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TO: HOUSE JUDICIARY COMMITTEE
FROM: F. JAMES ROBINSON, JR.
KANSAS ASSOCIATION OF DEFENSE COUNSEL
DATE: March 13, 2013
RE: SB 124

Chairman Kinzer, members of the committee, we thank you for this opportunity to submit written testimony about SB 124 concerning the Kansas Restraint of Trade Act. I am a past president of Kansas Association of Defense Counsel (KADC), a statewide association of lawyers who defend civil lawsuits and business interests. I am unable to appear in person because of prior commitments.

On February 20, 2013, we provided written testimony to this committee about HB 2224, HB 2225, and HB 2275, which also address the Kansas Restraint of Trade Act. We argued there that in the wake of the 2012 decision in *O'Brien v. Leegin Creative Leather Products, Inc.*, the Kansas Restraint of Trade Act statute should be changed to make it clear that certain types of competitive conduct, particularly vertical price agreements, must be viewed against a standard of reasonableness. The options include inserting a reasonableness standard in the Kansas Restraint of Trade Act or repealing that Act so that federal antitrust law controls. We took no specific position as to which of the options presented in HB 2224, HB 2225, and HB 2275 was best for Kansas, even though we expressed concern about the prohibition against "horizontal conduct" in HB 2275.

Before SB 124 was amended on the Senate floor it prohibited "horizontal price-fixing," whereas another bill, SB 123, prohibited "horizontal conduct." We generally supported the language in SB 124. The term "horizontal conduct" is largely undefined in antitrust law and therefore creates uncertainty about the scope of the prohibition. "Horizontal price-fixing" on the other hand has a well-accepted legal meaning.

SB 124, as amended and passed by the Senate, struck the reference to a "reasonableness standard" and the clarification that such a standard would not apply to a claim of "horizontal price-fixing." The amendment provided instead that "the Kansas restraint of trade act shall be construed in harmony with judicial

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interpretations of comparable federal antitrust law by the United States supreme court.”

Unfortunately, the “federal” standard is none too clear. The Supreme Court has not addressed all issues. Much of the law in this area is being made by the United States courts of appeals, comprised of twelve circuits, each of which has regional jurisdiction. Frequent conflicts arise between the circuit courts over questions of statutory interpretation. As a consequence, we fear that this none too clear federal standard will fail to provide the legal certainty that Kansas businesses need, creating the possibility that unintended violations could lead to state enforcement actions or civil lawsuits.

In addition, courts may conclude that federal antitrust law is not even a “comparable” source of law for the interpretation of the Kansas Act. Highly summarized, the Kansas Supreme Court in *O'Brien v. Leegin Creative Leather Products, Inc.*, declined to adopt federal case law in part because the Kansas Act was not the same as the federal antitrust statutes. And so, to the extent the federal standards are clearer than existing state law, Kansas could lose the benefit of this since there is a real question whether the Kansas Act is “comparable” to the federal Sherman Act.

Another amendment from the floor of the Senate repealed the “full consideration” provision in the Kansas Act. This is a good step. “Full consideration” damages are unfair. Each plaintiff in one of these cases wanted the alleged overpriced product and bought it. The plaintiff should not get the product for free; rather, their damages should be the difference between the actual price and what the price should have been. Given the fact that so few other states provide for “full consideration” damages (see e.g. Wisconsin Statutes § 133.14; T.C.A. §69-106 (Tennessee)), it is obvious that a business deciding whether to move to, or even do business in, Kansas may well determine that better options exist elsewhere. Sufficient protection for the consumer and sufficient punishment for the wrongdoer are available in the form of statutory attorneys’ fees and – in this new bill – treble damages.

In sum, even though KADC believes that the law should be changed our association is concerned whether SB 124 is the best legislation to make that change.