To: Representative Lance Kinzer, Chairman
Members of the House Judiciary Committee

From: Rex A. Sharp
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Re: Testimony in Opposition to HB 2797 before the House Judiciary Committee

Antitrust laws are the bedrock of free enterprise. Without them, big businesses with market power can squeeze out the small businesses and drive up costs to consumers. Kansas antitrust cases are almost always directed at out-of-state big companies and foreign multi-national companies that take advantage of Kansas businesses and consumers.

Federal and Kansas antitrust law have never been and should not be alike. First, Kansas antitrust law preceded federal antitrust law. The Kansas Legislature enacted K.S.A. 50-112 in 1889, one year before Congress enacted the Sherman Antitrust Act, 15 U.S.C. § 2 *et seq.*, so it is no surprise that Kansas antitrust law has developed independently of the federal law. Second, federal law does not protect indirect purchasers, i.e. Kansas small businesses or consumers. Under federal law, only direct purchasers, i.e. those who purchase directly from the manufacturer, can sue for antitrust violations. *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (barring indirect purchaser suits).,In Kansas's Unfair Trade and Consumer Protection statutes, the Kansas Legislature, along with 25 other states, expressly rejected the *Illinois Brick* holding that denied indirect purchasers standing to sue for harms caused by anticompetitive conduct. K.S.A. 50-161(b); *In re Vitamin Antitrust Litig.*, 2006 WL 4058904 at p.2, n.1 (Kan. Dist.Ct. Dec. 22, 2006); Karon, *Undoing the Otherwise Perfect Crime,* 108 W. Va .L. Rev. 395, 402-403 n. 42 (2005) (summarizing the statutes, including K.S.A. 50-161, and noting other states rejecting *Illinois Brick*). Without the Kansas Restraint of Trade Act (KRTA), Kansas indirect purchasers, *i.e.*, consumers, would lack standing to bring a claim for violation of antitrust law, no matter how egregious. Third, federal courts have almost unlimited resources to do their job—magistrate judges who work full time for almost every judge, research clerks who work full time for every judge, nationwide reach for subpoena power. Unless we fund our state courts the same way, we cannot expect the state courts to handle the battle of the experts in a rule of reason trial where huge panels of economists discuss what is and is not anti-competitive conduct. The per se rule best fits Kansas markets and best protects Kansans from anti-competitve market conduct.

Full Consideration Damages for Void Restraints of Trade Has Been the Law of Kansas for a Long Time. Federal antitrust law allows the recovery of only overcharge damages which requires hiring expensive economic experts and consumes significant resources; whereas, Kansas antitrust law allows recovery of "full consideration or sum paid" for the price fixed goods. K.S.A. 50-115. Kansas state and federal courts have recognized this for many years. *Cox* v. *F. Hoffman-La Roche, Ltd.*, 2003 WL 24471996 (Kan.Dist.Ct. Oct. 10, 2003); *Four B Corp.* v. *Daicel Chemical Ind., Ltd.*, 253 F. Supp. 2d 1147, 1151-53 (D. Kan. 2003). This difference makes Kansas antitrust damages easier and less expensive to calculate.

In addition to being the clear mandate of the Kansas law, full consideration damages play a critical role in antitrust enforcement in Kansas. Virtually all antitrust cases brought to date are the result of an international conspiracy of multinational companies, and certainly companies outside

> Kansas. These circumstances bring a variety of legal issues that are vigorously litigated and expensive to pursue. *See e.g. Merriman* v, *Crompton Corp., et al,* —Kan.--, 146 P.3d 162 (Nov. 9, 2006) (personal jurisdiction issues contested). . . [D]efendants raise practically every imaginable technical contrivance to avoid or delay the judgment day. . . Kansas has such a small population (about 1% of the U.S. population), that without full consideration damages, it would not be worth the trouble and risk to bring the wrongdoers to court to recover only an overcharge amount. On the other hand, full consideration damages can be a significant cost of doing business, and thereby protect Kansas markets from the anticompetitive conduct. Full consideration damages are not only large enough to make bringing a case worthwhile, but also simpler to prove so that the Kansas courts are not tied up for weeks as economists testify about different expert damage estimates. The wrongdoers should not get that benefit, and this rescission like remedy is quite common in the law.

In re (Kansas) Vitamins Antitrust Litig., 2006 WL 4058904 at ¶ 7, n. 10 (Kan.Dist Ct., Dec. 22, 2006). This streamlined proof eliminates the gamesmanship of technical arguments during class certification. *Todd v. F. Hoffman-LaRoche, Ltd,* Case No. 98-C-4574, 2006 WL 4008465 (Kan.Dist.Ct., Mar. 10, 2006). If federal law were followed, Kansas antitrust law and enforcement, as a practical matter, would be nullified.

Rule of Reason Is No Help. In the past 50 years, no Kansas case has applied the "rule of reason" analysis to the KRTA. Under federal law, it is now important to differentiate between vertical and horizontal restraints. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* 551 U.S. 877 (2007). [1] But, not so under Kansas law. The Kansas statutory law is simple--trusts, combinations, monopolies, and any other restraints of trade are "void". K.S.A. 50-101. Not sometimes void and sometimes not void. There is no room for "reasonable restraints" that could tie our courts in knots for years. Instead "all" restraints are "against public policy, unlawful and void". K.S.A. 50-112. "Any" trust, combination, or restraint, is illegal. K.S.A 50-101. The law is simple and easy to apply. Reasonableness is in the eye of the beholder. Kansas has used the bright line, per se rule, to provide clear guidance to businesses and consumers, thereby reducing the need for litigation and government enforcement actions.

Kansas Antitrust Law Is Not Overkill. Kansas has about 1% of the U.S. population and thus market. Without clear and simple to apply antitrust law, no one would protect 1% of the market using federal law. Litigation is too costly and risky to pursue against foreign companies and multi-nationals. The KRTA's provisions are straight-forward, protect Kansas consumers, and deter anticompetitive conduct within the State's borders. Coupling the strong substantive law with the class action procedure under Kansas law provides a practical method for antitrust enforcement. Even with the combined efforts of the U.S. Department of Justice, the State

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[1] The logic of *Leegin* is hardly compelling in a 5-4 decision which has been roundly criticized. Martin, *The American Consumer Is Not Well: Where Is Dr. Miles*? 47 Wash. L. J. 581 (2008).

Attorneys General, federal direct purchaser class actions, and state indirect purchaser class actions--antitrust crimes still pay. *See* Connor and Helmers, Statistics on Modern Private International Cartels, 1990-2005 (Nov. 2006) (noting high recidivism rates among cartel participants and low payout of combined government fines or penalties and class action settlements compared to overall economic effect of cartel).

No Class Actions And Retroactive. These provisions reek of desperation and self-benefit. Big businesses already caught cheating the Kansas economy and unable to win their cases in court now hope to buy their way out by lobbying the Legislature. Without class actions, no one can sue the huge foreign companies involved in price fixing car tires (EPDM, Carbon Black, and Rubber Chemicals all price fixed) or computers (practically every piece of a computer, including the LCD screen is price fixed). Each consumer loses less than a few dollars, while the defendants get line their pockets with those few dollars from millions of consumers. If these provisions are enacted, the playing field becomes less level.

False Argument That Businesses Will Leave The State. If I had a dollar for every time this argument has been trotted out without proof, there would be no budget problems. Businesses need a free, competitive, and open market to start and thrive. The KRTA has provided that for generations of Kansans. No businesses have left the State because of the KRTA. This bill would do more harm than good.