

Report of the
Subcommittee on HB 2797
to the
House Committee on Judiciary

CHAIRPERSON: Representative Bob Brookens

OTHER MEMBERS: Representatives John Rubin, Pat Colloton, Jan Pauls, Melanie Meier, and Jim Ward.

STUDY TOPICS

- The subcommittee was charged with studying HB 2797, which would amend the Kansas Restraint of Trade Act (KRTA). The bill was introduced in response to a recent decision of the Kansas Supreme Court, *O'Brien v. Leegin Creative Leather Products, Inc.*, No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 2012), which rejected the application of the federal "rule of reason" doctrine to lawsuits brought under the Kansas Restraint of Trade Act (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).

May 15, 2012

REPORT

CONCLUSIONS AND RECOMMENDATIONS

The subcommittee recommended HB 2797 be amended to modify the language of the "Whereas" clause to indicate the bill's purpose is to correct the interpretation of the KRTA made in *O'Brien v. Leegin Creative Leather Products, Inc.*, No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 2012). Additionally, it would state the Kansas Legislature intended for the doctrine of the rule of reason to be applied in cases involving arrangements, contracts, agreements, trusts, understandings, or combinations under the KRTA. Further, to determine reasonableness, the subcommittee's proposed amendment would replace the application of the Sherman Act with the following factors, based on *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948):

- Such restraint is reasonable in view of all the facts and circumstances of the particular case, and
- Such restraint does not contravene public welfare.

The proposed amendment also would remove the class action and retroactivity provisions and add a severability clause and a June 30, 2013 sunset date.

BACKGROUND

HB 2797, amending the Kansas Restraint of Trade Act (KRTA), was introduced in response to a recent decision of the Kansas Supreme Court, *O'Brien v. Leegin Creative Leather Products, Inc.*, No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 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).

As introduced, the bill would add a new section to the KRTA stating an arrangement, contract, agreement, trust, understanding, or combination would not be deemed a trust under the KRTA and would not be deemed unlawful, void, prohibited, or wrongful under the KRTA if it would be deemed a reasonable restraint of trade or

commerce under the federal Sherman Act. Further, it would provide that any private action to enforce the KRTA could not be brought as a class action. The bill would apply retroactively in any pending or future litigation.

Committee Action

After being appointed by House Committee on Judiciary Chairman, Lance Kinzer, on Monday, May 14, 2012, the subcommittee agreed to meet later that day on recess or adjournment of the House. At that meeting, the subcommittee members offered their opinions on the bill. Members acknowledged that time for consideration was limited, but expressed concern that the *O'Brien* opinion may cast uncertainty over existing business agreements. Given the relatively short amount of time within which to act, the subcommittee agreed adding a June 30, 2013 sunset date to the bill would be appropriate, requiring prompt reconsideration of any action taken in the 2012 Legislative Session. Further, because of time constraints, the subcommittee agreed to remove the provisions of the bill concerning class actions.

The subcommittee then identified two issues it would consider before moving forward with the bill: whether and to what extent current law should be amended to preserve the application of the doctrine of the rule of reason in Kansas; and whether the bill should be applied retroactively. On the issue of reasonableness, the subcommittee opposed the reliance on the Sherman Act as construed and interpreted by federal courts.

After additional discussion and input from the audience, the subcommittee asked the staff of the Revisor's Office to draft two proposed amendments to the bill for consideration at a meeting to be held the following morning. The amendments would remove the references to federal law and class action provisions; identify factors for courts to consider to determine whether an arrangement, trust, understanding, or combination is a reasonable restraint of trade or commerce; amend the retroactivity language to provide the bill would apply to any arrangement, trust, understanding, or combination formed or in existence prior to, on, and after May 14, 2012; and add a severability clause and the June 30, 2013 sunset provision.

At the first meeting of Tuesday, May 15, 2012, Representative Brookens noted that Representative Jan Pauls was unable to attend, and Representative Melanie Meier, who had also attended the May 14th meetings, attended in her place. After additional discussion on the issues noted previously and input from audience members, the subcommittee asked the staff of the Revisor's Office to draft an additional amendment that would revise the language of the "Whereas" clause included in the bill as introduced and adopt the reasonableness factors proposed by Representative Colloton. The subcommittee agreed to meet later that day on recess or adjournment of the House.

At the second May 15th meeting, the subcommittee agreed to the revised "Whereas" clause, after removing references to horizontal and vertical arrangements, and to strike all provisions related to prior and future application of the bill. The subcommittee agreed to meet again that afternoon to finalize its proposed amendment before presenting it to the full House Committee on Judiciary.

The final proposed amendment was adopted at the third meeting. It would modify the language of the "Whereas" clause to indicate the bill's purpose is to correct the interpretation of the KRTA made in *O'Brien*. Additionally, it would state the Kansas Legislature intended the doctrine of the rule of reason be applied in cases involving arrangements, contracts, agreements, trusts, understandings, or combinations under the KRTA. Further, the subcommittee's proposed amendment would replace the application of the Sherman Act with the following factors for determining reasonableness, based on *Okerberg v. Crable* and *Heckard v. Park*:

- Such restraint is reasonable in view of all the facts and circumstances of the particular case; and
- Such restraint does not contravene public welfare.

The proposed amendment would also remove the class action and retroactivity provisions and add a severability clause and a June 30, 2013 sunset date.