

{As Amended by Senate Committee of the Whole}

As Amended by Senate Committee

Session of 2013

SENATE BILL No. 124

By Committee on Judiciary

2-5

1 AN ACT concerning the Kansas restraint of trade act; amending K.S.A.
2 50-101, 50-112, 50-158 and 50-161 and repealing the existing sections;
3 *also repealing K.S.A. 50-108 and 50-115.*

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

5 New Section 1. (a) The purpose of this section, and the amendments
6 to K.S.A. 50-101 and 50-112, 50-158 and 50-161 by this act, is to clarify
7 and reduce any uncertainty or ambiguity as to the application of the
8 Kansas restraint of trade act and applicable evidentiary standards to certain
9 types of business contracts, agreements and arrangements that are not
10 intended to unreasonably restrain trade or commerce and do not
11 contravene public welfare.

12 (b) (1) ~~Except as provided in subsection (b)(3), an arrangement,~~
13 ~~contract, agreement, trust, understanding or combination shall not be~~
14 ~~deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101~~
15 ~~through 50-162, and amendments thereto, and shall not be deemed~~
16 ~~unlawful, void, prohibited or wrongful under any provision of the Kansas~~
17 ~~restraint of trade act, K.S.A. 50-101 through 50-162, and amendments~~
18 ~~thereto, if that arrangement, contract, agreement, trust, understanding or~~
19 ~~combination is a reasonable restraint of trade or commerce. An~~
20 ~~arrangement, contract, agreement, trust, understanding or combination is a~~
21 ~~reasonable restraint of trade or commerce if such restraint is reasonable in~~
22 ~~view of all of the facts and circumstances of the particular case and does~~
23 ~~not contravene public welfare.~~

24 (2) ~~Whether an arrangement, contract, agreement, trust,~~
25 ~~understanding or combination is a reasonable restraint of trade or~~
26 ~~commerce in view of all of the facts and circumstances, shall include, but~~
27 ~~not be limited to, an analysis of the following factors:~~

- 28 (A) ~~Specific information about the relevant industry;~~
- 29 (B) ~~whether the history, nature, and effect of the restraint stimulates~~
30 ~~or harms interbrand competition;~~
- 31 (C) ~~whether there were legitimate business justifications; and~~
- 32 (D) ~~whether the defendant involved has market power.~~
- 33 (3) ~~The reasonableness standard described in subsections (b)(1) and~~
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SB124-Balloon-Rubin
Prepared By: Jason Thompson,
Office of Revisor of Statutes
March 20, 2013

~~(b)(2) shall not apply to any claim of horizontal price-fixing between or among competitors that otherwise violates the Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto. A manufacturer or wholesaler that also engages in retail sales shall not be considered engaged in horizontal conduct with respect to sales the manufacturer or wholesaler makes to third-party retailers.~~

~~(b) Except as otherwise provided in subsections (c) and (d), the Kansas restraint of trade act shall be construed in harmony with ruling-judicial interpretations of comparable federal antitrust law by the United States supreme court.~~

~~(c) The Kansas restraint of trade act shall not be construed to prohibit:~~

~~(1) Actions or proceedings concerning intrastate commerce;~~

~~(2) actions or proceedings by indirect purchasers pursuant to K.S.A. 50-161, and amendments thereto;~~

~~(3) Recovery of damages pursuant to K.S.A. 50-161, and amendments thereto;~~

~~(4) any remedy or penalty provided in the Kansas restraint of trade act, including, but not limited to, recovery of civil penalties pursuant to K.S.A. 50-160, and amendments thereto; and~~

~~(5) any action or proceeding brought by the attorney general pursuant to authority provided in the Kansas restraint of trade act, or any other power or duty of the attorney general provided in such act.~~

~~(e)(4) The Kansas restraint of trade act, K.S.A. 50-101 through 50-162, and amendments thereto, shall not be construed to apply to:~~

~~(1) Any association that is governed by *comples* with or becomes subject to the provisions and application of article 16 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the cooperative marketing act;~~

~~(2) any association, trust, agreement or arrangement that is governed by the provisions and application of 7 U.S.C. § 291 et seq, the Capper-Volstead act;~~

~~(3) any corporation organized under the electric cooperative act, K.S.A. 17-4601 et seq, and amendments thereto, or which becomes subject to the electric cooperative act in any manner therein provided, or any limited liability company or corporation, or wholly owned subsidiary thereof, providing electric service at wholesale in the state of Kansas that is owned by four or more electric cooperatives that provide retail service in the state of Kansas; or any member-owned corporation formed prior to 2004;~~

~~(4) any association that is governed by the provisions and application of article 22 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the credit union act;~~

Strike

(1) Except as provided in subsection (b)(3), an arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust pursuant to the Kansas restraint of trade act and shall not be deemed unlawful, void, prohibited or wrongful under any provision of the Kansas restraint of trade act if that arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce. An arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce if such restraint is reasonable in view of all of the facts and circumstances of the particular case and does not contravene public welfare.

(2) Whether an arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce in view of all of the facts and circumstances, shall include, but not be limited to, an analysis of the following factors:

(A) Specific information about the relevant industry;

(B) whether the history, nature, and effect of the restraint stimulates or harms interbrand competition;

(C) whether there were legitimate business justifications; and

(D) whether the defendant involved has market power.

(3) The reasonableness standard described in subsections (b)(1) and (b)(2) shall not apply to any claim of horizontal price-fixing between or among competitors that otherwise violates the Kansas restraint of trade act. A manufacturer or wholesaler that also engages in retail sales shall not be considered engaged in horizontal conduct with respect to sales the manufacturer or wholesaler makes to third-party retailers.

1 (5) any association, trust, agreement or arrangement that is governed
2 by the provisions and application of 7 U.S.C. § 181 et seq., the packers and
3 stockyards act;

4 ~~(6) any association that complies with the provisions and~~
5 ~~application of article 15 of chapter 17 of the Kansas Statutes Annotated,~~
6 ~~and amendments thereto, the cooperative societies act;~~

7 ~~(7) any group purchasing organization or group purchasing~~
8 ~~cooperative engaged in coordinated purchasing activities designed to~~
9 ~~obtain lower prices or increase efficiencies for its members so long as it~~
10 ~~does not possess monopoly powers; and~~

11 ~~(6) (b) (6) any franchise agreements or covenants not to compete.~~

12 (4) (e) If any provision of this section or the application thereof to
13 any person or circumstance is held invalid, the invalidity does not affect
14 other provisions or applications of this section which can be given effect
15 without the invalid provision or application, and to this end the provisions
16 of this section are severable.

17 (e) (f) This section shall be a part of and supplemental to the Kansas
18 restraint of trade act; ~~K.S.A. 50-101 through 50-162, and amendments~~
19 ~~thereto.~~

20 Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101.
21 *Except as provided in section 1, and amendments thereto,* a trust is a
22 combination of capital, skill, or acts, by two or more persons, for either,
23 any or all of the following purposes:

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

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

29 *Third.* To prevent competition in the manufacture, making,
30 transportation, sale or purchase of merchandise, produce or commodities;
31 ~~or to prevent competition in aids to commerce.~~

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

36 *Fifth.* To make or enter into, or execute or carry out, any contract,
37 obligation or agreement of any kind or description by which such person
38 shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose
39 of or transport any article or commodity, or article of trade, use,
40 merchandise, commerce or consumption below a common standard figure;
41 (b) agree in any manner to keep the price of such article, commodity
42 or transportation at a fixed or graded figure;

43 (c) in any manner establish or settle the price of any article or

1 commodity or transportation between them or themselves and others to
2 preclude a free and unrestricted competition among themselves or others
3 in transportation, sale or manufacture of any such article or commodity; or
4 (d) agree to pool, combine or unite any interest they may have in
5 connection with the manufacture, sale or transportation of any such article
6 or commodity, that such person's price in any manner is affected. Any such
7 combinations are hereby declared to be against public policy, unlawful and
8 void.

9 Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112.
10 *Except as provided in section 1, and amendments thereto*, all
11 arrangements, contracts, agreements, trusts, or combinations between
12 persons made with a view or which tend to prevent full and free
13 competition in the importation, transportation or sale of articles imported
14 into this state, or in the product, manufacture or sale of articles of domestic
15 growth or product of domestic raw material, or for the loan or use of
16 money, or to fix attorney or doctor fees, and all arrangements, contracts,
17 agreements, trusts or combinations between persons, designed or which
18 tend to advance, reduce or control the price or the cost to the producer or
19 to the consumer of any such products or articles, or to control the cost or
20 rate of insurance, or which tend to advance or control the rate of interest
21 for the loan or use of moneys to the borrower, or any other services, are
22 hereby declared to be against public policy, unlawful and void.

23 *Sec. 4. K.S.A. 50-158 is hereby amended to read as follows: 50-158.*
24 *The provisions of article 1 of chapter 50 of the Kansas Statutes Annotated,*
25 *and amendments thereto, and the provisions of K.S.A. 50-158 through 50-*
26 *160 K.S.A. 50-101 through 50-162 and section 1, and amendments*
27 *thereto, may be cited as the Kansas restraint of trade act.*

28 *Sec. 4- 5. K.S.A. 50-161 is hereby amended to read as follows: 50-*
29 *161. (a) As used in this section, the term "person" means any individual,*
30 *corporation, partnership, firm, company or other association of persons,*
31 *and such term shall include the state of Kansas and any of its political*
32 *subdivisions.*

33 (b) Except as provided in K.S.A. 12-205, and amendments thereto,
34 any person who may be damaged or injured by any agreement, monopoly,
35 trust, conspiracy or combination which is declared unlawful by any of the
36 acts contained in chapter 50 of the Kansas Statutes Annotated, and
37 amendments thereto, relating to unlawful acts, agreements, monopolies,
38 trusts, conspiracies or combinations in restraint of trade, shall have a cause
39 of action against any person causing such damage or injury. Such action
40 may be brought by any person who is injured in such person's business or
41 property by reason of anything forbidden or declared unlawful by this act,
42 regardless of whether such injured person dealt directly or indirectly with
43 the defendant. The plaintiff in any action commenced hereunder in the

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1 district court of the county wherein such plaintiff resides, or the district
 2 court of the county of the defendant's principal place of business, may sue
 3 for and recover treble the *actual* damages sustained ~~or such damages as~~
 4 ~~provided for in K.S.A. 50-115, and amendments thereto, but not both.~~ In
 5 addition, any person who is threatened with injury or additional injury by
 6 reason of any person's violation of ~~such acts~~ may commence an action in
 7 such district court to enjoin any such violation, and any damages suffered
 8 may be sued for and recovered in the same action in addition to injunctive
 9 relief. Any suit for injunctive relief against a municipality shall be subject
 10 to the provisions of K.S.A. 12-205, and amendments thereto.

11 (c) In any action commenced under this section, the plaintiff may be
 12 allowed reasonable attorney fees and costs. The remedies provided herein
 13 shall be alternative and in addition to any other remedies now provided by
 14 law.

15 ~~Sec.-5: 6.~~ K.S.A. 50-101, 50-112, **50-108, 50-115, 50-158** and 50-161
 16 are hereby repealed.

17 ~~Sec.-6: 7.~~ This act shall take effect and be in force from and after its
 18 publication in the ~~Kansas register~~ **statute book.**

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New Sec. 6. Section 1 and the amendments to K.S.A. 50-101, 50-158 and 50-161 by this act shall be applied retroactively to any cause of action premised on any provision of the Kansas restraint of trade act repealed by this act, and any such cause of action that has accrued as of March 1, 2013, shall be abated, but such causes of action that were pending in any court before March 1, 2013, shall not be abated. All other non-remedial provisions of this section shall be applied prospectively.