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Chairman Kinzer and the members of the Committee, thank you for allowing me the opportunity to speak to the Committee on Friday in opposition to House Bill 2797. We additionally appreciate the opportunity to submit written testimony on this same Bill, which we submit on behalf of our firm and with the support of Kansas business clients including Seaboard Corporation, a Fortune 500 company headquartered in Merriam, Kansas, and Associated Wholesale Grocers, a Kansas City, Kansas company with annual sales in excess of $7 billion.

The proponents of this Bill, including the losing party in the Kansas *Leegin* decision, ask for immediate action. While we do not believe immediate action is necessary to address the very narrow and unique set of facts in *Leegin*, any proposed legislation must make clear that it applies only to vertical business arrangements that do not have the purpose or effect of unreasonably restraining or eliminating competition, should not incorporate often conflicting federal case law or include any form of retroactivity, which will invite unnecessary Constitutional challenges and could unfairly prejudice the existing rights held by Kansans.

In 2007, the United States Supreme Court overruled antitrust precedent dating back to 1911. This decision discussed the complicated but narrow antitrust concept of vertical minimum resale price maintenance, which occurs when an upstream company like a manufacturer fixes a minimum sale price for any downstream seller. This is the scenario in which a manufacturer tells a retail store that it cannot sell item X for less than $10. For almost 100 years prior to this opinion, vertical minimum resale price maintenance was considered to be "per se" illegal under nearly all state and federal antitrust laws. This 2007 decision held that these types of arrangements are no longer considered "per se" illegal, but are evaluated under a "rule of reason." Even today, this remains a controversial decision that has been rejected by many states across the country in interpreting their own state antitrust laws.

The *Leegin* case before the Kansas Supreme Court involved essentially this same narrow issue, just evaluated under the Kansas Restraint of Trade Act instead of the federal Sherman Act. While we believe that the Kansas Supreme Court's unanimous decision in *Leegin* is entirely consistent with the plain language of the Kansas statutes and consistent with Kansas precedent concerning resale price maintenance agreements, others strongly disagree.

As we discussed in more detail at the hearing, we remain concerned that the Bill broadly and ambiguously incorporates federal case law and requires Kansas state courts to apply what "is or would be" federal law to a whole host of antitrust issues under the Kansas Restraint Trade Act, an Act that differs dramatically from the federal Sherman Act. This will certainly cause great confusion for Kansas businesses and undoubtedly increase, rather than reduce, wasteful litigation. As a 25-year practitioner in the area of antitrust law for small and large businesses,

this type of legislation will make it nearly impossible to advise our clients on what Kansas courts will do when evaluating a claim under the Kansas Restraint of Trade Act.

Similarly, requiring retroactivity of the proposed Bill will additionally invite litigation concerning the questionable Constitutionality of such a provision. Thus, rather than eliminate the perceived uncertainty created by *Leegin,* the Bill in its current form will only create greater uncertainty and wasteful litigation.

Finally, the Bill as currently written appears, unintentionally, to encourage anticompetitive conduct in this State, like bid-rigging or other horizontal agreements between direct competitors to fix prices. This type of conduct has always been subject to a *per se* rule in Kansas. Such an unintended result will negatively impact not only all Kansas citizens, but all family-owned and Fortune 500 companies headquartered in this State. Any proposed legislation must make clear that purpose and intent of such legislation is to confirm that under the Kansas Restraint of Trade Act, everyday vertical business relationships like franchise agreements or agribusiness contracts are not per se illegal, but subject to a reasonableness standard as discussed in *Heckard v. Peck.,* 164 Kan. 216, 216-17 Syl. ¶ 7, 223-224 (1948) and *Okerberg v. Crable,* 185 Kan. 211, 212 Syl ¶ 3, 217-18 (1959).

If the primary concern raised by the proponents of the Bill is truly that normal, everyday vertical business relationships, like franchise agreements or agribusiness contracts, are now somehow illegal because of the *Leegin* decision (rather than an attempt to reverse an adverse decision against an out-of-state company accused of price fixing), then we strongly believe that when provided with sufficient time to review and analyze these issues, all of the parties expressing interest at Friday's hearing could work together to amicably resolve these issues in a way that is beneficial to all Kansas citizens and Kansas businesses. We welcome the opportunity to continue to participate in such discussions.