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Memo to the Senate Judiciary Committee
SB 123 and SB 124 Kansas Restraint of Trade Act
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1. **Full Consideration or Treble Damages.** The argument is that allowing both would be overkill. First, there is no real data or studies that suggest that is true. The Dr. Connor article shows just the opposite, which is why even those that have been held criminally or civilly liable do it again. Second, not a single case is cited where any defendant, even those found liable or those that settled, have ever paid full consideration or the price paid for the price fixed product. Third, the argument that price fixed carbon black which is a component in a tire and attached to a car, makes the criminal price fixer liable for the price paid for the car or tire is wrong. It is only liable for the carbon black that was price fixed. Fourth, treble damages is higher than full consideration if the overcharge is 33% or more. Fifth, even if an illegal restraint of trade exists, the amount of overcharge will be contested extensively and expensively, usually more than $1 million to hire expert economists with a computerized regression analysis, so without full consideration damages, small business and indirect purchaser (consumers) cannot afford access to the court no matter how strong the liability evidence.

2. **Exemptions to KRTA**
   a. Co-ops have had statutory exemptions for decades, so adding those exemptions directly to the KRTA is no change.
      i. Governed by v. Complied with. First, the exemption should be narrow not broad. Second, whether the language is "governed by" or "complied with" it must be "related to the restraint of trade claim". In other words, just being a co-op that does not have governmental regulatory oversight on price effecting issues leaves the co-op able to price fix without any oversight at all.
      ii. They have entered into contracts (joint ventures, supply agreements, etc.) which they do not want subject to question in court. They won't be since they are exempt.
   b. Franchise agreements (not everything a franchise does) has been statutorily authorized for decades, so adding "franchise agreements" to the KRTA exemptions is no change
   c. Covenants not to compete "in employment or buy/sell agreements" have been legal on a limited basis for decades, so again adding it directly to the KRTA is no change
   d. Incredibly, these entities that are going to be exempt still want to change the KRTA. Why? What is their real agenda if they are no longer going to be subject to the KRTA?
   e. The exemptions made sense 50 years ago when farmers and ranchers could be small businesses and were being encouraged to band together to gain market power. Now, Land O' Lakes, Dairy Farmers of America, and other co-ops are mega-businesses capable abusing market power (see DFA fined for trying to corner the Chicago Board of Trade cheese futures market)

3. **Horizontal Price Fixing v. Horizontal Conduct.** No one has suggested how horizontal conduct is beneficial. All other states and federal law bars all horizontal conduct. A horizontal restraints (like agreements to restrict supply or to misrepresent products to artificially increase demand, or price fixing) all have the same end result—they raise prices from what a competitive market would be. How is that beneficial to anyone other than the entities restraining trade at the expense of all other businesses and consumers playing by the rules?

4. **Vertical v. Horizontal Restraints**. What is the difference? The result to the consumer is the same. MSRP cannot be required by a horizontal agreement between car manufacturers or between car dealers. Why should it be by a vertical agreement between a manufacturer and car dealer? The argument is that the manufacturer can assure certain service, but that can be done by selling a competitive Service Agreement or requiring minimum service to keep the Warranty valid. Competition for both products and for service should be maintained.

5. **Reasonableness v. Rule of Reason.** All of the bills for some reason mandate "reasonableness", which is not the federal standard and is not the standard in any state. Why should Kansas be different? The argument is to bring "reasonableness back to contracts". But contracts are not reasonable or unreasonable. They are legal or illegal. And business should know which is which. A bright line is better than leaving it subject to a jury.

6. **SB 123 v. SB 124.** Neither one are needed. Indeed, nothing is needed. But SB 123 solves all of the "sky is falling" issues raised last year and this year, while SB 124 just leads to more uncertainty in business and the courts.

7. **Retroactivity.** Generally illegal, so please do not just pack courts with more litigation over this issue. Worse yet, do not invite every failed litigant to hire lobbyists to litigate their case in the Legislature.