HB 2797 J. Jordan

Correcting the Kansas Supreme Court Decision in *O'Brien v Leegin Creative Leather Products*

1. On Friday, the Kansas Supreme Court issued an antitrust opinion in the case of *O'Brien v Leegin Creative Leather Products*. While the case itself deals with how a manufacturer's resale price maintenance policy would be treated under Kansas antitrust law, the court went well beyond addressing that issue to overrule 60+ years of Kansas precedent interpreting the Kansas Restraint of Trade Act, KSA 50-101, *et. seq.* (KRTA) which had held that only unreasonable restraints of trade would be considered unlawful. The effect of the court's decision under the KRTA is to effectively make everyday business activities conducted in Kansas subject to a claim that it is now illegal. For example, the KRTA makes VOID all contracts or agreements "To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state." K.S.A. 50-101 First. The overwhelming breadth of this decision would void franchise agreements with territorial limitations, covenants not to compete, exclusive dealer arrangements, lease protections for tenants, … in effect any agreement that has any limitation upon the "full and free pursuit of any lawful business," or that is an aid to commerce – helpful to consumers and citizens of Kansas – is now subject to being declared void. Attached is the Statement of Professor Michael Hoeflich, which explains his view of the importance of this legislation and the need for the decision to be corrected.
2. Specifically, the KRTA has been interpreted since 1948 to not prohibit all kinds of business activity, but only those that created an unreasonable restraint upon trade and were inimical to the public welfare. *Heckard v. Park*, 164 Kan. 216 (1948). As stated in the *Heckard* case: "The real question is never whether there is any restraint of trade, but always whether the restraint is reasonable in view of all the facts and circumstances and whether it is inimical to the public welfare." It is that fundamental principal thrown out by the court that the legislation seeks to correct.
3. The federal courts recognized this same principle as far back as 1911 when the U.S. Supreme Court in *Standard Oil of New Jersey v United States* held that even though the Sherman Act did not contain an express "reasonableness" standard, only contracts that unreasonably restrained trade would be considered unlawful.
4. *Heckard* applied the rule of reason to hold that an exclusive agency relationship was reasonable and lawful even though such an arrangement clearly is a restraint on the ability to freely engage in business.
5. Eleven years later, *Okeberg v. Crable*, 185 Kan. 211 (1959) found a territorial restriction on milk routes was reasonable and lawful.
6. The Kansas Supreme Court in the *Leegin* decision has now expressly overruled both decisions and held that both pro-competitive and anticompetitive conduct by businesses in Kansas is not subject to a reasonableness standard and is simply illegal and void.
7. Because the KRTA makes agreements that violate the act VOID, the legislation must apply retroactively if at all possible to prevent businesses from having claims asserted based upon contracts that the Kansas Supreme Court has now held are unenforceable and void in Kansas. Would every contract have to be re-issued, re-negotiated, and re-signed? It is this quagmire for the business community that retroactivity seeks to prevent.
8. However, because the legislature cannot be sure that the court will apply this legislation as intended and do that retroactively, businesses need protection from an onslaught of litigation for anything they have done in business over the last 3 years. Thus to protect business in Kansas from being damaged in the interim, the legislation also limits class actions in this area for private causes of action. The Kansas Consumer Protection Act contains a similar limitation preventing class actions for damages or penalties. It is important to remember that the Attorney General has full power and authority to protect classes of citizens who have been harmed by truly anticompetitive behavior or conduct.