, the proposed HB 2855 retains the *standards* established in current law but comprehensively rewrites, updates and modernizes other provisions of the law now on the books. Its key changes are as follows:

- Gives the attorney general modern investigative powers, including administrative subpoena power, to replace the inquisition authorities in current law. Inquisition powers, which require the enforcing attorney to immunize the witness before taking testimony, are of little or no use in antitrust enforcement.
- Allows Courts to impose a civil penalty up to \$5,000.00 for each day a violation of this statute occurs. This figure mirrors the civil penalties available in the Kansas Consumer Protection Act and is more appropriate than the lower penalties in current law, which range from \$100 to \$1,000 in various parts of the current statute. HB 2855 also clarifies that the penalty can be imposed, cumulatively, for each day a violation occurs.
- Creates explicit authority for the Attorney General to recover the state’s investigation costs in successful litigation.
- Gives the attorney general and the Court a “menu” of remedies available for tailoring an appropriate remedy after liability is found. This is in contrast to current law, which contains a more limited range of remedies and which makes certain remedies, such as the forfeiture of a corporate charter, mandatory in certain circumstances.
- Permits Kansas courts to exercise jurisdiction over nonresident entities that violate this statute to the maximum extent allowed by the United States Constitution. We should make absolutely clear the Legislature’s intent that persons or entities that violate this act in Kansas are subject to the jurisdiction of Kansas courts to the maximum extent allowed by due process.
- Concentrates all enforcement power in the attorney general rather than in county and district attorneys. The reality is that local prosecutors are not spending time and resources prosecuting complex antitrust cases – and they are not likely to. To establish certainty, we should make clear that to the extent the State of Kansas is involved in antitrust litigation, the attorney general will be the state’s litigator.
- Permits enforcement actions to be filed in Shawnee County District Court. This makes sense in connection with consolidation of enforcement authority in the attorney general.

- Consolidates the “hodgepodge” provisions of current law, as set forth in Article 1 of Chapter 50, into a single statute called the Kansas Restraint of Trade Act. This consolidation makes clear that all state antitrust actions are governed by one uniform set of procedural rules, one uniform set of available remedies, and one uniform set of investigative powers.
- Makes the entire statute civil and repeals the miscellaneous criminal penalties in the current law. There has not been a criminal antitrust case in Kansas in recent memory, and there is not likely to be one in the future. Almost all of the criminal penalties in current law are misdemeanors. The reality is that antitrust violations that rise to the level of criminal activity are likely to attract the attention of federal law enforcement, which has much more substantial criminal penalties available. State resources are better focused on civil enforcement.
- Puts all enforcement litigation under the Code of Civil Procedure. Current law, much of which was enacted prior to the establishment of a uniform Code of Civil Procedure, contains an eclectic mix of procedures for litigating various violations. HB 2855 would put all antitrust litigation under modern process.
- Repeals more than thirty (30) outdated and unused sections in current law.
- Requires the attorney general to report annually on her antitrust investigations and enforcement activities as part of her currently required annual report on consumer protection activities.

Mr. Chairman, we have proposed to the Committee several balloon amendments to this legislation as it was approved by the House. While there appear to be numerous amendments, they all fall into one of three categories:

- First, we have worked with the Revisor to identify and propose numerous technical amendments to “clean up” language throughout the bill.
- Second, we are proposing to streamline and clarify the definition of “person” in the statute. In current law, there is a definition of “persons” who are subject to the statute. (K.S.A. 50-148). In addition, at almost every reference to “person” throughout the statute, there is what might best be called a “sub-definition,” such as “person, company or corporation” (K.S.A. 50-131), “persons, firm or corporation” (K.S.A. 50-132), or “persons, partnership, company, corporation or association” (K.S.A. 50-137). The House exacerbated this confusion by its clerical amendment of moving the current law provisions of K.S.A. 50-801 into Article 1 of Chapter 50, because this provision contains yet another slightly different definition of “person.” We propose to have a single definition of “persons” subject to this Act and to reference that definition in all applications.
- Finally, we ask this Committee to delete a House floor amendment, added by voice vote and without significant debate, that expanded the scope of the Attorney General’s investigative powers. The House amendment, found on page seven (7) of the bill, allows the Attorney General to use her investigative powers, including subpoena power, whenever “any announced conduct of any person may have the effect of substantially lessened competition, tend to create a monopoly, or otherwise violate this act.” This amendment constitutes a significant shift in public policy. Under current law, and under the Governor’s proposal as approved by the House Judiciary Committee, the Attorney General may use her statutory powers of investigation whenever she has reason to believe that the Act *has been* violated.

This amendment extends those authorities by granting subpoena power and other investigative powers *prior to* a violation of the Act. This sort of authority is more appropriate for a regulatory entity rather than a law enforcement official, such as the Attorney General. The Governor believes this amendment conflicts with two of his principles in drafting this legislation – it duplicates federal action since the language was borrowed from federal law and it increases state intrusion into the marketplace. It also is likely to increase the cost of the legislation. We request this Committee advance this legislation, which has broad support, without the burden of this controversial amendment.

The administration believes this modernization of Kansas antitrust law is the proper, balanced approach to this issue. We look forward to working with the Committee on this matter.

Thank you.

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HOUSE BILL No. 2855

By Committee on Judiciary

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12 AN ACT concerning the restraint of trade; amending K.S.A. 50-103, 50-
13 109, 50-110, 50-131, 50-132, 50-133, 50-137, 50-139 and, 50-153[, 75-
14 715] and 75-716 and repealing the existing sections; also repealing
15 K.S.A. 50-104, 50-105, 50-106, 50-107, 50-114, 50-118, 50-119, 50-
16 121, 50-122, 50-123, 50-124, 50-125 and, 50-126, 50-127, 50-128, 50-
17 129, 50-130, 50-134, 50-138, 50-140, 50-141, 50-142, 50-143, 50-144,
18 50-145, 50-146, 50-150, 50-151, 50-152, 50-154, 50-155 and, 50-156,
19 50-801 and 75-713.

ADD K.S.A. 50-101, 50-102, 50-108, 50-112,
50-113, 50-115, 50-117, 50-136, 50-148, 50-149
and 50-157 to the title

20
21 *Be it enacted by the Legislature of the State of Kansas:*

22 New Section 1. The provisions of article 1 of chapter 50 of the Kan-
23 sas Statutes Annotated, and amendments thereto, and the provisions of
24 sections 1 through 3, and amendments thereto, may be cited as the Kansas
25 restraint of trade act.

26 New Sec. 2. The attorney general may conduct research, hold public
27 hearings, make inquiries and publish studies relating to antitrust, monop-
28 olies, combinations and other subjects relating to restraint of trade.

29 New Sec. 3. (a) The commission of any act or practice declared to
30 be a violation of the Kansas restraint of trade act shall render the violator
31 liable to the state for the payment of a civil penalty in a sum set by the
32 court of not less than \$100 nor more than \$5,000 for each day such
33 violation shall have occurred.

34 (b) Any person who willfully violates the terms of any court order
35 issued pursuant to the Kansas restraint of trade act shall forfeit and pay
36 a civil penalty of not more than \$10,000 per violation, in addition to other
37 penalties that may be imposed by the court, as the court shall deem
38 necessary and proper. For the purposes of this section, the district court
39 issuing an order shall retain jurisdiction, and in such cases, the attorney
40 general may petition for recovery of civil penalties.

41 Sec. 4. K.S.A. 50-103 is hereby amended to read as follows: 50-103.
42 ~~Any corporation holding a charter under the laws of the state of Kansas~~
43 ~~which shall violate any of the provisions of this act shall thereby forfeit~~

50-120,

1 its charter and franchise, and its corporate existence shall cease and de-
2 termine, and any stockholder, director, officer, agent, representative or
3 consignee of any such corporations shall be subject to the penalties herein
4 prescribed: (a) The attorney general may bring an action:

5 (1) To obtain a declaratory judgment that an act or practice violates
6 this act;

7 (2) to obtain a temporary restraining order prohibiting violations of
8 this act;

9 (3) to enjoin violations of this act;

10 (4) to recover reasonable expenses and investigation fees;

11 (5) to obtain civil penalties as authorized by this act;

12 (6) to forfeit the charter and for the dissolution of the corporate ex-
13 istence of any corporation holding a charter under the laws of the state
14 of Kansas;

15 (7) to enjoin any person ~~[company or corporation]~~ within or without
16 this state, which has violated or is violating this act, and their officers,
17 agents, representatives or consignees, from doing business within this
18 state, either directly or indirectly;

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19 (8) to recover actual damages on behalf of any person or persons by
20 reason of violations of this act; or

21 (9) to void any contract or agreement in violation of any of the pro-
22 visions of this act.

23 (b) In any action brought by the attorney general, the court may
24 without requiring bond of the attorney general:

25 (1) Make such orders or judgments as may be necessary to prevent
26 violations of this act;

27 (2) make such orders or judgments as may be necessary to enforce
28 any remedy available to the attorney general; or

29 (3) grant other appropriate relief.

30 Sec. 5. K.S.A. 50-109 is hereby amended to read as follows: 50-109.

31 It shall be the duty of the attorney general of the state and the county
32 attorneys in their respective counties to diligently prosecute any and all
33 persons violating any of the provisions of this act, and it shall be the duty
34 of all state and county officials having notice and knowledge of any vio-
35 lation of the provisions of this act to notify the county attorney of their
36 respective counties and the attorney general of the state of the fact of
37 such violation, and to furnish them with the names of any witnesses by
38 whom such violations can be proved. If any such officer or officers shall
39 fail to comply with the provisions of this section the officer or officers
40 shall upon conviction be fined in any sum not less than one hundred
41 dollars nor more than one thousand dollars, and such conviction shall be
42 a forfeiture of the office held by such person, and the court before whom
43 such conviction is had shall, in addition to the imposition of the fine

1 ~~aforesaid, order and adjudge the forfeiture of his or her said office. The~~
2 ~~attorney general shall.~~

3 (a) *Enforce this act throughout the state;*

4 (b) *cooperate with state and local officials, officials of other states and*
5 *officials of the federal government in the administration of comparable*
6 *statutes;*

7 (c) *maintain a public file of final judgments rendered under this act*
8 *that have been either reported officially or made available for public dis-*
9 *semination under subsection (a)(3) of K.S.A. 50-630, and amendments*
10 *thereto, and of consent judgments; and*

11 (d) *include in the report required by subsection (a)(6) of K.S.A. 50-*
12 *628, and amendments thereto, a statement of the investigatory and en-*
13 *forcement procedures and policies of the attorney general's office, of the*
14 *number of investigations and enforcement proceedings instituted and of*
15 *their disposition, and of the other activities of the office and of other*
16 *persons to carry out the purposes of this act.*

17 Sec. 6. K.S.A. 50-110 is hereby amended to read as follows: 50-110.
18 ~~The several district courts of this state and the judges thereof shall have~~
19 ~~jurisdiction, and it shall be their duty, upon good cause shown and upon~~
20 ~~written application of the county attorney or the attorney general, to cause~~
21 ~~to be issued by the clerk of said court subpoenas for such witnesses as~~
22 ~~may be named in the application of a county attorney or the attorney~~
23 ~~general, and to cause the same to be served by the sheriff of the county~~
24 ~~where such subpoena is issued, and such witnesses shall be compelled to~~
25 ~~appear before such court or judge at the time and place set forth in the~~
26 ~~subpoena, and shall be compelled to testify as to any knowledge they may~~
27 ~~have of the violations of any of the provisions of this act, and any witness~~
28 ~~who fails or refuses to attend and testify shall be punished as for con-~~
29 ~~tempt, as provided by law.~~

30 ~~—Any person subpoenaed and examined shall not be liable to criminal~~
31 ~~prosecution for any violation of this act about which such person may~~
32 ~~testify. Neither shall the evidence of any such witness be used against~~
33 ~~him or her in any criminal proceeding. The evidence of all witnesses so~~
34 ~~subpoenaed shall be taken down by the reporter of said court, and shall~~
35 ~~be transcribed and placed in the hands of the county attorney or the~~
36 ~~attorney general, and he or she shall, in the proper courts, at once pros-~~
37 ~~ecute such violator or violators of this act as the testimony so taken shall~~
38 ~~disclose. Witnesses subpoenaed as provided for in this section shall be~~
39 ~~compelled to attend from any county in the state. (a) Jurisdiction. For~~
40 ~~the purpose of enforcing this act, the courts of this state shall have power~~
41 ~~to exercise jurisdiction over persons, ~~corporations and other entities~~ to~~
42 ~~the maximum extent permitted by the constitution of the United States.~~

43 (b) *Venue. Every action pursuant to this act shall be brought in the*

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1 district court of any county in which there occurred an act or practice
2 declared to be a violation of this act or in the district court of Shawnee
3 county.

4 Sec. 7. K.S.A. 50-131 is hereby amended to read as follows: 50-131.
5 If any No person ~~company or corporation~~ doing business in Kansas shall
6 make any agreement, expressed or implied, or by any understanding or
7 combination with any person, ~~company or corporation~~ within or without
8 the state, by which any shipper of seeds, grains, hay or livestock is de-
9 frauded out of any portion of the net weight of any consignment of grain,
10 seeds, hay, or livestock. All such agreements or combinations are hereby
11 declared to be in ~~restraint of trade~~, and any such person, company or
12 corporation shall be deemed guilty of a misdemeanor, and upon convic-
13 tion shall be fined in the sum of not less than one hundred dollars and
14 not exceeding one thousand dollars for each offense.

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15 Sec. 8. K.S.A. 50-132 is hereby amended to read as follows: 50-132.
16 Every No person, servant, agent or employee of any ~~firm or corporation~~
17 doing business within the state of Kansas that shall conspire or combine
18 with any other persons, ~~firm or corporation~~ within or without the state
19 for the purpose of monopolizing any line of business, or shall conspire or
20 combine for the purpose of preventing the producer of grain, seeds or
21 livestock or hay, or the local buyer thereof, from shipping or marketing
22 the same without the agency of any third person ~~firm or corporation~~
23 shall be deemed guilty of a misdemeanor, and on conviction shall be fined
24 in a sum not less than one thousand dollars and not to exceed five thou-
25 sand dollars for each offense.

violation of this act

person

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26 Sec. 9. K.S.A. 50-133 is hereby amended to read as follows: 50-133.
27 Any No person who shall, as agent or employee of any person, ~~firm or~~
28 ~~corporation~~, shall enter into an agreement, expressed or implied, by
29 which it is stipulated that grain, seeds or hay shall not be shipped by the
30 producer or local buyer unless accompanied with warehouse receipts or
31 that the same shall in any manner be under the control of any warehouse-
32 man or agent as a condition precedent to the marketing of ~~said such~~ grain.
33 All such agreements shall be deemed and are hereby declared unlawful
34 and in ~~restraint of trade~~, and the person entering into such agreement or
35 combination shall be deemed guilty of a misdemeanor, and upon convic-
36 tion shall be fined in a sum not less than one thousand dollars and not
37 more than five thousand dollars, or by imprisonment in the county jail
38 not less than ninety days and not to exceed one year, or by both such fine
39 and imprisonment, at the discretion of the court.

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violation of this act

40 Sec. 10. K.S.A. 50-137 is hereby amended to read as follows: 50-137.
41 In case any grain dealer or dealers, ~~partnership, company, corporation or~~
42 ~~association of grain dealers~~, or any person or persons, ~~partnership, com-~~
43 ~~pany, corporation or association~~ subject to the provisions of this act, shall

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1 do or cause to be done or permit to be done any act, matter or thing in
 2 this act prohibited or declared to be unlawful, or shall omit to do any act,
 3 matter or thing in this act required to be done, such grain dealer or grain
 4 dealers, ~~partnership, company, corporation or association of grain dealers,~~
 5 or any other person or persons, ~~partnership, company, corporation or~~
 6 ~~association,~~ shall be liable to the person or persons injured thereby to the
 7 full amount of damages sustained in consequence of any such violation
 8 of the provisions of this act, together with a reasonable counsel or attor-
 9 ney's fee *attorney fees*, to be fixed by the court in every case of recovery,
 10 which *attorney's fee attorney fees* shall be taxed and collected as a part
 11 of the costs in the case; and in any such action brought for the recovery
 12 of damages the court before whom the same shall be pending may compel
 13 any grain dealer or grain dealers, partnership, company, corporation or
 14 association of grain dealers, or any person or persons, partnership, com-
 15 pany, corporation or association subject to the provisions of this act, or
 16 any director, officer, receiver, trustee, agent, employee, or clerk of them
 17 or either of them, defendant in such suit, to attend, appear and testify in
 18 such case, and may compel the production of the books and papers of
 19 such grain dealer or grain dealers, partnership, company, corporation or
 20 association of grain dealers, or any other person or persons, partnership,
 21 company, corporation or association party to such suit. The claim that any
 22 such testimony or evidence may tend to criminate the person giving such
 23 evidence shall not excuse such witness from testifying, but such evidence
 24 or testimony shall not be used against such person in the trial of any
 25 criminal proceeding.

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26 Sec. 11. K.S.A. 50-139 is hereby amended to read as follows: 50-139.
 27 ~~In all civil actions brought in the supreme court or in the district courts~~
 28 ~~of this state for the purpose of enforcing the provisions of Laws 1887,~~
 29 ~~chapter 175, Laws 1889, chapter 257, Laws 1897, chapter 265, Laws 1899,~~
 30 ~~chapter 293, Laws 1899, chapter 77, as amended by Laws 1900, chapter~~
 31 ~~121, whether such suits are for the purpose of ousting corporations, firms~~
 32 ~~or associations from transacting business in the state through or in pur-~~
 33 ~~suance of unlawful agreements and combinations in restraint of trade or~~
 34 ~~to enjoin such unlawful combinations and agreements, the said court may~~
 35 ~~on motion of either party require the opposing litigant to produce books~~
 36 ~~or writings in his or her possession or under his or her power which may~~
 37 ~~contain evidence pertinent to the issue, and may require the party to~~
 38 ~~answer interrogatories filed in court with said motion for the discovery of~~
 39 ~~facts material to the support or defense of the action, and if either of said~~
 40 ~~parties fail to comply with such order of the court or judge, the court~~
 41 ~~may, on motion, give judgment by default. All ~~civil~~ actions brought to~~
 42 ~~enforce this act shall be brought pursuant to chapter 60 of the Kansas~~
 43 ~~Statutes Annotated, and amendments thereto.~~

strike

1 Sec. 12. K.S.A. 50-153 is hereby amended to read as follows: 50-153.

2 ~~Whenever the attorney general or assistant attorney general shall have~~
3 ~~knowledge of any violation of any of the provisions of any of the laws of~~
4 ~~the state of Kansas relating to trusts, monopolies, combinations in re-~~
5 ~~straint of trade, unlawful discrimination, unfair trade or the unlawful buy-~~
6 ~~ing, selling and dealing in commodities without the intention of delivering~~
7 ~~the same, the attorney general may for the purpose of investigating and~~
8 ~~inquiring into such violations issue subpoenas for such persons as he or~~
9 ~~she shall believe to have any information or knowledge of any such vio-~~
10 ~~lation to appear before him or her at any time and place within the state~~
11 ~~of Kansas to be designated in the subpoena, then and there to testify~~
12 ~~concerning any violation of any of the provisions of said laws, or said~~
13 ~~attorney general or assistant attorney general may file with the judge of~~
14 ~~a court of competent jurisdiction a written statement, signed by said at-~~
15 ~~torney general or assistant attorney general, alleging any violations of any~~
16 ~~of said laws, and such judge shall then, at the request of the said attorney~~
17 ~~general or assistant attorney general, issue subpoenas for witnesses, com-~~
18 ~~manding such witnesses to be and appear before such judge at the time~~
19 ~~designated in such subpoena to testify concerning any violation of the~~
20 ~~provisions of said laws.~~

21 ~~—Such subpoenas may direct witnesses to bring with them any papers,~~
22 ~~documents and books that may be considered material, and may be served~~
23 ~~by any person and shall be served and returned to said attorney general,~~
24 ~~assistant attorney general or judge, as the case may be, in the same man-~~
25 ~~ner that subpoenas are served and returned under the code of civil pro-~~
26 ~~cedure, but said subpoenas may be returned by mail to the attorney gen-~~
27 ~~eral or assistant attorney general when served in a county other than that~~
28 ~~in which the same is returnable. Each witness shall be sworn to make~~
29 ~~true answers to all questions put to him or her touching the matter under~~
30 ~~investigation and the testimony of each witness may be reduced to writing~~
31 ~~and when reduced to writing shall be signed by the witness. The attorney~~
32 ~~general or assistant attorney general or judge shall be empowered to ad-~~
33 ~~minister oaths and affirmations to such witnesses.~~

34 ~~—Any disobedience to the subpoena of the attorney general or assistant~~
35 ~~attorney general or any refusal to be sworn as a witness or to sign the~~
36 ~~testimony given or to answer any proper question propounded by the~~
37 ~~attorney general or assistant attorney general, in any such inquiry before~~
38 ~~said attorney general or assistant attorney general, shall be a misdemeanor~~
39 ~~and shall be punished by a fine of not more than three hundred dollars~~
40 ~~(\$300) or by imprisonment in the county jail for not more than ninety~~
41 ~~(90) days or by both such fine and imprisonment.~~

42 ~~—Adjournments of any such inquiries may be made from time to time~~
43 ~~and such judges may punish any witness for contempt for or on account~~

1 of any refusal to be sworn or to answer questions as a witness or to sign
 2 his or her testimony, and the attendance of witnesses may be compelled
 3 by attachment by such judge. (a) Whenever the attorney general has rea-
 4 son to believe that any provision of this act has been violated ~~for that~~
 5 ~~any announced conduct of any person may have the effect of sub-~~
 6 ~~stantially lessened competition, tend to create a monopoly, or oth-~~
 7 ~~erwise violate this act~~ the attorney general, or any deputy attorney
 8 general or assistant attorney general, may:

strike

- 9 (1) Administer oaths and affirmations;
- 10 (2) subpoena witnesses or matter, propound written questions to
- 11 be answered under oath;
- 12 (3) take testimony under oath;
- 13 (4) examine or cause to be examined any documentary material of
- 14 whatever nature relevant to such alleged violations; and
- 15 (5) collect evidence.

16 (b) If matter that the attorney general subpoenas is located outside
 17 this state, the person subpoenaed may either make it available to the
 18 attorney general at a convenient location within the state or pay the rea-
 19 sonable and necessary expenses for the attorney general or the attorney
 20 general's representative to examine the matter at the place where it is
 21 located. The attorney general may designate representatives, including
 22 officials of the state in which the matter is located, to inspect the matter
 23 on the attorney general's behalf, and the attorney general may respond
 24 to similar requests from officials of other states.

- 25 (c) Service by the attorney general of any subpoena shall be made by:
- 26 (1) The mailing thereof by certified mail to the last known place of
- 27 business, residence or abode within or without this state; or
- 28 (2) in the manner provided in the code of civil procedure as if a pe-
- 29 tition has been filed.

30 (d) The attorney general may request that an individual who refuses
 31 to comply with a subpoena, on the ground that testimony or matter may
 32 incriminate the individual, be ordered by the court to provide the testi-
 33 mony or matter. Except in a prosecution for perjury, an individual who
 34 complies with a court order to provide testimony or matter after asserting
 35 a privilege against self-incrimination to which the individual is entitled
 36 by law, may not be subjected to a criminal proceeding or to a civil penalty
 37 to the transaction concerning which the individual is required to testify
 38 or produce relevant matter.

39 (e) If any person willfully fails or refuses to obey any subpoena issued
 40 by the attorney general pursuant to this act, the attorney general, after
 41 notice, may apply to the district court, and, after a hearing thereon, the
 42 district court may issue an order:

- 43 (1) Granting injunctive relief restraining the sale or advertisement of

1 *any merchandise or services by such persons;*

2 (2) *vacating, annulling or suspending the corporate charter of a cor-*
3 *poration created by or under the laws of this state or revoking or sus-*
4 *pending the certificate of authority to do business in this state of a foreign*
5 *corporation or revoking or suspending any other licenses, permits or cer-*
6 *tificates issued pursuant to law to the person which are used to further*
7 *the allegedly unlawful practice; or*

8 (3) *granting such other relief as may be required, until the person*
9 *obeys the subpoena.*

10 **New Sec. 13. (a) As used in this section, the term “person”**
11 **means any individual, corporation, partnership, firm, company or**
12 **other association of persons, and such term shall include the state**
13 **of Kansas and any of its political subdivisions.**

14 (b) **Except as provided in K.S.A. 12-205, and amendments**
15 **thereto, any person who may be damaged or injured by any agree-**
16 **ment, monopoly, trust, conspiracy or combination which is de-**
17 **clared unlawful by any of the acts contained in chapter 50 of the**
18 **Kansas Statutes Annotated, relating to unlawful acts, agreements,**
19 **monopolies, trusts, conspiracies or combinations in restraint of**
20 **trade, shall have a cause of action against any person causing such**
21 **damage or injury. Such action may be brought by any person who**
22 **is injured in such person’s business or property by reason of any-**
23 **thing forbidden or declared unlawful by this act, regardless of**
24 **whether such injured person dealt directly or indirectly with the**
25 **defendant. The plaintiff in any action commenced hereunder in**
26 **the district court of the county wherein such plaintiff resides, or**
27 **the district court of the county of the defendant’s principal place**
28 **of business, may sue for and recover treble the damages sustained.**
29 **In addition, any person who is threatened with injury or additional**
30 **injury by reason of any person’s violation of such acts may com-**
31 **mence an action in such district court to enjoin any such violation,**
32 **and any damages suffered may be sued for and recovered in the**
33 **same action in addition to injunctive relief. Any suit for injunctive**
34 **relief against a municipality shall be subject to the provisions of**
35 **K.S.A. 12-205, and amendments thereto.**

36 (c) **In any action commenced under this section, the plaintiff**
37 **may be allowed reasonable attorney fees and costs. The remedies**
38 **provided herein shall be alternative and in addition to any other**
39 **remedies now provided by law.**

40 **New Sec. 14. Whenever it appears to the attorney general that**
41 **the state of Kansas or any city, town, political subdivision or other**
42 **governmental agency, body or authority established under the**
43 **laws of the state of Kansas has been so injured or damaged by any**

1 conspiracy, combination or agreement in restraint of trade or com-
2 merce or similar unlawful actions, as to entitle the state of Kansas,
3 a city, a town, or political subdivision, or other such governmental
4 agency, body or authority to a right to bring any action or pro-
5 ceeding for the recovery of damages under the provisions of any
6 state or federal antitrust or other similar law, the attorney general
7 shall have the authority to institute and prosecute any such actions
8 or proceedings on behalf of the state of Kansas or of any city, town,
9 or political subdivision, or other governmental agency, body or
10 authority established under the law of the state of Kansas, and shall
11 have the authority to intervene on behalf of the state of Kansas or
12 any city, town, political subdivision or other governmental agency,
13 body or authority in such actions or proceedings.

14 [Sec. 15. K.S.A. 75-715 is hereby amended to read as follows:
15 75-715. In any civil action prosecuted by the attorney general for
16 violation of any federal or state antitrust law or laws in which mon-
17 eys are recovered by the attorney general on behalf of the state or
18 any political subdivision thereof, or on behalf of any persons, firms,
19 corporations, or associations, or any combination or class thereof,
20 by reason of any judgment, consent decree, or settlement, the at-
21 torney general is hereby authorized and directed to deposit ten
22 percent ~~(10%)~~ 20% of any such moneys so recovered with the state
23 treasurer in a special fund hereby created in the state treasury to
24 be known as the “attorney general’s antitrust special revenue
25 fund.” As used in this section, “moneys so recovered” shall include
26 damages, penalties, attorneys’ fees, costs, disbursements, refunds,
27 rebates or any other monetary payment made or paid by any de-
28 fendant by reason of any such judgment, consent decree or settle-
29 ment, after payment of any costs or fees allocated by court order.
30 The balance of such recovered moneys shall be deposited with the
31 state treasurer in a special fund, or funds, as may be required by
32 the attorney general, and shall be disbursed by the director of
33 accounts and reports to the beneficiaries thereof upon order of
34 the attorney general.]

35 Sec. 15 [16]. K.S.A. 75-716. ~~(a)~~ Except as otherwise provided by
36 law, any moneys in the attorney general’s antitrust special revenue
37 fund shall be disbursed by the director of accounts and reports in
38 the manner provided by law, upon order of the attorney general,
39 for the payment of any expense incurred by the attorney general
40 in the prosecution of antitrust actions. Such expenses shall include,
41 but not be limited to, professional and witness fees, deposition
42 costs, investigation, travel and subsistence, or any other expense
43 reasonably related to enforcement of such laws, whether incurred

1 pursuant to the recovery of money or enforcement through other
2 civil or criminal remedies.

3 (b) ~~On each June 30, the attorney general shall determine the~~
4 ~~amount of moneys credited to the attorney general's antitrust special rev-~~
5 ~~enue fund which is in excess of the amount authorized by the legislature~~
6 ~~to be expended from such fund for the ensuing fiscal year and shall certify~~
7 ~~such amount to the director of accounts and reports. Upon receipt of~~
8 ~~such certification, the director of accounts and reports shall transfer the~~
9 ~~amount certified from the attorney general's antitrust special revenue~~
10 ~~fund to the state general fund.~~

11 Sec. ~~13 16~~ [17]. K.S.A. 50-103, 50-104, 50-105, 50-106, 50-107, 50-
12 109, 50-110, 50-114, 50-118, 50-119, 50-121, 50-122, 50-123, 50-124, 50-
13 125, 50-126, 50-127, 50-128, 50-129, 50-130, 50-131, 50-132, 50-133, 50-
14 134, 50-137, 50-138, 50-139, 50-140, 50-141, 50-142, 50-143, 50-144,
15 50-145, 50-146, 50-150, 50-151, 50-152, 50-153, 50-154, 50-155 and 50-
16 156, **50-801, 75-713[, 75-715] and 75-716** are hereby repealed.

17 Sec. ~~14 17~~ [18]. This act shall take effect and be in force from and
18 after its publication in the statute book.

ADD K.S.A. 50-101, 50-102, 50-108, 50-112,
50-113, 50-115, 50-117, 50-120, 50-136, 50-148,
50-149 and 50-157 to the repealer

ADD K.S.A. 50-101, 5-102, 50-108, 50-112,
50-113, 50-115, 50-117, 50-136, 50-148, 50-149
and 50-157, as amended(SEE ATTACHMENT)

Sec. 4. K.S.A. 50-101 is hereby amended to read as follows: 50-101. A trust is a combination of capital, skill, or acts, by two or more persons, ~~firms, corporations, or associations of persons, or either two or more of them,~~ for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

Fourth. To fix any standard or figure, whereby ~~its~~ such person's price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which ~~they shall~~ such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; ~~or-by-which-they shall~~

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; ~~or-by-which-they shall~~

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; ~~or-by-which-they shall~~

(d) agree to pool, combine or unite any

interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its such person's price may in any manner be is affected. And Any such combinations are hereby declared to be against public policy, unlawful and void.

Sec. 5. K.S.A. 50-102 is hereby amended to read as follows: 50-102. All persons, ~~companies, or corporations~~ within this state are hereby denied the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in K.S.A. 50-101, and amendments thereto.

Sec. 6. K.S.A. 50-108 is hereby amended to read as follows: 50-108. Except as provided in K.S.A. 12-205, and amendments thereto, any person, ~~firm, company or corporation~~ that may be damaged by any such agreement, trusts or combinations described in K.S.A. 50-101 and 50-102, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person, ~~company or corporation~~ operating such trust or combination, such damages ~~as they have~~ sustained, together with a reasonable attorney ~~fee fees.~~

Sec. 7. K.S.A. 50-112 is hereby amended to read as follows: 50-112. All arrangements, contracts, agreements, trusts, or combinations between persons ~~or corporations~~ made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material, or for the loan or use of money, or to fix ~~attorneys' attorney or doctors' doctor~~ fees, and all arrangements, contracts, agreements, trusts or combinations between persons ~~or corporations~~, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of

interest for the loan or use of moneys to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.

Sec. 8. K.S.A. 50-113 is hereby amended to read as follows: 50-113. It shall not be lawful ~~unlawful~~ for any corporation to issue or to own trust certificates, other than the regularly and lawfully authorized stock thereof, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, ~~corporation or corporations,~~ or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

Sec. 9. K.S.A. 50-115 is hereby amended to read as follows: 50-115. Except as provided in K.S.A. 12-205, and amendments thereto, any person ~~or corporation~~ injured or damaged by any such arrangement, contract, agreement, trust or combination, described in K.S.A. 50-112 and 50-113, and amendments thereto, may sue for and recover in any court of competent jurisdiction in this state, of any person ~~or corporation~~, the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination, or the full amount of money so borrowed.

Sec. 10. K.S.A. 50-117 is hereby amended to read as follows: 50-117. The purchase, sale or manufacture of any goods, wares, merchandise or other commodities in this state by any person ~~or corporation~~ who has entered into any such arrangements, contracts, agreements, trusts or combinations in any other state or territory, as described in K.S.A. 50-112 and

50-113, and amendments thereto, or the purchase, sale or manufacture of any such articles by any agent or attorney for such person, or as an agent, officer or stockbroker of any such corporation, as a trustee, committee, or in any capacity whatever, shall constitute a violation of this act, and shall subject the offender to the aforesaid liabilities and penalties as provided by this act.

Sec. 11. K.S.A. 50-136 is hereby amended to read as follows: 50-136. It shall be unlawful for any grain dealer or grain dealers, ~~partnership, company, corporation or association of grain dealers,~~ or any other person or persons, ~~partnership, company, corporation or association,~~ to enter into any agreement, contract or combination with any other grain dealer or grain dealers, ~~partnership, company, corporation or association of grain dealers,~~ or any other person or persons, ~~partnership, company, corporation or association,~~ for the pooling of prices of different and competing dealers and buyers, or to divide between them the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof, or for fixing the price which any grain dealer or grain dealers, ~~partnerships, company, corporation or association of grain dealers,~~ or any other person or persons, ~~partnership, company, corporation or association,~~ shall pay for grain, hogs, cattle, or stock of any kind or nature whatever, ~~and.~~ In case of any agreement, contract or combination of such pooling of prices of different and competing dealers and buyers, or to divide between them the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof, or for fixing the price which any grain dealer or grain dealers, ~~partnership, company, corporation or association of grain dealers,~~ or any other person or persons, ~~partnership, company, corporation or association,~~ shall pay for grain, hogs, cattle, or stock of any kind or nature whatever, each day of its continuance shall be deemed a

separate offense.

Sec. 12. K.S.A. 50-148 is hereby amended to read as follows: 50-148. ~~The word As used in this act:~~ (a) ~~"Trade" as used in this act~~ means the business of buying or selling any commodity of general use within the state; ~~and the word;~~ and

(b) ~~"person" or "persons" shall be deemed to include~~ includes individuals, corporations, limited liability companies, general partnerships, and limited partnerships, firms, companies, voluntary associations and other associations or business entities, existing under or authorized by the state of Kansas, or the laws of any other state, territory, or foreign country. ~~This~~ The provisions of this act shall not apply to persons whose business is under the supervision and control of the state corporation commission or the banking department.

Sec. 13. K.S.A. 50-149 is hereby amended to read as follows: 50-149. Any person, ~~firm or corporation,~~ foreign or domestic, doing business in the state of Kansas, and engaged in the production, manufacture, distribution, sale or purchase of any commodity in general use, that shall intentionally for the purpose of destroying competition, discriminate between the different sections, communities, or cities of this state, by buying at a higher rate or selling at a lower rate, any such commodity, in one section, community or city, or any portion thereof, than is charged or paid for such commodity in other section, community, or city, after equalizing the distance from the point of production to the factory, for distribution, and freight rates therefrom, shall be deemed ~~guilty of unfair discrimination~~ in violation with the provisions of this act.

Sec. 14. K.S.A. 50-157 is hereby amended to read as follows: 50-157. In any ~~civil or criminal~~ action or proceeding for violation of the antitrust, discrimination in restraint of trade or unfair competition laws of this state, of that the act complained of was done in compliance with the provisions of any code, agreement, license, rule or regulation in

effect under the terms of the national
industrial recovery act or the federal
agricultural adjustment act, to which the
defendant was a party at the time of such act,
shall be a complete defense to such action or
proceeding.



CARLA J. STOVALL
ATTORNEY GENERAL

State of Kansas

Office of the Attorney General

CONSUMER PROTECTION/ANTITRUST DIVISION

120 S.W. 10TH AVENUE, 2ND FLOOR, TOPEKA, KANSAS 66612-1597
PHONE: (785) 296-3751 FAX: 291-3699

Testimony of

Rex G. Beasley, Assistant Attorney General
Consumer Protection/Antitrust Division
Office of Attorney General Carla J. Stovall
Before the Senate Committee on Judiciary

March 14, 2000

House Bill 2855

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at 3

CONSUMER HOTLINE
1-800-432-2310

Chairperson Emert, and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla J. Stovall to testify in support of House Bill 2855 proposed by Governor Graves. My name is Rex Beasley, and I am the Assistant Attorney General assigned to handle the antitrust matters for the Consumer Protection/Antitrust Division of the Attorney General's office.

Kansas had the foresight to enact its first restraint of trade laws before Congress enacted the Sherman Antitrust Act of 1890. Our current antitrust laws contain fundamental principles designed to protect against restraints of trade, provide procedures for enforcing those principles and remedies for violations. Over time, some of the procedures established for enforcement and the remedies have become outdated and are in need of modernization. The Attorney General is pleased that the Governor took the initiative in proposing much needed modifications to our antitrust laws. House Bill 2855 does not change the fundamental principles of our laws but does establish modern investigative authority more in line with that available to Attorneys General in other states and clarifies the enforcement procedure.

The amendments now being offered by the Governor to the bill, as passed by the House, are for the most part a further refinement and modernization of our antitrust laws. One substantive amendment being offered by the Governor would delete a provision currently in the bill which gives the Attorney General authority to investigate whenever there is reason to believe that "any announced conduct of any person may have the effect of substantially lessen[ing] competition, tend to create a monopoly, or otherwise violate [the] act." That language, in section 12 on page 7 at lines 4-7 of the bill was added by the House Committee as a Whole.

In order to effectively enforce our antitrust laws the Attorney General needs the authority to properly investigate anti-competitive conduct. The Governor's original bill, following existing law, reaffirmed the authority of the Attorney General to conduct an investigation whenever there is reason to believe that any provision of the act has already been violated. In committee, the Attorney

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General suggested an amendment which would have clarified the Attorney General's authority to conduct an investigation, not only after the fact, but also whenever there is reason to believe that any provision of the act "*is about to be violated.*" That language was opposed by the Kansas Livestock Association and was never voted upon by the House Judiciary Committee. Other amendments were approved and the bill, as amended, was sent to the House with the recommendation that it be passed as amended. When considered by the House Committee of the Whole, the investigative authority provision was amended to read as it does now at page 7, lines 4-7. Thereafter the bill in its current form received Final Approval in the House on a vote of 120-4.

We realize that the decision to authorize an investigation not only after the fact, but also when ever there is reason to believe "that any announced conduct of any person may have the effect of substantially lessen[ing] competition, tend to create a monopoly, or otherwise violate [the] act." is a policy decision to be left up to your sound judgement. The issue is whether, in certain circumstances, it is best to give the Attorney General the authority, under state law, to gather facts in order to act to prevent violations of the act before they occur; or whether the Attorney General should be forced to delay any action until after the violations and resulting harm have already occurred.

Assistant Attorneys General in other states have advised me that their statutes grant them the authority to investigate whether any person is actively preparing to engage in activities which may constitute a antitrust violations or are about to engage in any prohibited act or practice. Other states prohibit not only certain anti-competitive conduct but also "attempts" to engage in such conduct.

The authority to investigate for the purpose of ascertaining whether any person is actively preparing to engage in activities which may constitute an antitrust violation is not foreign to Kansas. In fact the Kansas Insurance Commissioner has been given such authority. K.S.A. 40-510 provides that no merger or consolidation of a domestic mutual insurer shall be allowed unless, in advance of the proposed merger or consolidation, the insurer files with the commissioner, the agreement therefor and any other information requested by the commissioner. The commissioner of insurance may disapprove an agreement, if the commissioner determines that it: " would materially tend to lessen competition in this state as to the kinds of insurance involved or would tend to create a monopoly therein." K.S.A. 40-510 gives the Insurance Commissioner authorities well beyond those that section 12 of House Bill 2855 would grant to the Attorney General. The need to prevent anti-competitive conduct is not limited to the insurance industry.

Thank you again for the opportunity to provide information on this very important topic. I urge you to report the bill favorably for passage. I would be happy to respond to any questions you may have on these issues.



PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON THE JUDICIARY

RE: HB 2855 – Strengthening the Kansas Restraint of Trade Act.

**March 14, 2000
Topeka, Kansas**

**Prepared by:
Leslie Kaufman, Assistant Director
Public Policy Division
Kansas Farm Bureau**

Chairman Emert and members of the Senate Judiciary Committee, thank you for the opportunity to appear today and share Farm Bureau's support for many of the concepts behind HB 2855. I am Leslie Kaufman, the Assistant Director of Public Policy for Kansas Farm Bureau.

Monopoly power, whether it arises in industry, labor, finance, agriculture or government is a threat to our competitive enterprise system and the individual freedom of every American. We applaud the efforts of the Governor and his administration to take seriously the need to examine the structure of Kansas' anti-trust laws. Many of the concepts contained in HB 2855 further our policy that government should assist in property rights protection by preventing mergers that result in a monopoly, or would violate antitrust laws that threaten competitive enterprise system.

At the same time, governments should not abuse this role and attempt to halt development or limit the size of a business, no matter if it is agricultural, manufacturing,

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processing or retailing. We believe several of the provisions contained in HB 2588 will allow the state to have additional, appropriate oversight through our antitrust laws while still maintaining a productive, open business market in Kansas. These include:

- Modernizing the Attorney General's power to conduct investigations, including administrative subpoena power;
- Providing multiple remedy options for addressing violations;
- Allowing the Attorney General to recover investigation cost if litigation is successful;
- Enabling the courts to extend jurisdiction over non-residents violating our state statutes; and
- Including antitrust activities as a segment of the Attorney General's annual consumer protection report.

These changes in HB 2588, in our opinion, appear to be reasonable, appropriate means to strengthen the state's antitrust initiatives without the need to establish additional layers of bureaucracy or duplicate upon existing state or federal programs.

Another provision that appears reasonable to us, and was included in HB 2855 by a House floor amendment, is allowing the Attorney General to allocate 20% (instead of 10%) of moneys recovered from successful litigation under the Kansas restraint of trade act to an "antitrust special revenue fund." Through this fund, those violating the act would essentially be funding the enforcement of the act. It seems logical to use these proceeds to fund this enforcement. If we want to encourage the Attorney General to actively investigate and enforce the act, adequate resources are necessary. This is one way to help fund such efforts without relying solely on state general funds or diverting moneys from other important programs within the AG's office.

We would like to briefly comment on one other provision in HB 2855, the language in section 12(a) [pg. 7, ln. 3] which allows the Attorney General to initiate an investigation whenever s/he

“has reason to believe that any provisions of this act has been violated or that any announced conduct of any person may have the effect of substantially lessened competition, tend to create a monopoly, or otherwise violate this act. . .”

There may be some question whether this language is over-broad and allows the AG to take action based on a very low evidentiary standard. On the other hand, some might argue that proposed consolidations and proposed mergers are frequently investigated on the federal level. We encourage the committee to review the language, and if procedural safeguards are helpful, or necessary, to include them in this bill.

Overall, we feel this is a balanced approach to meeting state anti-trust enforcement needs. We encourage the committee make any needed procedural changes and advance this bill favorably. Thank you.



Since 1894

March 14, 2000

Senate Judiciary Committee

Testimony of the Kansas Livestock Association

From: Allie Devine

RE: HB 2855

The Kansas Livestock Association (KLA) is a trade association representing nearly 7,000 livestock producers including all segments of the livestock industry.

The Kansas Livestock Association supports HB 2855 except the provision on page 7, lines 4-7 that was added as a floor amendment, with little debate, by the House Committee of the Whole.

HB 2588 as originally drafted was an attempt to modernize Kansas's antitrust law. KLA supported the original bill because the bill did not change the long established thresholds for bringing a cause of action for violations of the act. Current law, contained in K.S.A. 50-151, authorizes and charges the Attorney General with the duty to "investigate all complaints charging that this act has been violated." The current law then establishes a procedure for the Attorney General to investigate "whenever the attorney general is advised that there are **good reasons for believing that any person has violated** any of the provisions of this act."

HB 2588 on page 7 line 3 outlines similar language to K.S.A. 50-151. The bill states that "whenever the attorney general has **reason to believe** that any provision of this act **has been violated**." Both the current law and the original language of HB 2588 require the attorney general to have **facts** indicating a **violation**.

We are concerned that the language added by the House Committee of the Whole on page 7, lines 4-7 change the thresholds to allow the attorney general to bring an investigation when "any **announced conduct** of any person **may have** the effect of **substantially lessened competition**," or "**tend** to create a monopoly or otherwise violate the act". The term "announced conduct" is undefined. It is unclear what is included. Could "announced conduct" be an existing contractual arrangement, speculation of a merger between two entities, or ground breaking of a new facility or business? Further, the language does not require that the subject of a potential investigation to have actually

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VIOLATED the act, as current law requires, but rather that the announced conduct “**MAY HAVE** the effect of substantially lessening competition” or “**tend** to create a monopoly”. What evidentiary threshold must the attorney general meet to determine that announced conduct “may have” the effect of lessening competition or that competition has been reduced? What does “tend” mean? The language is overly broad and provides no procedural safeguards.

Last week, this committee heard testimony from a number of innovators in the livestock industry. Some of those witnesses contract with processors to capture a particular market. They are aggressively competing to sell their products. Sometimes these arrangements are not popular and are viewed as anti-competitive by others in the industry. Under the language of this amendment, would their legal contractual arrangements subject them to an attorney general’s investigation as “announced conduct” that “may have” the effect of substantially lessening competition? It certainly would depend upon the attitude and perception of the attorney general. Antitrust laws should be enforced based upon facts not political perception.

KLA opposes the language contained in the HB 2855 page 7, lines 4-7. It is overly broad and exposes business to what could be political investigations verses factual investigations. KLA also opposes attempts to lessen the thresholds for investigation or prosecution to levels that allow the attorney general to initiate an investigation or prosecution without a clear showing that the laws have been violated.

KLA supports HB 2855 without the language on page 7 lines 4-7 and asks that you consider deleting this language and pass the bill. Thank you for your time and consideration.

LEGISLATIVE TESTIMONY



The Unified Voice of Business

835 SW Topeka Blvd. • Topeka, KS 66612-1671 • 785-357-6321 • Fax: 785-357-4732 • E-mail: kcci@kansaschamber.org • www.kansaschamber.org

HB 2855

March 14, 2000

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the
Senate Judiciary Committee

by

Terry Leatherman
Vice President, Legislative Affairs

Mr. Chairman and members of the Committee:

My name is Terry Leatherman and I am Vice-President of Legislative Affairs for the Kansas Chamber of Commerce and Industry (KCCI). KCCI has did not appear previously regarding the provisions in HB 2855 and does not support or oppose the legislation. What has prompted KCCI to comment on HB 2855 is a Kansas House amendment to the bill concerning Attorney General powers to initiate investigations regarding business competition and monopolies.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The amendment KCCI questions can be found on page 7 of the bill, beginning on line 4. This amendment appears to give the Attorney General's office the ability to investigate any announced

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ject of any person that may have the effect of substantially lessening competition or tend to create a monopoly. The amendment prompts many questions. Does the amendment apply to the state as a whole, or individual communities in Kansas? What constitutes "announced conduct?" When announced conduct can be by "any person," does that mean someone not involved in the decision-making process for a business in question?

KCCI would urge this Committee carefully review the potentially broad investigatory powers that might be unleashed by this amendment, and consider removing it from the bill. Thank you for this opportunity to explain KCCI's concern regarding HB 2855. I would be happy to attempt to answer any questions.



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KANSAS

Bill Graves
Governor

OFFICE OF THE SECURITIES COMMISSIONER

David Brant
Commissioner

Testimony in Support of
HOUSE BILL NO. 2855

The Office of Securities Commissioner appears in support of HB 2855. Our support is specifically limited to the repeal of K.S.A. 50-121 through 130. We have no position on the rest of the bill.

Our office was asked by the Revisor if we had any objections to repeal of K.S.A. 50-121 through 130, and since no one could recall ever using them, no basis for objecting could be found. Out of an abundance of caution, and to determine if our agency had been neglecting an historic duty, research on the history and applicability of the bucket shop statutes was undertaken, and yielded the following information and opinions.

I. HISTORICAL

It appears from examining the case law that the prohibition against bucket shops was the result of the practice being considered a form of gambling. No actual commodity transaction took place. Instead a form of betting occurred between the bucket shop operator and his customer, which was dependent on what price a particular commodity would bring on a particular exchange at a certain time (closing). A price was agreed upon, and if the price went down, the operator simply kept the money and the customer chalked it up to a bad

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investment. Presumably, if the price went up, the customer was paid the difference between the agreed price and the closing price of the commodity by the bucket shop operator. While the practice sounds somewhat similar to present-day margin or futures trading, it apparently never gained the legitimate reputation the latter enjoy today. This failure may be due to the origin of the term "bucket shop", a euphemism for saloon, a reference to the time when beer was sold by the bucket, supplied by the customer. The practice of commodity "betting" probably arose in such sordid surroundings, hence the disreputable term evolved to describe the trading practice itself.

The bucket shop statutes were intended to prohibit such speculation in commodities, where speculation could be carried out without the commodity actually existing, a legitimate, even noble, objective for a state dependent on agriculture. Stafford County Grain Co. v. Rock Milling & Elevator Co., 94 Kan. 360 (1915). Thus, in cases brought under the bucket shop statutes, the ultimate fact question became whether there was a real sale or "pretend" sale. To call such pretend trading gambling, with criminal penalties rather than merely a private cause of action with civil remedies, was presumably a deterrent to such speculative activity. And by calling commodity speculation gambling, actions by customers against the bucket shop operator, or vice versa, would not be enforceable in civil courts under the "clean hands" doctrine. Carey, et al. v. Myers, 92 Kan. 493 (1914).

II. PREEMPTION

This halcyon age of a state's ingenious method of regulating commodity speculation came to an end with federal intervention, even before the advent of the New Deal. In a major case cited in the annotation, the Kansas Supreme Court denied an injunction to halt futures trading on the Kansas City Board of Trade, based on the conclusion that the Grain Futures Act (passed in 1923) preempted the Kansas bucket shop statutes. State, ex rel. v. Rosenbaum Grain Co., 115 Kan. 40 (1924). The result was that the effective use of the statutes was severely circumscribed: Regardless of whether the commodity was real or not (and apparently regardless of the intentions of the parties), if the transaction involved interstate commerce, the preemption doctrine applied. The effect of preemption continues with subsequent federal acts involving commodities, i.e. the Federal Commodity Exchange Act. Happily, unlike court rulings in other states, the Kansas Supreme Court has held that the Act does not preempt our state securities statutes. Schlatter v. Mo-Comm Futures, Ltd., 233 Kan. 324 (1983).

It is easy to conclude, especially with every commodity transaction involving some sort of interstate commerce, that the federal acts sufficiently regulate trading in commodities (including speculative ones); and the federal and state securities statutes are left alone to regulate securities, without the need for the bucket shop statutes found in K.S.A. 50-121 through 130.

III. STATUTORY INTERPRETATION

A second reason for repealing the statutes, particularly K.S.A. 50-121, lies in the doctrine of applying a more specific statute over a general one in criminal cases. For example, in a case involving our agency, the Court of Appeals reversed convictions of theft by deception, holding that the more specific loan brokering statute applied. Thankfully, the Supreme Court rectified the error by finding the two crimes to be separate and distinct, allowing the charging of both offenses, State v. Fritz, 261 Kan. 294 (1992). A more egregious example of the arbitrary results of the doctrine occurred in State v. Wilson, 11 KA 2d 504 (1986), where the Court of Appeals held that a court services officer who filed a false expense voucher amounting to a claim for hundreds of dollars could only be convicted of the misdemeanor offense of making a false voucher by a state employee, as K.S.A. 75-3202 was the more specific statute over the general felony offense of making a false claim, K.S.A. 21-3904.

It would appear that under some factual scenarios in cases involving securities fraud either by selling away or embezzling, an argument could be made that the misdemeanor offense described in K.S.A. 50-121 is the more specific over the general securities fraud offense in K.S.A. 17-1253. While a misdemeanor may actually impose more jail time under the felony presumptive sentence scheme, it would clearly be a travesty of justice for an offender to avoid a felony conviction (which would also bar him or her from future securities trading) because of historical happenstance.

There are some good points in the statutes, which may actually improve our securities fraud statutes. For example, in K.S.A. 50-126, there is a requirement that the dealer furnish a written statement of the transaction; and failure to do so is a felony, K.S.A. 50-127. This beneficial language, however, is not sufficient reason to forego repeal. It can always be resurrected and added to the existing, and increasingly used, securities fraud statutes at some future date.

Submitted by
James W. Clark
Litigation Counsel
Office of the Kansas Securities Commissioner
Senate Judiciary Committee, March 13, 2000

Every person who shall buy, sell, exchange, or in any other manner deal in grain, stocks, bonds, securities, provisions, or any other commodities whatsoever, upon telegraphic or telephone market reports and quotations, it not then being the intention of such person, in pursuance of such purchase, sale, or exchange, to receive or deliver such grain, stock, bonds, securities, provisions, or other commodities, and the said person selling or agreeing to sell not then being in the possession and control of such grain, stocks, bonds, securities, provisions, or other commodities, shall on conviction be adjudged guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months.

History: L. 1899, ch. 77, § 1; March 29; R.S. 1923, 50-121.

17-1253. Unlawful acts in connection with offer, sale or purchase of securities; qualifications; assignment defined; penalty.

(a) It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:

(1) Employ any device, scheme or artifice to defraud;

(2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

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(j) 'Security' means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificates; thrift certificates or investment certificates, or thrift notes issued by investment companies; certificate of deposit for a security; certificate of interest in oil and gas royalties, leases or mineral deeds; or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 'Security' does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.