

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 A.M. on March 16, 2006, in Room 123-S of the Capitol.

All members were present except:

David Haley- excused
Dwayne Umbarger- excused
Barbara Allen arrived, 9:36 a.m.
Greta Goodwin arrived, 9:37 a.m.
Kay O'Connor arrived, 9:39 a.m.
Derek Schmidt arrived, 9:47 a.m.
Donald Betts arrived, 10:00 a.m.

Committee staff present:

Mike Heim, Kansas Legislative Research Department
Helen Pedigo, Office of Revisor of Statutes
Karen Clowers, Committee Secretary

Conferees appearing before the committee:

Jerry Sloan, Office of Judicial Administration
Curtis Woods, Kansas Chamber of Commerce
Scott Nehrbass, President-elect, Kansas Association of Defense Counsel
James R. Zakoura, Attorney, Smithyman & Zakoura
Joe Zima, General Counsel, USD 501

Others attending:

See attached list.

The hearing **SB 568--Delay of phased in increase of court of appeals to 14 judges** was opened.

Jerry Sloan appeared as a proponent providing background on the bill (Attachment 1).

There being no further conferees, the hearing on **SB 568** was closed.

The hearing on **SB 548--Recovery of certain damages in antitrust cases** was opened.

Curtis Woods appeared in support providing background on the bill (Attachment 2). Mr. Woods indicated the full consideration statute produces punitive results in excess of any existing antitrust statute in the United States. Mr. Woods also claimed Kansas is drawing antitrust plaintiffs from around the country due to its potential for overly excessive judgements.

Scott Nehrbass spoke in support stating his opinion that the full consideration statute does not deter price fixing and indicated the Kansas appellate court has never ruled on the constitutionality of full consideration (Attachment 3).

James Zakoura appeared in opposition indicating it is bad public policy to repeal a statute providing a specific remedy for violations of antitrust law when suits are pending (Attachment 4). Kansas antitrust laws have been on the books since 1889 and have worked well. Claims that such statutes are anti-business is false since it speaks only to a remedy of a violation and provided a list of the three anti-trust cases pending in Kansas.

Joe Zima spoke in opposition providing accounts of successes his school district using current anti-trust law (Attachment 5).

Written testimony in support of **SB 548** was submitted by:

Thomas M. Palace, Executive Director, Petroleum Marketers and Convenience Store Association of Kansas (Attachment 6)
Lew Ebert, Kansas Chamber of Commerce (Attachment 7)

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on March 16, 2006, in Room 123-S of the Capitol.

Written testimony in opposition to **SB 548** was submitted by:

Gary D. McCallister, Attorney, McCallister & Associates (Attachment 8)

There being no further conferees, the hearing on **SB 548** was closed.

The meeting adjourned at 10:28 a.m. The next scheduled meeting is March 20, 2006.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-14-06

NAME	REPRESENTING
Lew Ebert	KANSAS Chamber
Curtis Woods	Kansas Chamber
James P. Zakawa	Smithyman & Zakawa, Chartered -
Egbert Gillespie	Shawnee Co. DOC
Jeff Bottonborg	Kansas Sheriffs' Ass'n
Lana Welsh	OTA
Jenny Sloan	OTA
Jennifer Hermann	KODK - DMV
Marcy Balston	KODK - DMV
Neel fette	Shook, Hardy & Bacon
Beth Lange	SRS
Shan Rattin	Rattin Law Firm LLP
Richard Smayda	Kenny & Assoc.
Tom Wright	Self
Ron Hein	Hein Law Firm, Chtd



State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507

(785) 296-2256

Testimony before the Senate Judiciary Committee

On Senate Bill No. 568

Jerry Sloan

March 16, 2006

I appear today in support of SB 568 concerning the Court of Appeals. This bill would delay the continued expansion of the Court of Appeals until January 1, 2008. Legislation that phased-in an expansion of the Court of Appeals from 10 to 14 judges was passed during the 2001 legislative session to begin on January 1, 2003. The full expansion has been delayed twice and this bill would delay the addition of the last two judges by a year. Attached is the testimony that Chief Judge Rulon gave to the budget committees.

At this point in the session, both the Senate and the House have removed funding for the additional judge and staff from our budget and the Joint Committee on State Building Construction also recommended removing the funds budgeted for the additional suite necessary for the new positions.

The statute currently requires the addition of the 13th judge on January 1, 2007, while all funding for the additional judge and staff have been removed from our budget. Passage of this bill will complete the steps that are necessary to delay the addition of a judge to the Court of Appeals by one year.

Senate Judiciary

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Attachment 1



KANSAS COURT OF APPEALS

GARY W. RULON
CHIEF JUDGE

301 WEST TENTH
TOPEKA, KANSAS 66612-1507

(785) 296-6184
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TESTIMONY OF
CHIEF JUDGE GARY W. RULON
OF THE
KANSAS COURT OF APPEALS

This year's budget request from the Court of Appeals is brief:

In prior years Judges of the Court of Appeals supported a proposal which postponed increasing the number of Court of Appeals judges. This year we again propose postponing, without abandoning, the addition of the 13th position by one year.

Staffing Levels

One of the ways this Court remains productive is by employing enough staff attorneys to prepare cases for hearings. Our need for additional staff attorneys has grown as our caseload has increased over the past two years. We request the addition of one Research Attorney II and one Research Attorney I positions.

Court Travel

The final item of our budget request is the continued funding of the Court of Appeals travel budget to allow this Court to hear cases at locations around the State. By scheduling hearings in or near the county where cases arise, expense to the parties would be minimized. See Recommendations for Improving The Kansas Judicial System, Report of the Kansas Judicial Study Advisory Committee, (JSAC), 13 Washburn L.J. 271, 351-52 (1974).

Thank you for your consideration.

Testimony of Curtis Woods
on behalf of the Kansas Chamber of Commerce
before the Senate Judiciary Committee
in support of Senate Bill 548

Thank you Mr. Chairman. I appreciate the opportunity to testify about Senate Bill 548. I am testifying on behalf of the Kansas Chamber of Commerce, which supports this bill and urges its adoption for a number of reasons.

My name is Curtis Woods. I am a partner at the law firm of Sonnenschein, Nath & Rosenthal LLP, practicing in its Kansas City office. My practice focuses on business litigation, and I have extensive experience in litigating under both federal and state antitrust laws.

Kansas's Restraint of Trade Act provides two possible remedies for an antitrust violation. One is treble damages, a well-accepted remedy throughout the United States, but the other remedy is a historical anomaly that creates a hostile business environment in Kansas. The continued existence of this remedy can create awards of astronomical damages far in excess of what is needed either to fully compensate plaintiffs or to deter anti-competitive conduct. It should be repealed.

SB 548 would do just that. It would leave in place the treble damages remedy applied now in Kansas, at the federal level, and in every other state. It would ensure that as soon as SB 548 takes effect, this unfair and unconstitutional remedy will disappear immediately from Kansas' legal landscape.

The federal government and most states, including Kansas, have adopted an antitrust scheme that allows a plaintiff to recover three times the damages he or she sustained due to an antitrust violation. Thus, a jury is typically asked to determine the *incremental* difference between the normal price of the good and the higher price caused by the antitrust violation. Once that incremental amount is determined, it is trebled.

Kansas, however, still has § 50-115 on its statute books--an 1889 law providing for a full consideration antitrust remedy. The Kansas full consideration remedy allows a plaintiff to recover the full amount that he or she paid for a good whose price was improperly inflated because of an antitrust violation. A Kansas district court has further expanded the application of this statute by holding that this amount can be trebled, which makes the potential total damages much larger. Even worse, antitrust claims are often brought as a class action, and as a result the full consideration remedy can produce damages that are staggering.

The full consideration statute disproportionately overcompensates a plaintiff or class of plaintiffs. The statute leaves plaintiffs in full possession of the product they purchased, and also awards them three times the total price they paid for the product. For example, assume that as a result of a price-fixing conspiracy the cost of machinery increases by \$30 from \$500 to \$530. Each plaintiff's actual damages based on the purchase of one machine would be \$30--the amount of the overcharge. In a class action challenging the conspiracy, the treble damages remedy in Kansas would result in damages of \$90 for every member of the class. But under the Kansas full consideration statute, each class member would receive the entire cost of the

machine--\$530--which would then be trebled to \$1590. Thus, each plaintiff would recover 53 times the amount of his or her actual damage.

This disproportionate recovery would not only be unfair to the defendant, it could be unconstitutional. The United States Supreme Court generally forbids monetary awards greater than nine times the amount of one's actual damages because such an award is considered grossly excessive and an arbitrary punishment in violation of the Due Process Clause of the Fourteenth Amendment.

The full consideration scheme in Kansas is drawing antitrust plaintiffs from around the country, who file suit in Kansas courts because they know they stand to recover more than they could in other state courts, through either a judgment or settlement. In at least one case, a defendant offered Kansas consumer class action plaintiffs a settlement more than six times greater per plaintiff than the settlement it offered to plaintiffs in comparable class actions in other states. Plaintiffs suing under the federal antitrust laws are adding claims under Kansas law in order to benefit from the full consideration remedy. Given Kansas courts' broad construction of the full consideration remedy in recent years, plaintiffs will likely continue to flock to Kansas courts in order to maximize their antitrust recovery. This creates a significant and unnecessary burden on Kansas businesses.

The full consideration remedy is a historical anomaly. The statute was enacted in 1889. It is derived from a draft of the federal antitrust laws that was proposed in 1888 and subsequently rejected by Congress in favor of the treble damages remedy that still exists today. Thus, while this Kansas statute was intended to mimic the federal remedy, the full consideration remedy was abandoned by Congress when it passed the Sherman Antitrust Act in 1890.

The Kansas full consideration statute produces the most punitive results of any existing antitrust statute in the United States. Although a handful of other states have full consideration statutes, only Kansas allows a full consideration remedy by indirect purchasers in class action suits. A few other states that purport to have a full consideration remedy apply it far more narrowly than does Kansas.

Kansas SB 548 would eliminate the full consideration damages remedy, but would leave in place the well-accepted treble damages remedy currently permitted under the Restraint of Trade Act. When the legislation is enacted, Kansas will no longer stand out as a state with unfair antitrust laws, and Kansas consumers will be as fully protected as consumers in any other state.

The Kansas Chamber of Commerce and I urge a favorable vote on SB 548.

Testimony re: SB 548
Senate Judiciary Committee
Presented by Scott C. Nehrbass
on behalf of
Kansas Association of Defense Counsel
March 16, 2006

Mister Chairman, Members of the Committee:

My name is Scott C. Nehrbass of the law firm of Foulston & Siefkin. I am president-elect of the Kansas Association of Defense Counsel, and I appreciate the opportunity to speak to you today.

I would also like to address another issue that sometimes is raised as an argument in favor of statutory remedies like the full consideration statute: deterrence. Some might suggest that the full consideration statute is necessary to deter price fixing behavior. Such an argument is flawed. In the first case, the treble damages and attorney fees provisions of both the federal and Kansas antitrust statutes have proven themselves to be a strong deterrent to anti-competitive behavior. Indeed, these remedies are time-tested and proven deterrents. While no statute can ever be 100% effective in deterring illegal activity, there is no serious debate anywhere that treble damages and attorneys fees for successful plaintiffs is an ineffective deterrent. Further, there is no evidence whatsoever that having the full consideration statute provides any additional deterrence (beyond the customary antitrust remedies) against price fixing.

If anything, the existence of the full consideration statute has simply stimulated a cottage industry of bringing additional antitrust class action litigation to the State of Kansas by opportunistic plaintiffs. If the full consideration statute deterred price fixing behavior more effectively than the treble damages remedy, then Kansas should have less class action litigation than other states that do not have this remedy -- but if anything, Kansas has more such litigation. Moreover, the practical realities of the modern business world belie any deterrent effect to the full consideration statute. Virtually all of the modern cases involving this statute concern allegations of price fixing that occurred far away from Kansas, sometimes even outside the United States. To suggest that multinational corporations are even aware that Kansas has a full consideration statute and that they somehow think about it when they deciding whether to engage in illegal behavior is, simply put, naive. To be sure, companies are very much aware of the existence of state and federal antitrust laws proscribing price fixing and virtually all of them would be aware of the civil and criminal penalties that federal and state laws impose, including treble damages. Consequently deterrence exists by virtue of the awareness of tough penalties -- but the Kansas full consideration statute is not even in the back of anyone's minds. The overwhelming majority of businesses compete ethically and legally because it is the "right thing" to do. For some others, they avoid anti-competitive or illegal behavior because of fear of the traditional antitrust enforcement remedies. It would strain imagination to think that the Kansas full consideration statute was deterring anyone in distant states or foreign lands.

The full consideration provision of K.S.A. 50-115 is also of doubtful constitutionality.

No Kansas appellate court has ever ruled on the constitutionality of the full consideration remedy. But the United States Supreme Court has ruled that there are very few cases involving purely economic harm -- which antitrust injury certainly is -- in which a ratio of punitive to compensatory damages may exceed 4:1. Higher awards are deemed grossly excessive and arbitrary punishments that violate the Due Process Clause of the Fourteenth Amendment to the Constitution.

Treble damages, of course, are permissible; a 3-to-1 ratio is constitutionally acceptable, and it is enforced by state and federal courts across the country. But as has already been explained, any full consideration award will necessarily exceed that ratio by a factor of ten, a hundred, perhaps a thousand or a million. As a result, it is highly likely that such an award would be overturned on appeal.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

**STATEMENT OF OPPOSITION
SENATE BILL 548**

James P. Zakoura
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1. Legislative History of K.S.A. §50-115 **dates back to 1889.**
(History: L. 1889, ch. 257, §4; R.S. 1923, §50-115; L. 1985, ch. 181, §3; L. 200, ch. 136, §12; July 1).
2. **The statute is not anti-business** because it speaks only to a remedy upon violation. By its terms it cannot be used as a basis for recovery against a business operating lawfully. This statute has been on the books for 120 years.
3. **It is bad public policy** to retroactively repeal a statute providing a specific remedy for violations of anti-trust law when plaintiffs have already filed suit in reliance upon the remedy. It creates the appearance that the legislature is trying to favor one party over another in a pending cause of action. The clear purpose of the statute is to establish and quantify a remedial remedy. Therefore anyone who has filed suit in reliance upon it may have a vested property interest that may be unconstitutional to remove without due process.
4. **Pending Cases.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JP Morgan Trust Company, National)
Association, in its capacity as Trustee)
of the FI Liquidating Trust, on behalf of)
Farmland Industries, Inc., now known as)
Reorganized FLI, Inc.)

Plaintiff,)

vs)

Case No. 05 CV 2231 CM/JPO

Mid-America Pipeline Company,)
Mid-America Pipeline Company, L.L.C.,)
Williams Energy Services, Williams Energy)
Group, The Williams Companies, Inc.,)
Mapletree, L.L.C., ONEOK Field Services)
Company, ONEOK NGL Marketing, L.P.,)
ONEOK, Inc., and)
ONEOK NGL Pipeline, L.P.)

Defendants.)

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Attachment 4

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

Learjet, Inc., Cross Oil Refining & Marketing,
Inc., Topeka Unified School District 501 On
Behalf of Themselves and All Other Similarly
Situated Direct Purchasers of Natural Gas in
the State of Kansas)
)
)
)
)

Plaintiffs,

) Civil Action No. 05-cv-1500
) Chapter 60
) Class Action
)

v.

ONEOK, Inc., ONEOK Energy Marketing and
Trading Company, L.P., Kansas Gas Marketing
Company, The Williams Companies, Inc.,
Williams Merchant Services Company, Inc.,
Williams Energy Marketing & Trading,
American Electric Power Company, AEP Energy
Services, Inc., Duke Energy Corporation, Duke
Energy Trading and Marketing Company, LLC,
Dynergy Marketing & Trade, El Paso Corporation,
El Paso Merchant Energy, L.P., CMS Energy
Corporation, CMS Marketing Services & Trading
Company, CMS Field Services, Center Point
Energy, Inc., Reliant Energy, Inc., Reliant
Energy Services, Inc., Coral Energy Resources,
Inc., Xcel Energy, Inc. and E. Primie, Inc.)
)
)

Defendants.)

IN THE DISTRICT COURT OF SEWARD COUNTY, KANSAS

DARIC SMITH, on behalf of himself, and)
All others situated, ("The Class"))

Plaintiffs,)

v.)

PHILIP MORRIS COMPANIES, INC.,)
PHILIP MORRIS INCORPORATED,)
PHILIP MORRIS INTERNATIONAL, INC.,)
R.J. REYNOLDS TOBACCO COMPANY,)
BRITISH AMERICAN TOBACCO CO. LTD.,)
BROWN & WILLIAMSON TOBACCO CORP.,)
LORILLARD TOBACCO CO., LIGGETT)
GROUP, INC., BROOKE GROUP, LTD.)

Defendants.)

Case No. 00-CV-26

MARCH 16th, 2006

TESTIMONY OF JOE ZIMA - GENERAL COUNSEL OF SCHOOL DISTRICT 501 -
TOPEKA, KANSAS

IN OPPOSITION TO STATEMENT SENATE BILL 548

- Kansas schools including USD 501, have benefitted from the strength of the Kansas antitrust laws, receiving recoveries of damages as a result of class action cases brought under these provisions. Kansas schools are protected under the Kansas antitrust laws just like other companies and individuals in Kansas.
- In the 1990's we enjoyed lower gas prices from settlements in the Wyoming Tight Sands case. Today across the country there are price fixing cases being brought against natural gas companies who harmed consumers by engaging in manipulation of the price of this very important commodity that people must have for the basic necessities of life, such as heating homes and classrooms.
- A class action case was filed in Wyandotte County last year and named as defendants national natural gas trading companies. The case covers our school district's purchases of natural gas for the years 2000 - 2002. The case involves other school districts, hospitals, government entities, industrial purchasers and commercial purchasers in Kansas, which will receive financial recoveries if this case is allowed to proceed under the Full Consideration statute.
- It is important to keep in mind KSA 50-115 is not a problem for any company that does not violate the State of Kansas antitrust laws. All of the defendant natural gas companies named in the lawsuit have filed to be registered as foreign corporations doing business in Kansas and as a part of their admission to do business in the State of Kansas they have promised not to violate the states laws

Senate Judiciary

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Attachment 5

including the antitrust laws.

- The only time the Full Consideration statute is triggered is AFTER a judge or a jury has found that a company has violated the law. I understand that since KSA 50-115 has been on the statute books, there has NEVER been a case where a judge or a jury has applied this statute in a case. KSA 50-115 actually PROMOTES SETTLEMENTS. So why the sudden move to repeal this law? Is it because there is PENDING LITIGATION wherein the defendants have admitted to the Commodity Future Commission and others that they violated the laws and have paid in excess of 4 billion in fines? Do the defendants feel that the payment of enormous sums of money to government agencies, other states et.al., is appropriate and yet they want the legislature in Kansas to retroactively delete SUBSTANTIVE rights that belongs to Kansas citizens who have been wronged by their conduct?

- KSA 50-112 makes very clear the parties rights if they enter into contracts that violate this law:

All arrangements, contracts, agreements, trusts, ... which tend to prevent full and free competition in the importation, transportation or sale of articles imported into this State... are hereby declared to be against public policy, unlawful and void.

Since 1889 the law has been very clear in Kansas; if you violate KSA 50-112 your contract is void and against public policy.

- Therefore, according to KSA 50-115 if you are injured or damaged by such a contract you may receive back the Full Consideration paid to the other party. KSA 50-112 and KSA 50-115 set aside these contracts because they are against

public policy.

- A plain reading of the statute shows that 50-115 does not provide for Full Consideration damages to be trebled. In year 2000 the legislature amended KSA 50-161 and stated very clearly “... the remedies provided herein shall be ALTERNATIVE and in addition to any other remedies now provided by law”.
- If in the future there is ever a case where a final judgment is rendered under a Full Consideration calculation, the District Court has the ability to make certain that the amount awarded is fair and reasonable.
- If the introduction of this Senate bill is an attempt to interfere with the current pending litigation against the national natural gas trading companies that I mentioned earlier or any other pending class action antitrust case, then the reasons for the introduction of this bill and changing the Full Consideration statute are not valid and should be rejected.
- Our Full Consideration statute is a statement that Kansas does not welcome illegal, price fixing activities. It has been an effective deterrent since 1889 and it is a statute that encourages settlement resolution of disputes. Two other states, Tennessee and Wisconsin, have Full Consideration statutes very similar to ours. These states are not viewed as being “hostile” to business. Kansas welcomes businesses that want to compete honestly, fairly and those that comply with the laws, which do not break the rules, thereby harming Kansas citizens. This is good public policy - it is not anti-business in any respect.
- Thank you for the opportunity to appear and oppose this bill. It is bad for USD 501 and all Kansans.



Memo To: Senate Judiciary Committee
From: Thomas M. Palace
Date: March 16, 2006
Re: SB 548

Mr. Chairman and members of Senate Judiciary Committee:

My name is Tom Palace. I am the Executive Director of the Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas), a statewide trade association representing over 300 independent Kansas petroleum distribution companies and convenience store owners throughout Kansas.

I appreciate the opportunity to offer written comments in support of SB 548. I had planned on testifying in person; however, I have been called away to attend a funeral.

As it is currently enforced, the Kansas Restraint of Trade Act threatens the survival of Kansas businesses in a way that the original proponents of the legislation could not have intended back in 1989 when they passed the law.

Among most states and the Federal government, the accepted antitrust procedure is to collect three times the amount of the difference between the original price of the product or good in question and the higher price that resulted from the antitrust violation. This is considered a satisfactory and fair level of punishment for violators, and, at the same time, it allows the plaintiff to recover three times the damages he or she sustained because of the violation.

Under Kansas's antiquated 1989 antitrust law, a plaintiff is allowed the "full consideration antitrust remedy," meaning the full amount that he or she paid for a good whose price was inflated because of an antitrust violation would be awarded. In other words, the original cost of the good, plus the amount that the good was "inflated" can be added together, then tripled as compensation! If the violation qualifies as a class action violation, the results can be devastating to any business.

There is no doubt in anyone's mind that victims of price fixing or antitrust violations should be duly compensated, but to award them three times the amount of the cost of the good in addition to three times the amount of the violation is reprehensible and anti-business at best. Kansas can ill afford to be viewed by out-of-state companies who are considering relocating or expanding to our state as a state that would permit such a situation to exist.

I urge you to pass SB 548, thereby repealing the "full consideration" antitrust remedy and leaving in place the treble-damages remedy.

Thank you.

Petroleum Marketers and Convenience Store Association of Kansas

115 SE 7th • Topeka, KS 66603
PO Box 678 • Topeka, KS 66601-0678
785-233-9655 • Fax: 785-354-4374

Senate Judiciary

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Attachment 6

Legislative Testimony

SB 548

March 16, 2006

**Testimony before the Kansas Senate Judiciary Committee
By Lew Ebert, President and CEO**



**THE KANSAS
CHAMBER**

The Force for Business

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Chairman Vratil and members of the committee;

The Kansas Chamber and its over 10,000 members support SB 548, repealing the full consideration provision in antitrust claims under the Kansas Restraint of Trade Act. As it currently exists, Kansas's Restraint of Trade Act contains an outdated provision that provides incentives to bring lawsuits against Kansas businesses. Kansas has on its statute books an 1889 law providing for a "full consideration" antitrust remedy.

SB 548 repeals the full consideration remedy and leaves in place the well-accepted treble damages remedy currently permitted under the Restraint of Trade Act. If SB 548 is enacted, Kansas will no longer stand out as a state with unfair antitrust laws, and Kansas consumers will be as fully protected as consumers in any other state.

The full consideration statute vastly over-compensates a plaintiff or class of plaintiffs. It leaves the plaintiffs in full possession of the product they purchased, and also awards them three times the total price they paid for the product. Even worse, antitrust claims are often brought as a class action, a procedural device that did not exist in 1889 when this statute was passed. Because of class actions, this remedy can now produce damages that are staggering, yet the legislature has never reconsidered whether this law should remain on the books.

We urge you to support SB 548. I thank you for your time and will be happy to answer any questions.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, Chamber Federation, have more than 10,000 member businesses, including local and regional chambers and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

Senate Judiciary

3-16-06

Attachment 7

**Written Testimony of Gary D. McCallister Presented to the
Kansas Senate Judiciary Committee In Opposition to S.B. 548
March 16, 2006**

Mr. Chairman and members of the Committee, my name is Gary D. McCallister. I am an attorney licensed to practice law in the States of Kansas, Illinois, and Colorado. Presently, I am one of the co-lead counsel in two pending cases involving Kansas corporations which have filed state antitrust claims against natural gas trading companies claiming "full consideration" damages as permitted by K.S.A. 50-115 for the alleged unlawful conduct of those trading companies in manipulating the wholesale natural gas market and establishing artificially high prices for natural gas in the Mid-Continent region and Kansas in particular between 2000-2002. The alleged unlawful conduct involved these trading companies entering into phony trades, reporting false trading data and other information known to be used by respected trade publications whose information is relied upon daily if not hourly in the setting of natural gas prices, and engaging in wash trades, all of which served to significantly inflate the price of natural gas charged to direct purchasers of natural gas in Kansas such as two of our clients, Farmland Industries and LearJet. As a result of this market conduct, there have been criminal indictments issued by grand juries around the country, criminal convictions, regulatory and criminal fines and civil recoveries by other states totaling approximately \$4.5 billion dollars. These recoveries and fines pale by comparison to the billions of dollars of profits made by these companies during the time the natural gas markets were being manipulated.

Fortunately for Kansas businesses and consumers, the Kansas legislature has been vigilant in protecting the honesty and integrity of Kansas markets. The important protection is also the oldest. The legislature enacted laws protecting Kansas businesses and consumers from unlawful trade combinations dating back to 1887, when it first enacted K.S.A. 50-101, et seq., the Kansas Restraint of Trade Act.

Historical Perspective of the Kansas Restraint of Trade Act, K.S. A. 50-101, et seq. and K.S. A. 50-115, the “Full Consideration” Remedy

Kansas Restraint of Trade Act

The Kansas legislature enacted its first statute to suppress unlawful trade combinations in 1887. The statute, directed against grain dealers, made it unlawful for any person to enter into any agreement, contract, or combination with any other person 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 these dealings or for fixing the price that any person shall pay for grain, hogs, cattle, or stock of any kind or nature.

The statute was broadened in 1889 to prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or that tend to advance, reduce, or control the price to the consumer of articles imported into the state, or articles of domestic growth, or products of domestic raw material, or to control the cost or rate of interest, or fees for attorneys, doctors, or any other services.

In 1897, the legislature enacted Kansas’s primary antitrust statute. The statute prohibits trusts for five different purposes. The primary purpose of the law is to prevent combinations and organizations of all kinds created for the purpose of controlling trade, transportation, production, price or traffic in commercial commodities. The Kansas Supreme Court upheld the constitutionality of the 1897 act, stating that “it is no argument to launch the platitudes of personal liberty and freedom of contract and due process of law against this statute. What specific prohibition does it contain that the common law has not contained for ages past? Absolutely none.”

In 1899 another act was passed which was largely directed at agreements or combinations in restraint of trade relating to the shipment of seeds, grain, hay, or livestock. Further, it prohibits any person doing business in the state from

conspiring with any other person “for the purpose of monopolizing any line of business.”

In 1907 it became unlawful for any person doing business in Kansas to make it a condition of the sale of goods that the purchaser not sell or deal in the goods of any other person.

In 1915 an unfair practices act was passed prohibiting price discrimination between geographical sections “for the purpose of destroying competition.”

Kansas enacted several amendments to its “Restraint of Trade Act” in 2000 when it eliminated all criminal penalties for violations of the act, did away with criminal penalties for county attorneys and the attorney general for failure to prosecute antitrust violations, and gave the attorney general authority to bring suits *parens patriae*.

The above legislative enactments have remained in force for over a century and have been largely unchanged except for the 2000 amendments.

Full Consideration Damages

The Kansas Restraint of Trade Act found at K.S.A. 50-101, et. seq. provides alternative remedies for damages. Businesses or persons injured by conduct prohibited by Kansas antitrust law may pursue compensatory damages which may be trebled, together with reasonable attorneys fees, or they may recover “full consideration” damages as permitted by K.S.A. 50-115 which provides as follows:

“Any person 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, 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 borrowed.”

This is to say, the Kansas “full consideration” remedy allows for the injured party to sue for and recover the consideration or sum paid by the person for any goods, wares, merchandise and articles included in or advanced by the combination, or the full amount of money borrowed. This section is designed to make the injured party whole and to act as a deterrent against future anti-competitive behavior.

While the Kansas legislature has provided to provide Kansans with strong protections against anti-competitive market behavior, private state anti-trust actions under Kansas law have been extremely rare in the last 20 years. See *Bergstrom v. Noah*, 974 P.2d 520, 530 (Kan. 1999) (noting that Kansas antitrust statutes “have been virtually ignored by the bar, with only a few cases coming to this court since their enactment”). As a result there is neither a crisis nor a bona fide reason for the retroactive repeal of K.S.A. 50-115, which has stood to serve and protect Kansas businesses and consumers for over 117 years. This proposed legislation is clearly designed to protect perpetrators of anti-competitive behavior from significant financial exposure in two pending lawsuits seeking to obtain valid civil damages (not penalties) based on the long standing traditions of Kansas antitrust laws and remedies.

Examples of Anti-Competitive Behavior Harming Kansans

The threat of anti-competitive conduct adversely effecting Kansas businesses and consumers is real not imagined. The following are two glaring recent examples of anti-competitive conduct of global proportions. Kansas Livestock Association members were directly injured by the worldwide conspiracy described in *In re: Vitamins Antitrust Litigation* M.D.L. No. 1285. This scheme involved defendants engaging in a massive horizontal conspiracy to raise, fix, and maintain the prices of vitamins, vitamin premixes and bulk vitamin products, allocating customers and controlling the global market for vitamins, vitamin premixes and choline chloride for at least ten years between 1988-1998. The United States Justice Department investigated this activity. Convictions and criminal fines (not civil damages) exceeded \$900,000,000.00 for violating the criminal laws.

In re: Lorazepam and Clorazepate AntiTrust Litigation, M.D.L. No. 1290, involved a claim pursued by BlueCross BlueShield of Kansas, Inc. and other Blue Cross and Blue Shield plans, health care payers, direct purchasers and consumers against Mylan Laboratories for entering into agreements with the global suppliers of certain raw materials known as active pharmaceutical ingredients used by Mylan to manufacturer tablets of generic Lorazepam and Clorazepate distributed for sale in the United States. This conduct had the effect

of cornering the global market for active ingredients for these drugs for a period of ten years which enabled Mylan to raise its wholesale prices to supra-competitive levels and which price increases were paid by direct purchasers, third party payers, such as BlueCross BlueShield of Kansas, Inc. and other consumers of the drugs.

Litigation Against Which S.B. 548 is Directed

As stated above, Farmland Industries and LearJet have filed separate state antitrust cases against a number of the natural gas trading companies seeking “full consideration” damages against trading companies who are claimed to have engaged in anti-competitive activity artificially increasing the price for natural gas in Kansas during 2000-2002. This conduct has been fully investigated by federal regulatory agencies and has resulted in criminal indictments, convictions and criminal and regulatory fines in excess of \$400 million dollars. Other states and users of natural gas around the country have recovered approximately \$4 billion dollars as a result of this anti-competitive market conduct. The proposed repealer bill, S.B. 548, is designed to retroactively repeal the Kansas “full consideration” damage statute as it applies to these pending cases. This action should be defeated in this committee.

Conclusion

The purpose for the “full consideration” remedy afforded by the Kansas antitrust laws has not changed in 117 years. The reason for retaining this provision in our law is as good as it was when it was enacted. The Kansas Restraint of Trade Act is not a mini Sherman Act and, indeed, it pre-dates the Sherman and Clayton Acts and remains much more expansive in its protection of Kansas citizens. Is there any evidence that a statute meant to protect Kansas businesses and consumers is suddenly harming them? The fact is that antitrust remedies such as this were derived from English common law regulating competition, and they were historically designed to protect vulnerable Kansas businesses (then farmers) from harsh treatment by large interstate interests. Nothing has changed! Now Kansas businesses and consumers face similar harsh treatment from large multi-national interests. The only beneficiaries of a less expansive antitrust statute in Kansas are those who profit by manipulating

markets, which in turn weakens the integrity of those markets, and finally, this results in a loss of confidence in what should otherwise be freely competitive markets. I respectfully urge you to defeat S.B. 548. Thank you for the privilege of allowing me to present this testimony to your committee.