HB2194

Statement of Professor Michael Hoeflich

My name is Michael Hoeflich and I am the John H. and John M. Kane Distinguished Professor of Law at the University of Kansas School of Law in Lawrence. I hold a B.A. and M.A. from Haverford College, an M.A. and PhD from Cambridge University, and a J.D. from the Yale Law School. I served as Dean of the University of Kansas School of Law from 1994 until 2000 and have been the John H. and John M. Kane Distinguished Professor of Law at KU since 1998.

I come before your committee today to ask that the Legislature enact legislation in response to the recently decided opinion of the Kansas Supreme Court in *O'Brien v.Leegin Creative Leather Products, Inc.* That case was a suit against the maker of Brighton leather goods involving a claim that Brighton had engaged in illegal vertical price fixing, i.e. that Brighton had required that its retailers follow specific pricing guidelines when selling Brighton products. It was alleged that these agreements violated K.S.A. 50-101. While the technical details of the case are quite interesting, I need not delve into them in this forum. Instead, I would say only that the position expressed by the Supreme Court in its recent opinion in *O'Brien v. Leegin* could be interpreted as holding that K.S.A. 50-101 creates an absolute legal ban on a broad range of standard business agreements, most of which have no harmful effects on the public but, on the contrary, are absolutely necessary to the proper functioning of business and industry in Kansas. The decision does this by holding that the "reasonableness" standard used in adjudicating such cases in federal antitrust lawsuits is not to be used when interpreting K.S.A. 50-101 in Kansas courts. Decades of federal antitrust decisions have endorsed the use of a reasonableness standard in deciding antitrust cases [i.e. deciding whether restraints are harmful to consumers or whether they, in fact, "stimulate competition in the consumers' best interest"] precisely to avoid the potentially harmful effects of having an absolute *per se* rule against all agreements about such matters as price or geographical market. The Kansas Supreme Court, itself, adopted "reasonableness" standard in several earlier cases: *Heckard v. Park (1948)* and *Okerberg v. Crable (1959)*, the one involving an agreement between a music teacher and his pupil, the other involving a milk delivery contract. In both of these cases the court upheld the validity of these agreements by using a "reasonableness" standard. The Supreme Court now has overruled these two cases which, I would suggest, would put even innocent agreements like those between a music teacher and his student at risk of a legal challenge

I believe that the danger to business and industry in Kansas posed by the possible broad reading of the Supreme Court's recent decision in *O'Brien v. Leegin* is a serious one that is best addressed by immediate legislative action. Thus, I would ask this committee and the Legislature as a whole to enact legislation that would require Kansas courts to apply the same "rule of reason" that has been developed in federal antitrust jurisprudence and has been applied by federal judges in federal antitrust cases for decades.

Thank you.