

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 12, 2007 in Room 313-S of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:

Representative Anthony Brown
Paul Johnson, Kansas Catholic Conference
April Holman, Kansas Action for Children
Mark Gleeson, Office of Judicial Administration
Scott Nehrbass, Foulston-Siefkin
Joe Zima, Kansas Trial Lawyers Association

The hearing on **HB 2143 - no hunting or fishing license for persons in arrearages for child support, was opened.**

Representative Anthony Brown appeared as the sponsor of the proposed bill. Kansas currently ranks 38th in the collection of child support payments. Kansas collects only 54% of child support payments which are due. The proposed bill would have an arrears list being sent to the Department of Wildlife and Parks and any individuals, not just Title IV-D cases, on that list would not have the ability to receive a license. Wildlife and Parks would send a notice to individuals that their license has been revoked or will not be renewed until their child support is paid. Lifetime permit holders would not be affected by the proposed bill. (Attachment 1)

Paul Johnson, Kansas Catholic Conference, appeared before the committee in support of the proposed bill. He informed the committee that the Kansas Payment Center is changing providers to J.P. Morgan which will utilize direct deposit and develop data for non-IV-D cases. (Attachment 2)

April Holman, Kansas Action for Children, reminded the committee that child support is a very important financial need for many families to receive. (Attachment 3)

Mark Gleeson, Office of Judicial Administration, brought to the committee attention that only 14 of the 31 judicial districts have court trustee programs. Some of these programs have the authority to enforce IV-D orders while others do not. Also, the court trustee programs do not track who is in arrearages and who is current with child support payments. (Attachment 4)

The hearing on **HB 2143** was closed.

The hearing on **HB 2340 - recovery of certain damages in antitrust cases**, was opened.

Scott Nehrbass, Foulston-Siefkin, appeared as a proponent of the bill which would repeal of K.S.A. 50-115. The statute has allowed class action antitrust lawsuits by indirect purchasers seeking to collect windfalls and extort settlements from businesses doing business in Kansas. Without this statute, individuals and businesses who prove they are injured by anti-competitive behavior would be able to determine their damages and then treble them, and collect attorney fees. The ability to collect trebled damages does promote settlements. (Attachment 5)

The Kansas Chamber and Kansas Civil Law Forum provided written testimony in support of the bill. (Attachment 6)

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 12, 2007 in Room 313-S of the Capitol.

Joe Zima, Kansas Trial Lawyers Association, also is an attorney for Unified School District 501. He spoke in opposition to the bill. USD 501 has benefitted from antitrust lawsuits. In 1990's they received lower natural gas prices from settlements in the Wyoming Tight Sands case. They also filed a class action case against Microsoft Corporation resulting in a \$16 million settlement. They have a pending case against major tobacco companies for fixing prices of their products. (Attachment 7)

Written testimony in opposition to the bill was provided by Gary McCallister. (Attachment 8)

The hearing on **HB 2340** was closed.

HB 2006 - crimes against an unborn child

Representative Colloton made the motion to remove HB 2006 off the table. Representative Watkins seconded the motion. The motion carried.

Representative Kinzer made the motion to report HB 2006 favorably for passage, as amended. Representative Hodge seconded the motion.

Representative Wolf made a substitute motion to define an unborn child as being "viable fetus in utero" (Attachment 9). Representative Roth seconded the motion. Committee members expressed concern about who would determine what would be considered a "viable" fetus. The motion failed.

Representative Colloton made the motion to have the definition of unborn child as "a living fetus implanted in the uterine wall." The motion did not receive a seconded.

Representative Kinzer renewed his motion. The motion carried.

The committee minutes from January 16, 17, 18 & 22 were distributed by e-mail. If no changes are requested by February 16, 2007 the minutes will stand approved.

The committee meeting adjourned at 5:30 p.m. The next meeting is scheduled for February 13, 2007.

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIR: FINANCIAL INSTITUTIONS
MEMBER: FEDERAL AND STATE AFFAIRS
TAXATION

HB 2143

I. Introduction

- A. The need is there
- B. Explain current law
- C. Explain 2143

II. The need is there

- A. Kansas only collects 54% of Child Support
- B. State is near national average
- C. Any improvement would benefit children and families

III. Current Law

- A. Title IV-D cases are forwarded onto Wildlife and Parks from SRS
- B. Mails to Vendors not individuals
- C. Shortcomings
 - i. only individuals that in Title IV-D
 - ii. only individuals that renew license
 - iii. does not affect lifetime license holders
 - iv. requires merchant to view Social Security number

IV. HB 2143

- A. Arrears list sent from District court to SRS to Wildlife & Parks to individuals
- B. Only mail to individuals that are both in the arrears and have a license
- C. Closes some loopholes
 - i. mails to all license holders not just Title IV-D
 - ii. lifetime license holders are notified
 - iii. does not need merchant to view Social Security number.

V. Conclusion

- A. Kansas collects on 54%
- B. Current law has some limitations
- C. HB 2143 closes some loopholes

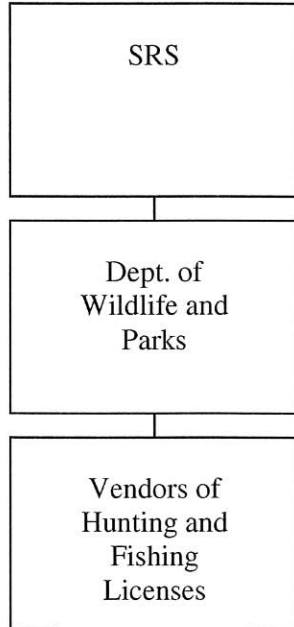
House Judiciary

Date 2-12-07

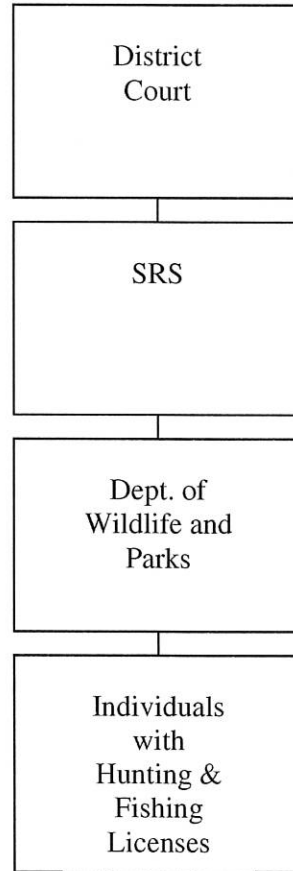
Attachment # 1

Comparison of Hunting and Fishing License Revocation Process for Individuals in Arrears

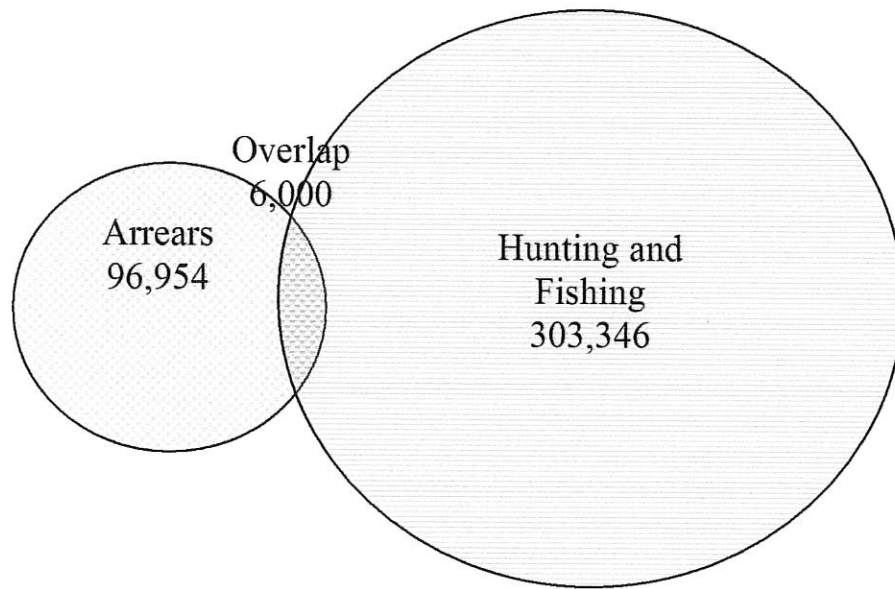
Existing Law



HB 2143



Overlap of Individuals in Arrears Targeted for Revocation of Hunting and Fishing Licenses



**KANSAS HOUSE JUDICIARY COMMITTEE
PAUL JOHNSON – KANSAS CATHOLIC CONFERENCE
TESTIMONY IN SUPPORT OF HB 2143 – FEBRUARY 12, 2007**

Thank you for this opportunity to testify in support of HB 2143. The Kansas Catholic Conference appreciated the improvements to child support collections that the Kansas Legislature made last year in approving sanctions on drivers licenses and recreational licenses as well as supporting the creation of a new child support customer call center. HB 2143 would be a further improvement in proactively notifying parents with hunting and fishing licenses they have fallen behind in their child support obligations and may have such licenses suspended.

Kansas needs to continue to improve its child support collection rate. At the present rate of 56% of current monthly support paid, Kansas ranks 38th out the 50 states. Kansas is behind the states of Nebraska, Iowa and Missouri in our region. The data on the reverse side of this testimony shows the last three years of SRS Child Support Enforcement Statistics. SRS has twice the normal caseload per collection officer (655) and a backlog of over 38,000 cases that need to have financial orders established. For the record, Kansas does not have comparable statistics for the non-4D cases as we do with the 4D cases. The Kansas Payment Center has 127,000 4D orders and 117,000 non-4D orders.

HB 2143 improves the collection of child support from parents with hunting and fishing licenses by reminding them regularly they have overdue child support obligations. This law may have to be phased in by setting a certain minimum of unpaid child support as a trigger to this law. As SRS and the Kansas Department of Wildlife & Parks gain some experience with the application and administration of this new law, the threshold for unpaid child support could be fine-tuned.

The Kansas Catholic Conference supports a special child support interim study that could investigate the whole system in some detail. There are many issues and opportunities that could be explored such as: **1) The Kansas Payment Center has a new contractor – J.P. Morgan – that could save costs by utilizing more direct deposit and developing data for non-4D cases. 2) SRS's child support computer system must be updated. 3) Kansas does not have a financial institution data match law for child support. 4) The dormancy statutes for child support should be reviewed and improved. 5) Many states have improved their child support systems by adopting an administrative process that would increase the efficiency of the system for the parents, SRS and the court system.**

The Kansas Catholic Conference hopes this Committee will recommend favorable passage of HB 2143 and consider a special interim study on child support.

House Judiciary
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Attachment # 2

Category **Child Support Enforcement Statistics**
Base

	Fiscal Year		
	2006	2005	2004
Ave. Total Caseload	131,694	131,616	134,115
Active Children	175,511	172,135	172,138
Ave. # Collection Officers	201	204	210
Ave Cases per Collection Officer	655	645	640
Collection per Case	1,222	1,188	1,131
Cases with Financial Orders	92,282	91,233	89,061
<i>% with Financial Orders</i>	70.0%	69.0%	66.4%
Cases with Current Support Ordered	66,405	65,421	63,831
<i>% with Current Support Ordered</i>	50.4%	49.7%	47.6%
Total Collections	\$160,976,628	\$156,391,906	\$151,735,429
Support Paid to Families	\$127,944,373	\$122,970,832	\$118,950,065
To Kansas Families	\$120,623,526	\$116,576,055	\$112,779,315
To Families in other States	\$7,320,847	\$6,394,777	\$6,170,750
Fees paid by Families	\$2,655,661	\$2,594,239	\$2,619,591
Ave. Current Support Due for the Month	\$15,453,566	\$14,608,500	\$14,089,804
Ave. Current Support Paid for the Month	\$8,544,563	\$7,944,810	\$7,791,982
<i>Percent of Current Support Paid</i>	55.3%	54.4%	55.3%
Children with Current Support Orders	87,907	86,872	84,943
Total Arrears due	\$610,819,512	\$576,822,313	\$543,022,689
Arrears Collected	\$53,348,632	\$48,672,827	\$47,839,797
Cases with Arrears Due (During the Year)	96954	93,985	92,038
<i>% of Cases with Arrears Due</i>	73.6%	71.4%	68.6%
Average Arrears	\$7,000	\$6,819	\$6,704
Cases with a Payment on Arrears (During Year)	61354	58,555	57,024
<i>Percent Paying on Arrears</i>	63.3%	62.3%	62.0%
TANF related cases	21,446	22,188	21,400
State Debt Only Case	28,306	2,625	3,240
TAF Foster Care related	2,242	1,794	1,901
GA and JJA Foster Care	4,618	4,581	4,533
Non TANF Cases	93,390	92,617	95,694
Interstate Cases	6,994	7,196	8,381
<i>% of Children with Health Insurance Order</i>	52.0%	46.0%	35.0%
<i>% of TAF Recovered</i>	35.0%	35.2%	37.6%
TAF Cases Closed with support	3,890	3,609	3,326
Current Support Orders Established	10,604	10,332	9,813
Orders Est. per Collection Officer	53	51	47

FISCAL FOCUS

Budget and Tax Policy in  Perspective

April Holman
Legislative Testimony
House Bill 2143
House Judiciary Committee
February 12, 2007

Good afternoon Chairman O'Neal and members of the Committee. On behalf of Kansas Action for Children (KAC), I would like to thank you for this opportunity to testify in favor of House Bill 2143.

KAC is a not-for-profit child advocacy organization that has been in existence since 1979. We advocate for policies and programs that ensure and improve the physical, emotional, and educational well-being of all Kansas children and youth. As a part of these efforts KAC began the Fiscal Focus initiative in 2003. The purpose of Fiscal Focus is to improve the economic security of Kansas children and their families and ensure a balanced and fair tax system and budget process that protects the well-being of children and families as well as a stable system of state revenues.

We support House Bill 2143, which would require parents to be in compliance with child support payments in order to obtain recreational licenses.

The Importance of Child Support

Child support is a critical source of support for many Kansas children growing up in single-parent households. As we look at ways to assist vulnerable Kansans with limited state and federal dollars, it is clear that child support is an effective and efficient support.

At the child development level, children whose noncustodial parents pay child support have more contact with them, potentially providing the children with emotional as well as financial support. Research indicates that children with parental contact have better grades, better test scores, and fewer behavior problems. They also remain in school longer.

Encouraging Child Support Compliance: HB 2143

Many children whose custodial parents seek child support do not receive it or receive inconsistent or reduced support. To address this, states have implemented measures to ensure compliance. One of these measures is requiring that parents be in compliance with child support payments in order to obtain recreational licenses. In fact, according to the National Conference of State Legislatures, more than 40 states tie child support compliance to the receipt of recreational licenses. Last year legislation was passed in Kansas requiring child support compliance to secure recreational licenses in the case of children receiving government assistance. HB 2143 would extend this requirement to all parents owing child support. Because of the financial and emotional/developmental benefits to children whose parents receive regular child support payments we respectfully request the passage of HB 2143.



State of Kansas

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Testimony before the Kansas House Judiciary Committee
House Bill 2143
January 29, 2007

Mark Gleeson
Office of Judicial Administration

House Bill 2143 conveys upon court trustees an additional responsibility to compile a list of individuals who owe child support arrearages. The purpose of compiling this list and providing it to the Secretary of Social and Rehabilitation Services is to restrict persons who owe a child support arrearage from obtaining a hunting, fishing, or furharvester license. The Office of Judicial Administration does not take a position on the policy decision to restrict these privileges and supports efforts to improve the collection of child support.

The purpose of this testimony is to create realistic expectations regarding the success of this bill by identifying two significant issues. The first issue is that only 14 of the 31 judicial districts have court trustee programs. Some court trustee programs also have contracts with SRS to enforce IV-D orders, while some enforce only non-IV-D orders. This would result in anyone who is in a judicial district without a court trustee enforcing non-IV-D orders avoiding detection that he or she is in arrears on child support payments.

The second issue is that court trustee programs do not always track who is in arrears and who is current with child support payments. Child support payments are made through the Kansas Payment Center and reports on payments are provided to the court trustee. While some match payments with obligations, I do not believe all court trustee offices are, or could reasonably be expected to be, adequately staffed to meet this expectation. Some court trustees would only know an obligor is behind when the parent expecting the check does not receive the check and the trustee brings the matter before a judge or hearing officer, who makes the determination that an arrearage exists. While we have not explored the ramifications of this issue, perhaps this could be accomplished by shifting the burden to the support recipient to notify either the court trustee or SRS office that payments are in arrears to initiate further action under the provisions of this bill.

As stated earlier, the Office of Judicial Administration does not take a position on this bill and appreciates the opportunity to testify.

House Judiciary
Date 2-12-07
Attachment # 4

TESTIMONY re: HB 2340
House Judiciary Committee
Presented by Scott Nehrbass
On behalf of
Kansas Association of Defense Councils
February 12, 2007

Mister Chairman, Members of the Committee:

My name is Scott Nehrbass. I am the President of the Kansas Association of Defense Councils and I appreciate the opportunity to provide written testimony in support of HB 2340.

HB 2340 would repeal K.S.A. 50-115, the full consideration remedy for antitrust claims alleging illegal pricing. The full consideration statute is an archaic and draconian measure dating back to 1889 that creates windfalls by providing plaintiffs with the entire purchase price for any item that was subject to illegal pricing activity, no matter how much consideration they paid and no matter how little the price was actually advanced. This remedy is distinctively anti-business and harmful. In virtually all other areas of trade regulation, the punishment is intended to “fit the crime.” Not so with K.S.A. 50-115. If this statute were not already on the books, it is hard to imagine how anyone could propose “full consideration” as a potential remedy for an antitrust violation and gain the support of anyone except trial lawyers.

As currently configured, Kansas’s antitrust remedies (trebling full consideration) has spawned a cottage industry of bringing class action antitrust lawsuits by indirect purchasers seeking to collect windfalls and extort settlements from businesses doing business in Kansas.

The justification for the repeal of such an obviously-flawed remedy is self-evident. If you buy an automobile for \$20,000 that was priced \$1,000 higher because local dealers agreed not to discount off of sticker price, for example, you have been damaged by exactly \$1,000. The full consideration statute, however, provides that you could recover the full \$20,000 and the trebling of those damages would result in an award of \$60,000 – more than 60 times the actual damages. That is like getting the car for free plus \$40,000 extra. Because of the patently unfair and disproportionate effect of K.S.A. 60-115, those opposing HB 2340 should be challenged to justify the retention of the full consideration statute.

Opponents of HB 2340 have previously advanced several arguments in favor of retaining the full consideration remedy where someone has purchased an item whose price has been illegally advanced: (1) it is needed to make the injured party whole; (2) it is needed to deter others from engaging in similar conduct; (3) it promotes settlements; and (4) “innocent” businesses are not hurt by the full consideration remedy. Each of these arguments is flawed.

Trebled Damages Makes Injured Plaintiffs Whole – Full Consideration Creates Windfalls

First, even after K.S.A. 50-115 is repealed, injured parties will continue to have remedies that more than makes them “whole.” K.S.A. 50-161 is the tried and true trebled damages remedy that fully compensates plaintiffs. Even without full consideration as a remedy, Kansas law allows

individuals or businesses who prove they are injured by anticompetitive behavior to (1) calculate the amount of their damages, then (2) treble them, and (3) recover their attorney fees and costs.

Trebled damages more than makes injured persons “whole.” For example, if they suffer \$10,000 in illegal overcharges, they recover \$30,000 plus the costs of litigation. The result actually puts the injured party in a better position than if there had not been illegal pricing in the first place. Trebled damages not only makes them whole, it creates a financial incentive for them to pursue valid claims against wrongdoers.

Trebled Damages Is An Effective Deterrent – Full Consideration Is Overkill

Similarly, full consideration is neither necessary nor more effective in deterring illegal pricing than traditional antitrust remedies. Trebled damages is a time-proven deterrent to anticompetitive behavior. The federal antitrust statute, 15 U.S.C. § 15, and almost every state’s antitrust laws, have used trebled damages as a strong deterrent against illegal pricing activity for a century or more. There is no evidence whatsoever that the existence of a full consideration statute in Kansas serves to prevent illegal pricing behavior any more reliably than trebled damages remedies.

Trebled damages, by definition, penalizes wrongdoers by a factor of three times the injury they inflicted. For example, suppose two retail gasoline stations in Anywhere, Kansas conspire to increase the price of gasoline from \$2.00 per gallon to \$2.10 per gallon (an advancement of \$.10 per gallon or 5%) for a period of 60 days, during which each of them sells 200,000 gallons of gasoline. Consumers in Anywhere will have collectively bought 400,000 gallons of gasoline for \$840,000 – having been overcharged by \$40,000 by the conspiring stations. Under the traditional trebled damages remedy, the consumers would recover three times that amount – or \$120,000 plus their attorneys fees. Since the illegal behavior only netted each dealer \$20,000 in extra profits, there is a strong deterrent effect of knowing that discovery of their conduct will cost them \$60,000 and they will not only pay their own attorneys, but the plaintiffs’ attorney fees as well.

Without HB 2340, however, the combination of the full consideration remedy and trebled damages, will literally drive both dealers out of business for what is a relatively modest transgression of advancing gasoline prices by ten cents a gallon for a few weeks. In the above example, the full consideration remedy would allow Anywhere consumers to recover the full amount spent on gasoline, \$840,000, as their damages, which trebled amounts to **\$2,520,000** in damages, plus plaintiffs’ attorney fees. Virtually no gasoline retailer could withstand a multi-million dollar judgment for activity which netted **\$40,000** in illegal profits.

Trebled damages deters. Kansas effectively deters other unlawful activity, without a full consideration remedy, by using similar multiples of actual damages. Besides the treble damages remedy for antitrust violations, Kansas provides for up to doubling of actual damages for willful misappropriations of trades secrets, plus attorneys fees. K.S.A. 60-3322(b). For torts committed willfully, wantonly or maliciously, Kansas provides for punitive damages as a deterrent to unwanted behavior. K.S.A. 60-3702. However, even here, Kansas has placed some reasonable limits on the amount of such punitive damages, striking a balance between the need for

punishment and deterrence and the crippling effects of unbounded damages. For example, punitive damages are limited to \$5 million or 1½ times the amount of profit the defendant gained from his misconduct, whichever is greater.

Consequently, in other areas of Kansas law, exemplary damages are already limited to between 1½ times the defendant's profits (for general punitive damages) to 2 times actual damages (for trade secret misappropriation). Those are substantial deterrents to anyone. Repealing K.S.A. 50-115 would leave the trebled damages provisions in place, providing a sufficient deterrent.

Trebled Damages Promotes Settlements – Full Consideration Is Not Needed

The clear rationale behind the argument that full consideration promotes settlements is that defendants, faced with a potentially business-crippling judgment for trebled full consideration, will cave in and pay significant sums of money in cases that may have little merit or little actual injuries. For example, if the Kansas Legislature passed a law that said all successful plaintiffs alleging employment discrimination will be awarded a minimum of \$10 million dollars, you can be sure that (a) more employment lawsuits will be filed, and (b) most employment lawsuits would settle before trial, regardless of merit. Even a questionable claim, with only a 5% chance of success would have substantial settlement value if an employer knew there was a chance of a ten million dollar-plus judgment. Yet, the Kansas Legislature does not pass punitive measures solely to induce plaintiffs to file claims and then settle them.

The full consideration statute is no different. It creates misplaced incentives to bring and settle cases, even those without merit. As currently structured, antitrust plaintiffs alleging illegal pricing are permitted to recover the entire cost of the item purchased and, according to some Kansas courts, the full consideration is also trebled – meaning that the damages will be three times the price paid.

For example, if a Kansas farmer purchases a combine for \$100,000 and he alleges that the price was advanced by \$10,000 because of collusion by area farm implement dealers, he can bring a claim for full consideration and trebled damages, plus attorney fees. Under current Kansas law, he could recover the full consideration, \$100,000. Thus, if he can prove his claim, he will receive \$300,000 after trebling, plus attorneys fees. Plus, he keeps the combine.

His actual injury, if his allegations are true, is only \$10,000. He may have little, if any, evidence that anyone actually did anything wrong, but may have a “hunch” or heard rumors that there was a “deal” that prevented price competition. Even a nuisance complaint, lacking a factual basis, will have settlement value of thousands of dollars under such circumstances. Causing unmeritorious claims to be filed and then “settle” is not a proper purpose or use of the full consideration remedy.

On the other hand, if full consideration is repealed, defendants will still have strong incentives to settle valid claims for illegal pricing due to the presence of the treble damages remedy and the attorney fee provision of K.S.A. 60-161. In the above example, the dealer who has collusively increased his price by \$10,000, faces \$30,000 in trebled damages, plus paying for both sides' attorneys fees. Unless the defendant has a high probability of succeeding at trial, the trebled

damages provision will induce settlement. Indeed, in antitrust cases brought under federal statutes or in states where trebled damages are the remedy, meritorious claims routinely settle before trial. Repealing K.S.A. 60-115 will not cause more antitrust cases to go to trial, although it may cause fewer frivolous or marginal cases to be filed in the first place.

Full Consideration Harms Law Abiding Businesses

It has also been argued that K.S.A. 50-115 “is not a problem” for anyone who does not violate the antitrust laws so it should not be repealed. By that logic, seizing one’s automobile as a penalty for speeding “is not a problem” for anyone who abides by the speed limits and a \$10,000 civil penalty for bouncing a check “is not a problem” for someone who keeps their checkbook balanced.

The current penalty – trebled full consideration – does harm legitimate companies and threatens their very survival when facing such a lawsuit. They are harmed when they are forced to settle dubious claims because of the risk, however slight, of a crippling trebled full consideration judgment. An antitrust violation can occur when a misguided rogue employee engages in collusive behavior, without the knowledge or consent of the company. Should the company be forced out of business by the full consideration statute? And, being human, there are occasional lapses in judgment even by senior management of companies. They should be held accountable for antitrust violations – and they are by trebling the actual damages suffered by injured consumers.

Repeal of the full consideration statute is not an endorsement of illegal pricing activity nor does it encourage illegal behavior. Trebled damages is a powerful tool that deters violations, punishes those who violate the law, and fairly compensates consumers.

Legislative Testimony

HB 2340

February 12, 2007

Testimony before the Kansas House Judiciary Committee
By Marlee Carpenter, Vice President of Government Affairs



The Force for Business

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Chairman O'Neal and members of the committee;

The Kansas Chamber and its over 10,000 members support HB 2340, 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.

HB 2340 repeals the full consideration remedy and leaves in place the well-accepted treble damages remedy, currently permitted under the Restraint of Trade Act. If HB 2340 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 HB 2340.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advoc becoming the best state in America to do business. The Kansas Chamber and its aff Chamber Federation, have more than 10,000 member businesses, including local an and trade organizations. The Chamber represents small, medium and large employe

House Judiciary
Date 2-12-07
Attachment # 6

KANSAS'S RESTRAINT OF TRADE ACT ALLOWS PLAINTIFFS TO RECOVER EXCESSIVE DAMAGES DISPROPORTIONATE TO THE INJURY

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 is an historical anomaly that creates a hostile business environment in Kansas. The continued existence of this remedy could result in an award of astronomical damages. It should be repealed. Kansas House Bill 2340, now pending, would do just this.

Kansas has two parallel antitrust remedies. The federal government and most states, including Kansas,¹ 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 on its statute books an 1889 law providing for a "full consideration" antitrust remedy.² 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 increased because of an antitrust violation. Kansas courts have further expanded the application of this statute by holding that this amount can be trebled,³ 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 an antitrust violation the cost of machinery increases by \$100 from \$1,000 to \$1,100. A plaintiff's actual damages based on the purchase of one machine would be \$100 -- the amount of the overcharge. Thus, in a class action based on a violation, the treble damages remedy in Kansas would result in damages of \$300 for every member of the class. But under the Kansas full consideration statute, each class member would receive the entire cost of the machine -- \$1,100 -- which would then be trebled to \$3,300. Thus, each plaintiff would recover 33 times the amount of his or her actual damage, together with a machine worth \$1,000.

¹ See Kan. Stat. Ann. § 50-161(b).

² See Kan. Stat. Ann. § 50-115.

³ See *Cox v. F. Hoffman-La Roche, Ltd.*, No. 00-C-1890 (Dist. Ct. Wyandotte County, Kan. Oct. 10, 2003).

But the unfairness does not stop there; it is only beginning. Assume the machine was worth only \$500, but the price was increased to \$1,100. The plaintiff would still recover \$3,300 in treble damages, together with a machine worth less than the one in the first example. But the seller's wrongdoing was greater in this case – overcharging by \$600. Yet, the seller here also loses \$3,300, just as in the first example, but loses a machine costing only \$500. Thus, the greater the wrongdoing (overcharge), the less the seller is penalized (loss of a less expensive machine), and the less the plaintiff recovers (a less expensive machine).

But there is more unfairness to come. Class action lawsuits have been filed in which the plaintiffs claim full consideration damages (trebled) when the violation that occurred involved only a small component of the product. In one case, the estimated cost of the component product was \$50,000, but the claim was for over \$100,000,000 in damages, which represented the full consideration paid for the finished product which would then be trebled.⁴

This disproportionate recovery would not only be unfair to the defendant, it could be unconstitutional. The United States Supreme Court generally forbids punitive damages greater than ten 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.⁵

The full consideration statute draws plaintiffs to Kansas courts. 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 *Chance v. United States Tobacco Company*,⁶ for example, the defendant offered to Kansas consumer class action plaintiffs a settlement more than six times greater per plaintiff than the settlement it offered to indirect purchaser-plaintiffs in comparable class actions in other states. Also, plaintiffs suing under the federal antitrust laws are adding claims under Kansas law in order to benefit from the full consideration remedy.⁷ Given Kansas courts' broad construction of the full consideration remedy in recent years,⁸

⁴ *Four B Corp., et al. v. Daicel Chemical Industries, Ltd., et al.*, 253 F. Supp. 2d 1147 (D. Kan. 2003); *Four B Corp., et al. v. Ueno Fine Chemicals Industry, Ltd., et al.*, Case No. 01 C 2570 (Dist. Ct. Wyan. Co., Kan.).

⁵ *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

⁶ No. 03-CV-112 (Dist. Ct. Seward County, Kan.).

⁷ *See In re: Linerboard Antitrust Litigation*, MDL No. 1261, 2004 U.S. Dist. LEXIS 17161 (Aug. 27, 2004). The plaintiffs sued under the Sherman Act and under the antitrust laws of five states, including Kansas, which recognize the full consideration remedy.

⁸ *See Smith v. Philip Morris, Inc.*, Case No. 00-CV-26 (Dist. Ct. Seward County, Kan. Nov. 8, 2001) (holding that a plaintiff class of indirect purchasers had standing to pursue full consideration damages under Kan. Stat. Ann. § 50-115); *Four B Corp. v. Daicel Chem. Indus.*, 253 F. Supp. 2d 1147 (D. Kan. 2003) (applying *Smith*, on the ground that the Kansas Supreme Court would probably follow the rule in *Smith*).

plaintiffs will likely continue to flock to Kansas courts in order to maximize their antitrust recovery.

The full consideration statute is an historical anomaly. The full consideration remedy 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 had been abandoned by the Congress when it passed the Sherman Act in 1890.

The full consideration statute invites “professional plaintiffs” and has involved thousands of claims in recent years. Some have erroneously suggested that the full consideration remedy does not pose a problem in Kansas because “only” a dozen or so cases in recent years have requested the full consideration remedy, along with treble damages. This is misleading. Virtually all of these cases were class action lawsuits, each involving hundreds, if not thousands, of plaintiffs and multiple defendants. For example, *Merriman v. Crompton Corporation* sought full consideration and trebled damages for all “persons with the State of Kansas who purchased tires” and *Chance v. U.S. Tobacco Company* sought full consideration and trebled damages for all “persons that are Kansas resident who have purchased moist snuff product.” Marvin D. Chance, Jr., the class representative in the latter case, is apparently a professional plaintiff, as he is also the named plaintiff in *Chance v. Intel*, which seeks full consideration and trebled damages for the entire cost of computers purchased in a number of Kansas counties due to allegations involving a component of the computer (Intel microprocessors).

The Kansas full consideration statute provides the harshest antitrust remedy in the country. The Kansas full consideration statute produces the most punitive results of any existing antitrust statute. Although a small handful of other states (7) have some form of full consideration statutes, only Kansas allows a full consideration remedy by indirect purchasers in class action suits.⁹ Indiana courts limit recovery under the full consideration statute to direct purchasers.¹⁰ South Carolina courts limit recovery of full consideration to direct purchasers and refuse to apply the remedy in class action suits.¹¹ Despite using full consideration language in its

⁹ See *id.*

¹⁰ Compare Ind. Code § 24-1-4-4 (allowing recovery of “the full consideration or sum paid”), with *Berghausen v. Microsoft Corp.*, 765 N.E.2d 592 (Ind. Ct. App. 2002) (holding that Indiana’s antitrust laws are modeled on the Sherman Act, which does not give standing to indirect purchasers).

¹¹ Compare S.C. Code Ann. § 39-3-30 (allowing recovery of “the full consideration or sum paid”), with *General Supplies, Inc. v. Southwire Co.*, 275 S.E.2d 579 (S.C. 1981) (holding that the full consideration remedy is unavailable in class actions), and *In re Microsoft Corp Antitrust Litig.*, 401 F. Supp. 2d 461 (D. Md. 2005) (holding that indirect purchasers may not recover under South Carolina antitrust law).

statute, Tennessee courts limit recovery to the incremental overcharge paid by the plaintiff.¹² A Vermont statute allows the recovery of full consideration damages or overcharge damages,¹³ but the Vermont courts have not yet considered the statute. Wisconsin courts have noted the possibility of a full consideration remedy but have not determined the availability of the remedy.¹⁴ Colorado courts have not considered their full consideration remedy, which is modeled on the Wisconsin statute, except to note that antitrust remedies are only available to direct purchasers.¹⁵ Federal law and the other 43 states do not allow a full consideration remedy.

All of these statutes allowing full consideration damages for a violation of the antitrust laws should be repealed, starting with Kansas. Kansas HB 2340 would do this, and 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.

¹² Compare Tenn. Code Ann. § 47-25-106 (allowing recovery of “the full consideration or sum paid”), with *Freeman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512 (Tenn. 2005) (limiting recovery to the amount of the overcharge).

¹³ See Vt. Stat. Ann. tit. 9, § 2465(a).

¹⁴ See *City of Madison v. Hyland, Hall & Co.*, 243 N.W.2d 422, 434 (Wis. 1976) (noting in dicta that an injured party may recover the full amount paid under a contract in violation of state antitrust laws).

¹⁵ See *Pomerantz v. Microsoft Corp.*, 50 P.3d 929 (Colo. Ct. App. 2002) (holding that antitrust remedies are available only to direct purchasers).

KANSAS CIVIL LAW FORUM

A Coalition of Professionals and Businesses
Interested in the Kansas Court System

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**Statement of Brad Smoot
Coordinator, Kansas Civil Law Forum
House Judiciary Committee
Regarding House Bill 2340
Written Only**

February 12, 2007

Mr. Chairman, Members of the Committee:

Thank you for the opportunity to comment on behalf of the Kansas Civil Law Forum (KCLF) in support of HB 2340. The KCLF is composed of various businesses, insurance interests and professional associations. Membership list attached. We have been privileged to comment on issues of civil law for nearly twenty years. KCLF supports the repeal of K.S.A. 50-115. Commonly know as "full consideration," this outdated statute can allow antitrust plaintiffs to recover excessive awards.

In most civil litigation, a plaintiff is permitted to recover damages equal to the amount of their actual injury. In some rare instances, statutes provide for doubling or even tripling of those damages and/or the recovery of attorney fees. In fact, the general remedy for antitrust damages, applicable to all federal claims and state law claims not involving advancement of pricing, is trebled damages, plus attorney fees. See K.S.A. 50-161.

The full consideration statute stands alone in providing plaintiffs with a windfall of unprecedented proportions. For example, suppose a consumer purchases a computer for \$1,000 in which an inexpensive component, such as a memory chip, has been improperly advanced in price by \$5, causing the consumer to ultimately pay \$5 too much for the computer. K.S.A. 50-115 has been used by plaintiffs to assert they are entitled, as "full consideration" damages, to recover the entire cost of the computer – \$1,000 (and keep the computer). Additionally, some Kansas courts have permitted the plaintiff to seek the trebling of the full consideration, so that damages claimed would be \$3,000 per computer. Yet, the actual damages from overpricing are only \$5 per computer. This creates a windfall situation in which the plaintiff could recover 600 times (or more) the actual damages suffered. This example is not fiction -- a real Kansas case (*McGrath v. Micron*) makes similar claims. Other such "component" cases filed in Kansas include *Four B Corp v. UENO Fine Chemicals Industry* (sorbates, a food additive), *Merriman v. Crompton Corp.* (rubber processing chemicals used in tires) and *Premier Pork, Inc. v. Rohone-Poulenc, S.A.* (methionine, animal feed additive).

The obvious harshness of this remedy is magnified because such claims are normally brought as class action lawsuits, on behalf of thousands of consumers. Antitrust violators should be held accountable for their violations – and they are by trebling the actual damages suffered by injured consumers. Repeal of K.S.A. 50-115 merely brings Kansas in line with other states and removes an unnecessary windfall for plaintiffs and their attorneys.

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KCLF MEMBERSHIP LIST - 2007

American Insurance Association

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Kansas Association of Property & Casualty Insurance Companies, Inc.

Kansas Hospital Association

Kansas Insurance Association

Kansas Medical Society

Pfizer, Inc.

State Farm Insurance Companies

The Boeing Company

Union Pacific Railroad

FEBRUARY 12TH, 2007

TESTIMONY OF JOSEPH W. ZIMA – BOARD CLERK & SCHOOL DISTRICT
ATTORNEY OF UNIFIED SCHOOL DISTRICT 501 – TOPEKA, KANSAS

STATEMENT IN OPPOSITION TO HOUSE BILL 2340

- Kansas schools, including USD 501, have benefited from the protection of the Kansas antitrust laws, receiving recoveries of damages as a result of class action cases brought under these provisions. Kansas schools are legal entities protected under the Kansas antitrust laws just like companies and individuals in Kansas.
- In the 1990's we enjoyed lower natural 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, which have harmed consumers by engaging in manipulation of the price of this very important commodity that people must have as a basic necessity of life, such as heating homes and classrooms.
- A class action case was filed in Wyandotte County and named national natural gas trading companies as defendants. 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, all of which will receive financial recoveries if this case is allowed to proceed under the Full Consideration statute. (K.S.A. 50-115).
- Presently, Kansas schools are benefiting from a \$16 Million settlement with the Microsoft Corporation. This class action was brought under full

consideration statutes and will directly benefit qualifying Kansas school districts with their purchases of computer software and equipment. This case was brought in Johnson County District Court and settled in 2005.

- Kansas schools make every effort to educate students about the health risks of smoking tobacco products. Presently, there is a class action case against the major tobacco companies, Philip Morris Companies, R.J. Reynolds Tobacco Company, and others for fixing prices of their products. This class action is pending in the District Court of Seward County. It is possible that a settlement from this case could benefit Kansas school districts in their fight against teen smoking.
- It is important to keep in mind that K.S.A. 50-115 is not a problem for any company that does not violate the antitrust laws of the State of Kansas. All of the defendant natural gas companies named in the lawsuit registered as foreign corporations to be authorized to transact business in Kansas. As part of their admission to do business in the State of Kansas, they have promised not to violate the state's laws, 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 K.S.A. 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. This is because K.S.A. 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 Futures Trading Commission and

others that they violated the laws and have paid in excess of \$400 million in fines? The defendants apparently feel that the payment of enormous sums of money to federal government agencies and to other states is appropriate! Yet they want the legislature in Kansas to delete **substantive** rights that belong to Kansas citizens, whom we believe have been wronged by their conduct!

- K.S.A. 50-112 protects Kansans' rights if they enter into contracts with parties 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 the 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 K.S.A. 50-112, your contract is void and against public policy.

- Therefore, according to K.S.A. 50-115, if we are injured or damaged by such a contract we may receive back the Full Consideration paid to the other party. K.S.A. 50-112 and K.S.A. 50-115 void these contracts because they are against public policy
- A plain reading of the statute shows that K.S.A. 50-115 does not provide for 50-115 damages to be trebled. In the year 2000, the legislature amended K.S.A. 50-161 and stated very clearly "...**the remedies provided herein shall be ALTERNATIVE and in addition to any other remedies now provided by law**".

- In the future, if there is ever a case where a final judgment is rendered under a K.S.A. 50-115 calculation, our District Courts have the ability to make certain that the amount awarded is fair and reasonable.
- If the introduction of this House Bill 2340 is an attempt to interfere with the 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 K.S.A. 50-115 are not only suspect, they are invalid and should be rejected.
- The Full Consideration statute is a clear statement of long standing public policy that Kansas does not welcome illegal, price fixing activities. It has been an effective deterrent since 1889 and it is a statute that encourages the resolution of disputes by settlement. I believe that other states, Colorado 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 and fairly and which comply with our laws and do not break the rules, thereby harming Kansas citizens. This is good, time-tested public policy. It is **not** anti-business in any respect.
- I want you to know that we do not enter into litigation lightly and without due diligence. I would like to show you the type of material we reviewed before considering litigation of this type, which indicates to us that this is not "frivolous" or "meritless" litigation as those terms are so widely applied by the proponents of this bill and others. Please consider a few of the attached exhibits.

Exhibit 1 – List of \$4.4 billion in fines and other payments by

natural gas companies to government authorities to settle allegations of market manipulation. I invite you to carefully review this to focus on the false reporting and manipulation of natural gas markets.

Exhibit 2 – Kansas City Star – Article – Ex-Aquila Traders Plead Guilty - Aquila agreed to pay \$26.5 million to settle charges they manipulated natural gas prices.

Exhibit 3 – Article – Former El Paso Gas Trader Gets Prison Time – For manipulating natural gas prices.

Exhibit 4 – Copy of Plea Agreement – United States District Court – For Thomas J. Pool – Trader for Williams Energy Marketing and Trading – A subsidiary of the Williams companies located in Tulsa, Oklahoma – This Plea Agreement describes how Williams conspired with others to report fictitious trades, which affected natural gas prices.

- These are examples to indicate to you that the litigation involving the anti-trust laws of Kansas, which have been on the books for better than 100 years, are utilized to protect Kansas citizens and Kansas businesses from very serious anti-trust violations. I want you to know that the Attorney General of the State of Kansas utilizes this law to protect Kansas consumers, Kansas businesses and Kansas State agencies.
- I think it is important for this committee to also be aware that there is not a great deal of Chapter 50 – Restraint of Trade litigation. However, I want you to be aware that it has been very protective of businesses in Kansas and has

yielded substantial multi-million dollar recoveries for Kansas businesses, which have been harmed by price conspiracies. For example, but not by way of limitation I'm aware that: (1.) The Kansas Livestock Operators in Kansas received a multi-million dollar recovery in the tetracycline anti-trust litigation. (2.) Hill Packing Company, a local company recovered multi-million dollars in the vitamin litigation. (3.) The Kansas livestock producers likewise recovered multi-million dollars in the vitamin anti-trust litigation.

- These three litigations involved cartel conspiracy's that impacted local Kansas businesses and that is exactly why Chapter 50 is meant to be helpful in providing remedies to Kansas businesses.

- It does not seem to me to be good public policy to repeal a statute providing a specific remedy for violations of anti-trust laws of Kansas when the Plaintiffs have already filed suit in reliance upon that remedy. It could create 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.

- I think it is important that you are all aware that there are pending cases which are attempting to address these anti-trust issues and I have therefore, set out below the descriptions of those cases, as originally filed.

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)

IN THE DISTRICT COURT OF WYNDOTTE COUNTY, KANSAS

J.P. Morgan Trust Company)

v.)

) CV-05C-1232
) Chapter 60

The Williams Companies, Inc.)
El Paso, Corporation; Duke Energy)
Corporation, et. al.)

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,)

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, Dynegy 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. Prime, Inc.)

Defendants)

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

- Thank you for the opportunity to appear and oppose this bill. It is bad for USD 501 and all Kansans.

6-1

Details of the \$4.4 billion in fines and other payments by natural gas companies to government authorities to settle allegations of market manipulation

Company	Payment (\$millions)	Agency	Date	Description of Enforcement Action
AEP (Columbus, OH)	\$ 81.0	CFTC	Jan-06	false reporting and manipulation of natural gas markets
Aquila (Kansas City, MO)	28.6	CFTC	Jan-04	making false reports and manipulation of natural gas prices
Black Hills Corp (Rapid City, SD)	3.0	CFTC	Jul-03	Black Hills subsidiary Enserco Energy manipulated natural gas prices
Calpine (San Jose, CA)	1.5	CFTC	Jan-04	reporting false volume and price data of natural gas
CenterPoint (Houston, TX)	0.3	FERC	Jun-05	abuse of affiliate transactions involving natural gas transportation
Cinergy (Cincinnati, OH)	3.0	CFTC	Nov-04	false reporting of trade information concerning natural gas prices
GMS Energy (Jackson, MI)	16.0	CFTC	Nov-03	false reporting and attempted manipulation of natural gas prices
Dominion Resources (Richmond, VA)	5.0	FERC	Aug-03	improper sharing of natural gas storage inventory information
Duke Energy (Charlotte, NC)	28.0	CFTC	Sep-03	false reporting and manipulation of natural gas
Dynegy (Houston, TX)	5.0	CFTC	Dec-02	Dynegy (ChevronTexaco owns 25%), through its 50% stake in West Coast Power (Xcel subsidiary NRG owns the rest) manipulated natural gas prices
El Paso Corp (Houston, TX)	1,690.0	FERC	Nov-03	manipulating natural gas pipeline capacity into California
El Paso Corp (Houston, TX)	20.0	CFTC	Mar-03	intentionally manipulating natural gas prices
EnCana (Calgary, Canada)	20.0	CFTC	Jul-03	EnCana's subsidiary, W.D. Energy, manipulated natural gas prices
Enron (Houston, TX)	35.0	CFTC	Jul-04	manipulation of natural gas prices
Entergy Koch Trading (New Orleans, LA)	3.0	CFTC	Jan-04	reporting false volume and price data of natural gas
Mirant (Atlanta, GA)	12.5	CFTC	Dec-04	false reporting and manipulation of natural gas
Nicor (Naperville, IL)	0.8	FERC	Aug-04	Nicor improperly shared natural gas storage data.
NISource (Merrillville, IN)	2.6	FERC	Aug-03	NISource's Columbia Gas subsidiary improperly shared natural gas storage data
OncoK (Tulsa, OK)	3.0	CFTC	Jan-04	reporting false volume and price data of natural gas
Reliant Energy (Houston, TX)	18.0	CFTC	Nov-03	false reporting and attempted manipulation of natural gas prices
Sempra Energy (San Diego, CA)	29.0	CA PUC	Nov-04	manipulating natural gas markets
Shell (The Hague, Netherlands)	30.0	CFTC	Jul-04	Shell's Coral Energy subsidiary manipulated natural gas prices.
Western Gas Resources (Denver, CO)	7.0	CFTC	Jul-04	knowingly reported false natural gas price and volume info
Williams Cos (Tulsa, OK)	20.0	CFTC	Jul-03	intentionally manipulating natural gas prices
Williams Cos (Tulsa, OK)	7.8	FERC	Jun-05	manipulating natural gas markets
Xcel (Minneapolis, MN)	16.0	CFTC	Jan-04	Xcel's subsidiary, e prime, manipulated natural gas prices
subtotal	\$ 2,083.6			

Enforcement actions combining natural gas and power manipulation

Duke Energy (Charlotte, NC)	\$ 207.6	CA AG	Jul-04	power and natural gas manipulation
Duke Energy (Charlotte, NC)	142.6	FERC	Dec-03	manipulation of power and natural gas prices in the west coast energy market
Williams Cos (Tulsa, OK)	1,817.0	CA AG	Nov-02	violating the Unfair Competition Act by illegally pricing power & natural gas
Williams Cos (Tulsa, OK)	140.0	FERC	Jul-04	manipulation of power and natural gas prices in the west coast energy market
subtotal	\$ 2,307.0			
grand total	\$ 4,390.6			

Pending lawsuit alleging natural gas manipulation

NRG (subsidiary of Minnesota-based Xcel)	-	CFTC	Jul-04	The CFTC is suing NRG for manipulation of natural gas prices
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Posted on Tue, Aug. 22, 2006

Ex-Aquila traders plead guilty

Three former managers admit that they were aware of false reports of natural gas trades.

By DAN MARGOLIES
The Kansas City Star

Three former managers of Aquila Inc. admitted Monday that they knew about false reports of natural gas trades but failed to report them.

Luke J. Larsen, 38, Joseph Patrick Kennedy, 40, and David Todd Bandy, 42, pleaded guilty to concealment of a felony. Each faces up to three years in prison and a maximum fine of \$250,000.

All three were natural gas traders at Aquila and supervised others who traded natural gas.

The case grew out of an investigation by the Federal Energy Regulatory Commission. In 2003, the commission said in a report that 37 companies, including Kansas City-based Aquila, had engaged in trading strategies that appeared to manipulate energy markets in 2000 and 2001. The report was the product of a wide-ranging inquiry into soaring power prices in California during that period.

In January 2004, Aquila agreed to pay \$26.5 million to settle charges that its energy-trading employees sought to manipulate natural gas prices.

A statement Monday by U.S. Attorney Bradley Schlozman's office said that the three former Aquila employees failed to report their knowledge of the false gas trade reports to a law firm that was retained by Aquila in connection with the commission investigation. The false reports, Schlozman's office said, had been submitted to two trade publications during a period spanning December 1999 to April 20, 2005.

Schlozman said the false reports had the potential to affect natural gas prices nationwide.

To reach Dan Margolies, call (816) 234-4461 or send e-mail to dmargolies@kcstar.com.

11/29/2006



bizjournals.com

Former El Paso gas trader gets prison time

Thursday October 5, 7:10 pm ET

Todd Geiger, a former gas trader and vice president of El Paso Corp. on Thursday was sentenced to two years in federal prison following his earlier conviction for reporting false information related to natural gas trades.

Geiger, 42, was sentenced at a hearing before U.S. District Judge Nancy Atlas.

Following his prison time — he is not subject to parole — Geiger will face two years of supervised release. He will remain free on bond pending an order to surrender to a federal prison facility in the near future, the U.S. Attorney's Office said in a release.

Geiger was convicted on Dec. 11, 2003, after admitting that in November 2001 he ordered a report containing 48 gas trades to be sent via e-mail to a trade publication. The report was used to calculate a natural gas "index" price used by the industry to buy and sell large volumes of natural gas. The false trades would have favored the trading position of Houston-based El Paso (NYSE:EP - News).

Published October 5, 2006 by the Houston Business Journal

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10/7/2006

7-11

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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 UNITED STATES OF AMERICA,
14 Plaintiff,

15 v.

16 THOMAS J. POOL,
17 Defendant.

No. CR 04-0404 SI
PLEA AGREEMENT

18
19 I, THOMAS J. POOL, and the United States Attorney's Office for the Northern District of
20 California and the Fraud Section of the Criminal Division of the Department of Justice (hereafter
21 "the Government") enter into this written plea agreement (the "Agreement") pursuant to Rules
22 11(c)(1)(A) and 11(c)(1)(B) of the Federal Rules of Criminal Procedure:

23 The Defendant's Promises

24 1. I agree to plead guilty to the sole count in the above-captioned information,
25 charging me with manipulation of the price of a commodity in interstate commerce, in violation
26 of 7 U.S.C. § 13(a)(2). I agree that the elements of the offense and the maximum penalties are as
27 follows:
28

PLEA AGREEMENT

1 Elements:

- 2 (1) I had the ability to influence the market price of natural gas in interstate
3 commerce;
4 (2) the published index price of natural gas was artificial in that it did not reflect
5 the legitimate forces of supply and demand;
6 (3) my conduct was a cause of the artificial price; and
7 (4) I intended to cause the artificial price.

8 Penalties:

- 9 a. Maximum prison sentence: 5 years
10 b. Maximum fine: \$500,000
11 c. Maximum supervised release term: 3 years
12 d. Mandatory special assessment: \$100
13 e. Restitution: Up to the amount of the loss

14 2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that
15 the following facts are true:

16 Background

17 Williams Energy Marketing and Trading ("Williams"), a subsidiary of The Williams
18 Companies, is located in Tulsa, Oklahoma. Williams trades a number of different commodities,
19 including natural gas. The natural gas trading group has three primary goals: (1) to ensure
20 physical delivery of natural gas to customers; (2) to hedge against adverse price fluctuations in
21 the market; and (3) to take speculative positions that involve more risk but have the potential to
22 generate high profits. To achieve these goals, traders work with several different natural gas
23 products. Physical trades call for the delivery of natural gas to specific locations. Physical
24 natural gas products include next day gas (to flow the next day), baseload gas (to flow throughout
25 the next month), and term gas (to flow for any designated length of time beyond 30 days). In
26 contrast, financial trades generally are entered without either party to the transaction intending to
27 take delivery of any natural gas. Financial trades can be entered on the New York Mercantile
28 Exchange (called futures contracts) or off-exchange directly between companies (called forward

PLEA AGREEMENT

1 contracts), Financial trades can be used both to speculate and to hedge against price risk in the
2 physical markets. Regardless of the type of transaction, the counter-parties can agree to any
3 price, but often contract prices are tied to published index prices, described below. Both monthly
4 and daily indices are published by a number of different industry newsletters. Monthly indices
5 are published by Inside FERC's Gas Market Report ("Inside FERC") and NGI's Bidweek Survey
6 ("NGI"), among others, on the first business day of each month. Natural gas prices are published
7 for dozens of locations throughout the United States where physical natural gas can be purchased
8 and sold. The publications calculate the monthly index prices using trade data they collect from
9 natural gas traders during the last week of the month. In the natural gas industry, the last week of
10 the month is called "bid week." It was my understanding that the index price at any given
11 location usually represented a volume-weighted average price for baseload gas bought and sold at
12 that location at a fixed price during the most recent bid week.

13 I began working for Williams in January 1997 directly after graduating from college.
14 From approximately August 1998 through October 2002, I was the basis trader for Williams'
15 West Desk for natural gas trading. As a basis trader, I was responsible for buying and selling
16 natural gas products to take advantage of the difference between the price of a physical natural
17 gas contract at a particular location and the price of a standard "Natural Gas" contract traded on
18 the New York Mercantile Exchange. During my employment at Williams, basis traders also
19 were responsible for reporting to the index publications, even though Williams' physical traders
20 executed most of the fixed price, baseload transactions that the indices used in calculating index
21 prices.

22 Manipulation of Natural Gas Index Prices

23 I understand and agree that natural gas is a commodity as defined in Title 7, United States
24 Code, Section 1a(4) and that natural gas flows through pipelines that cross state lines, thereby
25 affecting interstate commerce. As the basis trader for Williams' West Desk, I was responsible
26 for reporting trades negotiated during bid week at locations in the West to Inside FERC and NGI
27 for these publications to use in calculating the first of month indices. From approximately June
28 1, 1998 through June 30, 2002, I conspired with others at Williams to report fictitious trades to

PLEA AGREEMENT

1 Inside FERC and to NGI for the purpose of manipulating the published index prices to increase
2 the value or profitability of Williams' natural gas positions. By reporting false trades, I intended
3 to influence the price published by Inside FERC and NGI at each location for which I reported.
4 To the extent that my false trades were included in the index calculations, the published index
5 prices did not reflect the legitimate forces of supply and demand.

6 When I reported to the index publications, I attempted to skew the published index prices
7 in the direction that would result in a benefit to one or more entities within the Williams
8 Companies. I knew whether my basis positions would benefit from high or low published index
9 prices at the various locations where I traded, and the physical traders similarly knew how their
10 positions would be affected by the published index prices. In furtherance of the conspiracy, the
11 physical traders often indicated to me whether their positions would benefit from high or low
12 published index prices at the locations where they traded.

13 To achieve the goals of the conspiracy, most of the trades I reported were deliberately
14 fabricated. At the end of each bid week, the physical traders would orally inform me of their
15 actual fixed price, baseload trades and I would list these trades in an Excel spreadsheet. Then I
16 would add fictitious trades to the spreadsheet to achieve the desired weighted average price at
17 each location for which I reported to the index publications. My supervisor taught me how to
18 arrange the collection of false trades on this spreadsheet to look like a random sampling that
19 would appear credible to the publications. Finally, I would fax or e-mail the completed
20 spreadsheet to Inside FERC and NGI. For the false trades I included in the spreadsheet, the
21 reported prices and volumes did not represent any actual trades executed by Williams during the
22 relevant bid week. I knew that the publications were soliciting only fixed price, baseload trades
23 executed by Williams during bid week. On at least one occasion when my reported trades were
24 questioned by Inside FERC's Chief Editor, I concealed the fact that I had reported fictitious
25 trades.

26 I have reviewed Inside FERC's calculations for its February 2001 index prices, and I have
27 concluded that I successfully manipulated the index prices of natural gas on February 1, 2001 at
28 three locations: (1) Southern California Gas Co. ("Socal"), (2) the San Juan Basin on the El Paso

1 Natural Gas Co. pipeline, and (3) the Rocky Mountains location on the Colorado Interstate Gas
2 Co. (CIG) pipeline. I intended to manipulate the February 1, 2001 index prices of natural gas at
3 these three locations, and but for the false data that I submitted during bid week in January 2001,
4 the index calculations for these three locations would have been different.

5 3. I agree to give up all rights that I would have if I chose to proceed to trial,
6 including the rights to a jury trial with the assistance of an attorney; to confront and cross-
7 examine government witnesses; to remain silent or testify; to move to suppress evidence or raise
8 any other Fourth or Fifth Amendment claims; to any further discovery from the Government; and
9 to pursue any affirmative defenses and present evidence. I waive any venue defenses that I might
10 have in this case, and I consent to the disposition of this case in the Northern District of
11 California. To the extent that I have a right to have facts that are used to determine the sentence
12 (including any Sentencing Guidelines factors and any departure grounds) charged in the
13 indictment by the grand jury and found by a jury at trial beyond a reasonable doubt (see Blakely
14 v. Washington, 124 S. Ct. 2531 (2004)), I waive those rights and agree that the Court will find
15 the facts that determine my sentence beyond a reasonable doubt, consistent with the Ninth
16 Circuit's holdings in United States v. Thomas, 355 F. 3d 1191, 1201-02 (9th Cir. 2004) and
17 United States v. Banuelos, 322 F. 3d 700 (9th Cir. 2003).

18 4. I agree to give up my right to appeal my conviction, the judgment, and orders of
19 the Court. I also agree to waive any right I may have to appeal my sentence. As to any matter in
20 which I am cooperating with the Government pursuant to this Agreement, I waive any right I may
21 have to assert the attorney-client privilege to decline to answer questions relating to
22 communications with counsel for any other defendant including a defendant acting pro se, except
23 as to communications where counsel for the other defendant was my attorney of record. See
24 United States v. Henke, 222 F.3d 633 (9th Cir. 2000) (counsel for any defendant who has joined a
25 joint defense agreement may owe a duty of loyalty to all defendants participating in the joint
26 defense agreement). I also waive my right to conflict-free representation by any attorney or pro
27 se defendant where a conflict arises from that attorney's or defendant's participation in a joint
28 defense agreement to which I also was a party..

1 5. I agree not to file any collateral attack on my conviction or sentence, including a
2 petition under 28 U.S.C. § 2255, at any time in the future after I am sentenced, except for a claim
3 that my constitutional right to the effective assistance of counsel was violated.

4 6. I agree not to ask the Court to withdraw my guilty plea at any time after it is
5 entered.

6 7. I agree that if restitution is deemed appropriate, the amount will not be limited to
7 the loss attributable to the count to which I am pleading guilty, pursuant to 18 U.S.C. §
8 3663(a)(3). I agree that I will make a good faith effort to pay any fine, forfeiture, or restitution I
9 am ordered to pay. Before or after sentencing, I will, upon request of the Court, the Government,
10 or the U.S. Probation Office, provide accurate and complete financial information, submit sworn
11 statements and give depositions under oath concerning my assets and my ability to pay, surrender
12 assets I obtained as a result of my crimes, and release funds and property under my control in
13 order to pay any fine, forfeiture, or restitution. I agree to pay the special assessment at the time
14 of sentencing.

15 8. I agree to cooperate with the Government before and after I am sentenced. My
16 cooperation will include, but will not be limited to, the following:

- 17 a. I will respond truthfully and completely to any and all questions put to
18 me, whether in interviews, before a grand jury, or at any trial or other
19 proceeding;
- 20 b. I will provide all documents and other material asked for by the
21 Government;
- 22 c. I will testify truthfully at any grand jury, court or other proceeding as
23 requested by the Government;
- 24 d. Should the Government bring a forfeiture action, I will surrender any and
25 all assets acquired or obtained directly or indirectly as a result of my illegal
26 conduct as set forth above;
- 27 e. I will request continuances of my sentencing date, as necessary, until my
28 cooperation is completed;
- f. I will tell the Government about any contacts I may have with any co-
defendants or subjects of investigation, or their attorneys or individuals
employed by their attorneys;
- g. I will not reveal my cooperation, or any information related to it, to anyone
without prior consent of the Government.

1 The parties acknowledge and agree that U.S.S.G. § 1B1.8 applies to this Agreement, and
2 pursuant to that section any self-incriminating information provided by the defendant pursuant to
3 this Agreement shall not be used in determining the applicable guideline range.

4 9. I agree that the Government's decision whether to file a motion pursuant U.S.S.G.
5 § 5K1.1, as described below at paragraph 16 if this Agreement, is based on its sole and exclusive
6 decision of whether I have provided substantial assistance and that decision will be binding on
7 me. I understand that the Government's decision whether to file such a motion, or the extent of
8 the departure recommended by any motion, will not depend on whether convictions are obtained
9 in any case. I also understand that the Court will not be bound by any recommendation made by
10 the Government.

11 10. I agree not to commit or attempt to commit any crimes before sentence is imposed
12 or before I surrender to serve my sentence; violate the terms of my pretrial release (if any);
13 intentionally provide false information or testimony to the Court, the Probation Office, Pretrial
14 Services, or the Government; or fail to comply with any of the other promises I have made in this
15 Agreement. I agree that, if I fail to comply with any promises I have made in this Agreement,
16 then the Government will be released from all of its promises, but I will not be released from my
17 guilty plea.

18 11. If I am prosecuted after failing to comply with any promises I made in this
19 Agreement, then: (a) I agree that any statements I made to any law enforcement or other
20 government agency or in Court, whether or not made pursuant to the cooperation provisions of
21 this Agreement, may be used in any way; (b) I waive any and all claims under the United States
22 Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal
23 Rules of Evidence, or any other federal statute or rule, to suppress or restrict the use of my
24 statements, or any leads derived from those statements; and (c) I waive any defense to any
25 prosecution that it is barred by a statute of limitations, if the limitations period has run between
26 the date of this Agreement and the date I am indicted.

27 12. With respect to this plea, I agree that this Agreement contains all of the promises
28 and agreements between the Government and me, and I will not claim otherwise in the future.

PLEA AGREEMENT

1 13. I agree that this Agreement binds the U.S. Attorney's Office for the Northern
2 District of California and the Fraud Section of the Criminal Division of the Department of Justice
3 only, and does not bind any other federal, state, or local agency.

4 The Government's Promises

5 14. The Government agrees not to file or seek any additional charges against the
6 defendant that could be filed as a result of the investigation that led to the pending information.

7 15. The Government agrees not to use any statements or other incriminating
8 information provided by the defendant pursuant to this Agreement against him, unless the
9 defendant fails to comply with any promises in this Agreement. The Government may, however,
10 provide the defendant's statements to or require the defendant to submit to an interview by any
11 federal or state agency, or require him to provide testimony in any federal or state proceeding, so
12 long as his statements may not be used against him. The Government may also inform the Court
13 and the U.S. Probation Department about the full extent of the defendant's criminal activities,
14 provided, however, that information received by the Government from the defendant pursuant to
15 this Agreement shall not be used to determine the applicable guideline range.

16 16. If, in its sole and exclusive judgment, the Government decides that the defendant
17 has cooperated fully and truthfully, provided substantial assistance to law enforcement authorities
18 within the meaning of U.S.S.G. § 5K1.1, and otherwise complied fully with this Agreement, it
19 will file with the Court a motion under § 5K1.1 and/or 18 U.S.C. § 3553 that explains the nature
20 and extent of the defendant's cooperation and recommends a downward departure.

21 17. Based on the information now known to it, the Government will not oppose a
22 downward adjustment of three levels for acceptance of responsibility under U.S.S.G. § 3E1.1.

23 The Defendant's Affirmations

24 18. I confirm that I have had adequate time to discuss this case, the evidence, and this
25 Agreement with my attorney, and that he has provided me with all the legal advice that I
26 requested.

27 19. I confirm that while I considered signing this Agreement and, at the time I signed
28 it, I was not under the influence of any alcohol, drug, or medicine.

1 20. I confirm that my decision to enter a guilty plea is made knowing the charges that
2 have been brought against me, any possible defenses, and the benefits and possible detriments of
3 proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no
4 one coerced or threatened me to enter into this Agreement.

5
6 Dated:

THOMAS J. POOL
Defendant

7
8 KEVIN V. RYAN
United States Attorney

9
10
11 Dated:

KESLIE STEWART
Special Assistant United States Attorney

12
13
14 JOSHUA HOCHBERG
Chief, Fraud Section
Criminal Division
U.S. Department of Justice

15
16
17
18 Dated:

ROBERTSON T. PARK
Assistant Chief, Fraud Section

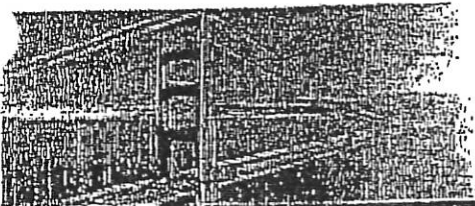
19
20 EUGENIA A.P. COWLES
Trial Attorney, Fraud Section

21
22 I have fully explained to my client all the rights that a criminal defendant has and all the
23 terms of this Agreement. In my opinion, my client understands all the terms of this Agreement
24 and all the rights he is giving up by pleading guilty, and, based on the information now known to
25 me, his decision to plead guilty is knowing and voluntary.

26
27 Dated:

VINCE G. CHHABRIA
Attorney for Defendant

28
PLEA AGREEMENT



United States Attorney's Office
Northern District Of California

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July 2003

June 2003

May 2003



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U.S. Department of Jus

United States Attorney
Northern District of California

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FOR IMMEDIATE RELEASE

December 17, 2004

WILLIAMS COMPANIES TRADER PLEADS GUILTY TO
MANIPULATING NATURAL GAS PRICES

The United States Attorney's Office for the Northern District of California announced that Thomas J. Pool pled guilty today to the manipulation of natural gas prices in interstate commerce. Mr. Pool, 31, of Tulsa Oklahoma, is a former natural gas trader at Williams Energy Marketing & Trading, a subsidiary of The Williams Companies based in Tulsa, Oklahoma.

In pleading guilty, Mr. Pool admitted that between approximately June 1, 1998 to June 30, 2002 he conspired with others at Williams Energy Marketing & Trading to report fictitious trades to two industry newsletters, *Inside FERC's Gas Market Report* and *NGI's Bidweek Survey*. Pool admitted to adding fictitious trades to a spreadsheet to achieve the desired price of natural gas that he would report to the publications for the purpose of manipulating the index prices published in these newsletters

"This plea – the admission by a natural gas trader of actual index price manipulation – is the first of its kind," said U.S. Attorney Kevin V. Ryan. "This plea will be instrumental in helping the government assess gain and loss figures for gas price manipulation, as well as to understand better the motivations behind price manipulation attempts among natural gas traders."

Mr. Pool admitted that he knew how his position would benefit from high or low published index prices, and that other traders often indicated

to him how their positions would benefit from high or low published index prices. Pool also admitted that his supervisor taught him how to arrange the false trades to look like a random sampling that would appear credible to the publications. He admitted that the false trades he reported in January 2001 affected the published index prices for February 1, 2001.

Mr. Pool waived indictment and was charged by information on Friday, December 10, 2004. He was charged with one count of manipulation of the price of a commodity in interstate commerce in violation of the Commodities Exchange Act.

Under the plea agreement, Mr. Pool agreed to cooperate with the United States' ongoing investigations into manipulation of natural gas index prices.

The maximum statutory penalty for each count in violation of 7 U.S.C. Section 13(a)(2) is five years of prison and a fine of \$500,000. The actual sentence, however, will be dictated by the Federal Sentencing Guidelines, which take into account a number of factors, and will be imposed in the discretion of the Court.

This guilty plea is the result of a two year investigation by agents of the Federal Bureau of Investigation with much assistance from staff at the Commodity Futures Trading Commission. This case was brought jointly by the Northern District of California and the Fraud Section of the Criminal Division of the Department of Justice. Prosecutors include Robertson Park, Assistant Chief of the Fraud Section, Eugenia Cowles, Trial Attorney with the Fraud Section, and Keshie Stewart, Special Assistant United States Attorney for the Northern District of California. Ms. Stewart is on loan to the U.S. Attorney's Office from the Antitrust Division of the Department of Justice to pursue investigations related to the California energy crisis of 2000-2001. Legal technicians Kelly Mitchell and Katie Cannuli assisted with the investigation from the Northern District of California.

A copy of this press release and related court filings may be found on the U.S. Attorney's Office's website at www.usdoj.gov/usao/can. Related court documents and information may be found on the District Court website at www.cand.uscourts.gov or on <http://pacer.cand.uscourts.gov>.

All press inquiries to the U.S. Attorney's Office should be directed to Luke Macaulay at (415) 436-6757 or by email at Luke.Macaulay3@usdoj.gov.

**Written Testimony of Gary D. McCallister
Presented to the
Kansas House Judiciary Committee In
Opposition to H.B. 2340
February 12, 2007**

**Gary D. McCallister
Gary D. McCallister & Associates, Ltd.
120 North LaSalle Street
Suite 2800
Chicago, Illinois 60602**

**Written Testimony of Gary D. McCallister Presented to the
Kansas House Judiciary Committee In Opposition to H.B. 2340
February 12, 2007**

Mr. Chairman and members of the Committee, my name is Gary D. McCallister. I am presenting this testimony in opposition to H.B. 2340. 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. This 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 Kansas Restraint of Trade Act clearly creates vested substantive rights for the benefit of Kansans that are protected by §18 of the Bill of Rights for the Kansas Constitution. 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, under Kansas law “full consideration” 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 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 shield perpetrators of anti-competitive behavior from significant financial exposure by responding in civil damages (not penalties) when their market conduct is determined by a court or a jury to have violated 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 operators 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.

The Kansas Medicaid program and the state's general fund have been the beneficiaries of this statute as well. Examples of other cases using the Kansas Restraint of Trade Act to recover damages for the benefit of the state and its health care programs have included, *In re Buspirone Antitrust Litigation*, M.D.L. No. 1410; *In re Terazosin Hydrochloride Antitrust Litigation*, M.D.L. 1317 and *In re Pharmaceutical Industry, Average Wholesale Price Litigation*, M.D.L. 1456.

Litigation Against Which H.B. 2340 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, H.B. 2340, is designed to repeal the Kansas "full consideration" damage statute. This action should be defeated in this committee.

Conclusion

The purpose for the substantive rights flowing from "full consideration" afforded by the Kansas antitrust laws has not changed in 117 years. The reason for retaining this provision in our law is as good today 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 principles 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 H.B. 2340. Thank you for the privilege of allowing me to present this testimony to your committee.

Representative Kay Wolf
January 18, 2006

HOUSE BILL No. 2006

By Representative Brunk

12-14

9 AN ACT enacting Alexa's law; relating to crimes against unborn children.

10

11 *Be it enacted by the Legislature of the State of Kansas:*

12 Section 1. (a) This act shall be known and may be cited as Alexa's
13 law.

14 (b) As used in this section:

15 (1) "Abortion" means an abortion as defined by K.S.A. 65-6701, and
16 amendments thereto.

17 (2) ~~"Conception" means the fusion of a human spermatozoon with a~~
18 ~~human ovum.~~

19 (3) "Unborn child" means a living fetus in utero at any stage of de-
20 velopment or gestation from conception until live birth.

21 (c) This section shall not apply to:

22 (1) Any act committed by the mother of the unborn child;

23 (2) any medical procedure, including abortion, performed by a phy-
24 sician or other licensed medical professional at the request of the preg-
25 nant woman or her legal guardian; or

26 (3) the lawful dispensation or administration of lawfully prescribed
27 medication.

28 Sec. 2. As used in the Kansas criminal code, "person" and "human
29 being" also mean an unborn child.

30 Sec. 3. The provisions of this act shall be part of and supplemental
31 to the Kansas criminal code.

32 Sec. 4. The provisions of this act are declared to be severable and if
33 any provision, word, phrase or clause of the act of the application thereof
34 to any person shall be held invalid, such invalidity shall not affect the
35 validity of the remaining portions of this act.

36 Sec. 5. This act shall take effect and be in force from and after its
37 publication in the statute book.

✓
viable

(3) "Viable" has the meaning ascribed thereto in K.S.A. 65-6701. and amendments thereto .

House Judiciary
Date 2-12-07
Attachment # 9

65-6700 Definitions. As used in this act:

(a) "Abortion" means the use of any means to intentionally terminate a pregnancy except for the purpose of causing a live birth. Abortion does not include: (1) The use of any drug or device that inhibits or prevents ovulation, fertilization or the implantation of an embryo; or (2) disposition of the product of in vitro fertilization prior to implantation.

(b) "Counselor" means a person who is: (1) Licensed to practice medicine and surgery; (2) licensed to practice psychology; (3) licensed to practice professional or practical nursing; (4) registered to practice professional counseling; (5) licensed as a social worker; (6) the holder of a master's or doctor's degree from an accredited graduate school of social work; (7) registered to practice marriage and family therapy; (8) a licensed physician assistant; or (9) a currently ordained member of the clergy or religious authority of any religious denomination or society. Counselor does not include the physician who performs or induces the abortion or a physician or other person who assists in performing or inducing the abortion.

(c) "Department" means the department of health and environment.

(d) "Gestational age" means the time that has elapsed since the first day of the woman's last menstrual period.

(e) "Medical emergency" means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(f) "Minor" means a person less than 18 years of age.

(g) "Physician" means a person licensed to practice medicine and surgery in this state.

(h) "Pregnant" or "pregnancy" means that female reproductive condition of having a fetus in the mother's body.

(i) "Qualified person" means an agent of the physician who is a psychologist, licensed social worker, registered professional counselor, registered nurse or physician.

(j) "Unemancipated minor" means any minor who has never been: (1) Married; or (2) freed, by court order or otherwise, from the care, custody and control of the minor's parents.

(k) "Viable" means that stage of gestation when, in the best medical judgment of the attending physician, the fetus is capable of sustained survival outside the uterus without the application of extraordinary medical means.