

REVISED
SESSION OF 2013

SUPPLEMENTAL NOTE ON SENATE BILL NO. 124

As Amended by House Committee on Judiciary

Brief*

SB 124, as amended, would create or amend sections of the Kansas Restraint of Trade Act (KRTA).

The bill would create a new section that would declare that the purpose of the new section and the amendments to existing sections is to clarify and reduce uncertainty or ambiguity in the application of the KRTA and applicable evidentiary standards to certain business contracts, agreements, and arrangements that are not intended to unreasonably restrain trade or commerce and do not contravene public welfare.

The new section would declare that an arrangement, contract, agreement, trust, understanding, or combination shall not be deemed a trust pursuant to the KRTA and shall not be deemed unlawful, void, prohibited, or wrongful under the KRTA if such arrangement, contract, agreement, trust, understanding, or combination is a reasonable restraint of trade or commerce. The reasonableness analysis would depend on a view of all of the facts and circumstances of a particular case, including, but not limited to:

- Specific information about the relevant industry;
- Whether the history, nature, and effect of the restraint stimulates or harms interbrand competition;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Whether there were legitimate business justifications; and
- Whether the defendant involved has market power.

A restraint contravening public welfare would not be considered reasonable, and the reasonableness standard would not apply to claims of horizontal price-fixing between or among competitors that otherwise violates the KRTA. A manufacturer or wholesaler engaging in retail sales would not be considered engaged in horizontal conduct with regard to that entity's sales to third-party retailers.

The new section would specify that the KRTA shall not be construed to apply to the following:

- Associations that comply with the Kansas Cooperative Marketing Act;
- Associations, trusts, agreements, or arrangements governed by the federal Capper-Volstead Act;
- Corporations organized under the Kansas Electric Cooperative Act, or Kansas wholesale electric service companies owned by four or more electric cooperatives, or any member-owned corporation formed before 2004;
- Associations governed by the Kansas Credit Union Act;
- Associations, trusts, agreements, or arrangements governed by the federal Packers and Stockyards Act; and
- Franchise agreements or covenants not to compete.

The new section would contain a severability clause.

The KRTA section defining trusts would be amended to recognize the applicability of the new section and to remove references to “aids in commerce.”

Additional KRTA sections would be amended to recognize the applicability of the new section.

KRTA damages sections would be amended or repealed to establish that a plaintiff could recover either treble the *actual* damages sustained or, upon a showing of willful or wanton conduct by the defendant, full consideration paid for any goods, wares, merchandise, and articles affected, or the full amount of money borrowed.

The bill would contain a retroactivity clause applying the new law and amendments made by the bill to any cause of action based on any KRTA provision repealed by the bill. Any such cause of action accruing by March 1, 2013, would be abated, unless the cause of action was pending in any court before March 1, 2013. All other non-remedial provisions would be applied prospectively.

Background

The bill was introduced in response to a 2012 decision of the Kansas Supreme Court, *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 277 P.3d 1062 (2012), which rejected the application of the federal “rule of reason” doctrine to lawsuits brought under the KRTA, such that an antitrust plaintiff need not demonstrate the unreasonableness of a defendant’s trade restraint to show a statutory violation. Further, the case overruled the application of such doctrine in *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948).

Late in the 2012 Session, the House of Representatives passed House Sub. for SB 291, which declared its purpose to correct the interpretation of the KRTA and stated the

Legislature intended the rule of reason to be applied in KRTA cases, as articulated by Kansas Supreme Court cases before *O'Brien*. The Senate took no action on the bill.

At the request of Representative Kinzer, the Kansas Judicial Council appointed an advisory committee to undertake a study of the rule of reason issue. Due to disagreements as to whether legislative action was required, the advisory committee split into two subcommittees and each produced a report. Subcommittee One offered proposed legislation to counter the *O'Brien* opinion. Subcommittee Two recommended no change be made and, if any change be adopted, it be specific and narrowly tailored. The subcommittees did agree the KRTA should be amended to explicitly exclude some of the types of associations or agreements about which proponents of the 2012 legislation had expressed concern.

SB 124, as introduced, contained language substantially similar to that proposed by the advisory committee's Subcommittee One, as well as additional provisions. Another bill, SB 123, contained much of the same language, with some differences.

The Senate Judiciary Committee held joint hearings on SB 123 and SB 124. The proponents of SB 124 who testified included an attorney for the defendants in *O'Brien* and representatives of the Kansas Department of Agriculture; Kansas Electric Cooperatives, Inc.; Kansas Livestock Association; Land O'Lakes, Inc.; and Coalition for a Competitive Kansas. Also appearing in support of SB 124 was a representative of the Kansas Cooperative Council who also spoke on behalf of the Kansas Grain and Feed Association, Kansas Agribusiness Retailers Association, Kansas Credit Union Association, Kansas Bankers Association, Kansas Farm Bureau, Kansas Association of Ethanol Processors, and the Petroleum Marketers and Convenience Store Association of Kansas.

A representative of the Kansas Chamber appeared as a neutral conferee. Written neutral testimony was received from the Wichita Metro Chamber of Commerce and the Kansas Association of Defense Counsel.

A Prairie Village attorney and counsel for Associated Wholesale Grocers testified in opposition to the bill. An attorney for the plaintiff in *O'Brien* and a representative of the Kansas Cattlemen's Association submitted written opposition testimony.

The Senate Judiciary Committee adopted a balloon amendment replacing language outlining a reasonableness analysis and exception under the KRTA with a provision directing that the KRTA be construed in harmony with U.S. Supreme Court decisions interpreting similar federal antitrust law, with certain exceptions. The amendment also added exemptions from KRTA for additional associations and groups. Additionally, the amendment removed all damages provisions except for the treble (triple) damages provision, made technical and clarifying amendments, and changed the effective date of the bill from publication in the *Kansas Register* to publication in the statute book.

The Senate Committee of the Whole amended the bill by removing duplicative exemptions from the KRTA added by Senate Judiciary Committee amendment.

In the House Judiciary Committee, conferees testifying in support of the bill included representatives of the Kansas Cooperative Council; Kansas Electric Cooperatives, Inc.; Kansas Grain and Feed Association; Kansas Agribusiness Retailers Association; Kansas Livestock Association; Coalition for a Competitive Kansas; Kansas Credit Union Association; Kansas Association of Ethanol Processors; Kansas Bankers Association; Petroleum Marketers and Convenience Store Association of Kansas; Land O'Lakes, Inc.; and Coalition for a Competitive Kansas, and an attorney for the defendants in *O'Brien*. Representatives of the Kansas Association of Defense Counsel and the Kansas Department of Agriculture submitted written testimony supporting the bill.

A representative of the Kansas Chamber appeared as a neutral conferee.

Representatives of Associated Wholesale Grocers, Seaboard Corporation, and Kansas Association for Justice and a Prairie Village attorney testified in opposition to the bill. A representative of the Kansas Cattlemen's Association submitted written opponent testimony.

The House Committee amended the bill to restore the reasonableness analysis and exception that had been in the bill when introduced, remove the federal harmonization provision added by the Senate Committee, add a retroactivity clause, and allow treble damages *or* full consideration damages. The House Committee also made several clarifying amendments.

The fiscal note prepared by the Division of the Budget for the bill, as introduced, indicates a reasonableness standard will make antitrust cases litigated by the Attorney General more complicated, which will take more time and increase costs. However, the Attorney General cannot estimate a precise fiscal effect. Local governments who bring antitrust actions also would have increased costs and decreased revenues, but no fiscal effect can be determined. Any fiscal effect associated with the bill is not reflected in *The FY 2014 Governor's Budget Report*.