

TO: Sen. Jeff King, Chairman
Members of the Committee
Senate Committee on the Judiciary

FROM: Leslie Kaufman, Kansas Cooperative Council, and on behalf of
Kansas Electric Cooperatives, Inc.
Kansas Grain & Feed Association
Kansas Agribusiness Retailers Association
Kansas Livestock Association
Kansas Credit Union Association
Kansas Bankers Association
Kansas Farm Bureau
Kansas Association of Ethanol Processors
Coalition for a Competitive Kansas
Petroleum Marketers & Convenience Store Association of Kansas

RE: Opposition for **SB 123** - Amending KRTA to apply a reasonableness analysis to all but horizontal conduct (unable to support without significant amendments, attached)

Support for **SB 124** – Amending the Kansas Restraint of Trade Act (KRTA) to apply a reasonableness analysis to all but horizontal price fixing, clarifying exemptions, and restructuring damages (amendments attached)

Chairman King and members of the Senate Judiciary Committee, thank you for the opportunity to appear today and offer these comments on behalf of the Kansas Cooperative Council, Kansas Electric Cooperatives, Inc., Kansas Grain & Feed Association, Kansas Agribusiness Retailers Association, Kansas Livestock Association, Kansas Credit Union Association, Kansas Bankers Association, Kansas Farm Bureau, Kansas Association of Ethanol Processors, the Coalition for a Competitive Kansas and the Petroleum Marketers & Convenience Store Association of Kansas. For those of you that may not be familiar with our associations, we have provided information regarding the interests we serve at the end of our testimony. I am Leslie Kaufman and I am the President/CEO of the Kansas Cooperative Council. I will be providing the over-view testimony for our group and you will hear more industry/organization specific comments from a few of our other members, too. We join in support of their individual testimony, as well.

In short, many of you remember last spring when the Kansas Supreme Court issued an opinion on May 4, 2012 in the case of *O'Brien v. Leegin*. That decision, as seen by us and many others, arguably changed the landscape for evaluating certain cases under the Kansas Restraint of Trade Act (KRTA) opining that a reasonableness analysis is not part of Kansas law.

In generic terms, a **reasonableness analysis** allows an action, alleged to be anti-competitive, to be evaluated in light of all the circumstances surrounding the activity. The court is allowed to consider if the activity in question provides a benefit to commerce or the consumer and weigh that against any possible anti-competitive impact. The reasonableness analysis does not automatically declare an action "reasonable". An act may still be evaluated and found to be in violation of the KRTA. It simply provides a framework for judging activity from a comprehensive viewpoint. In contrast, a *per se* standard declares certain activities to be automatically in violation of anti-trust laws, without ever considering if there is a benefit to the activity.

Several attempts to re-instate a reasonableness analysis under the KRTA were put forward during the 2012 Veto Session. The Kansas House of Representatives passed such legislation in at least three actions, but the effort fell short in the Senate.

Since the close of the 2012 Session, the Kansas Judicial Council undertook a review of the *O'Brien* decision and its impacts (or potential impacts). Representative John Rubin served on the subcommittee assigned to that task. Eventually, the subcommittee submitted two recommendations as there was no consensus on the issue of whether or not the decision necessitated legislative change. Option 1 suggested changes to reiterate a reasonableness analysis and provide clarification on exemptions related to agriculture marketing cooperatives, franchise agreements and agreements not to compete, and issues governed under the federal Packers & Stockyards Act.

Additionally, various business interests and informal working groups have been meeting in good faith, but strongly held differences remain. It seems likely the legislature will need to make the necessary policy decisions to settle these issues. Our associations hope to provide this committee with some clear policy options.

Those of us joining in this testimony have very straight-forward, **basic goals for revising the KRTA post-*O'Brien***:

1. Reiterate that, apart from *O'Brien*, Kansas law has developed over the years to include a reasonableness analysis for evaluating most conduct under the KRTA;
2. Clarify that Kansas law has long-recognized certain exemptions to the KRTA and continue those exemptions;
3. Clarify that federal law preempts certain state action and the venue and standards for evaluation of certain activity rest under federal law;
4. Recognize that certain exemptions have developed regarding franchise agreements and agreements not to compete; and
5. Reform the damages provisions by removing recovery of full consideration, thus eliminating a multi-layered punitive damages structure (full consideration + treble damages + attorneys' fees).

These goals may be met in different ways, as evidenced by the 2 bills before you today and 4 others in the House. The most direct, clear-cut approach is **repeal of the KRTA**. That option is not currently drafted in a Senate bill but is embodied in **HB 2225, and we support that option**. In fact, **repeal of the KRTA is our first choice for resolving concerns** in a post-*O'Brien* era. The reasonableness analysis is embedded in federal jurisprudence, thus consistent with our philosophies on evaluating anti-trust claims. Full repeal obviously solves the damages problem, as well. There will be political and philosophical opposition to this approach, but redress will still be available to Kansans and Kansas business owners of all sizes, under federal law. Repeal also fits well with the recent efforts of Kansas lawmakers to avoid duplication between and among governments.

Another option is amending the KRTA. **Our group formulated SB 124, and additional amendments to the bill, to reiterate the reasonableness analysis, clarify exemptions and reform damages provisions.**

A key aspect of our bill, SB 124, is narrowing the number of activities that are not analyzed under the reasonableness standard and we do this through the use of the phrase "**horizontal price fixing**" (pg. 1, ln. 34). We believe this reflects the state of case law immediately prior to the *O'Brien* decision and the phrase has well-settled legal meaning. Conversely, "horizontal conduct", as in SB 123 is broader than where we were prior to *O'Brien* and lacks the degree of settled legal meaning. Thus, **we strongly support the "horizontal price fixing" language.**

Our proposal provides **additional guidance to the court in determining what is "reasonable."** These factors are essentially pulled from the federal *Leegin* case. The language, if passed by the legislature, will give the Court direction and serve to articulate the legislature's intent on evaluating conduct under the KRTA.

We propose **adding clarifying exemptions** regarding credit unions and rural electric co-ops and reiterating the KRTA does not apply to ag marketing cooperatives or entities/activities governed under the federal Packers & Stockyards Act. It is important that the exemptions regarding the Capper-Volstead Act, rural electrics, credit unions, and Packers and Stockyards Act **use the language “governed by” not “complies with.”** This is critical so that minor technical errors do not result in loss of the exemption protections.

Each of the co-op exemptions in SB 124 are carried over for clarification purposes from other federal or state law. We included clarifying language regarding credit unions and rural electrics. Both are already excluded under KSA 50-148, but we wanted to ensure that REC’s exercising their legal right to opt-out of Kansas Corporation Commission rate jurisdiction were not jeopardizing in any way their exemption under KSA 50-148. Additionally, clarification regarding credit unions was necessary. Credit unions were exempt originally as they were supervised by the banking department. That language has not been updated since 1915 to reflect the creation of a separate supervising authority, the Kansas Dept. of Credit Unions. We are not proposing any additional clarification regarding our telecommunications cooperatives. We have consulted with their lobbyist and we understand they are comfortable that the wording in KSA 50-148 is still sufficient to exempt them from the KRTA.

Melissa Doeblin with the Kansas Electric Cooperatives, Inc. will be providing additional comments regarding the rural electric exemptions and Aaron Popelka with the Kansas Livestock Association will present more information regarding the Packers and Stockyards Act. We acknowledge support for their comments, as well.

We have continued to discuss legislative options and refine language even after our bill was printed. As such, we are requesting consideration of amendments presented in the attached balloon for SB 124. The balloon contains a technical correction in the language referencing the Kansas Cooperative Marketing Act. It also adjusts damages provisions under the KRTA, by **eliminating full consideration**. Currently, entities found in violation of the Act are penalized through a multi-level system. Successful plaintiffs can recover full consideration (full cost of item not just portion attributed to the anti-trust activity), treble damages (3 times the damages) and attorneys’ fees. Kansas is an anomaly when it comes to damages. No other state allows recovery of both full consideration and treble damages and only a hand-full of states provide for full consideration. Treble damages are punitive. Retaining them, in addition to awarding attorneys’ fees, provides full recovery to aggrieved parties and a deterrent to anti-trust activity. Eliminating full consideration will better align us with other states and help prevent potential forum shopping by those seeking to file cases in Kansas hoping to gain considerably more in damages than allowed in other jurisdictions.

As we continued to work with leaders interested in KRTA reform, we were asked to include a provision in our balloon similar to language incorporated into Delaware anti-trust law. This language provides direction to the court by referring them to comparable federal anti-trust law.

The above comments on will also provide insight as to why **we oppose SB 123**. SB 123 uses the “horizontal conduct” language which we cannot support. The bill uses “complies with” not “governed by” language in the exemptions and it does nothing to remedy the damages issues. The one redeeming factor in the bill is inclusion of the reasonableness analysis, including the same framework for examining reasonableness, as in our SB 124/balloon. For the record, we have included a proposed balloon amendment that would align SB 123 with SB124 and our additional proposed amendments, should the Committee elect to move forward with SB 123 as a vehicle for KTRA reform.

Our hope is this Committee will move forward expeditiously with KRTA reform. **Simply allowing the O’Brien decision to stand is unacceptable.** This issue has been debated, studied, and debated again and again. Now is the time to restore the reasonableness test that has for so long been a

common sense component of anti-trust analysis in Kansas. **We encourage this committee to craft a bill to repeal the KRTA or act favorably on SB 124 and our proposed amendments to that bill.**

There are many bills in play this year. In an effort to assist the Committee on identifying various components of the proposals we have attached a matrix noting key aspects of each bill. Additionally, we have attached a summary that briefly outlines the major points of each bill and our suggested revisions where needed.

We appreciate the opportunity to present our areas of support and concern, as well as our proposed amendments, on this very important issue. I would stand for questions and with the Chair's permission if appropriate, call on our coalition members to assist with answering those questions.

Thank you.

Brief Descriptions of Our Associations

Kansas Cooperative Council (KCC)

The Kansas Cooperative Council represents all types of cooperative businesses in Kansas including agriculture marketing and supply, utilities, financial co-ops and consumer cooperatives. Formed in 1944, the KCC works through educational and advocacy efforts to advance cooperative business success.

Kansas Electric Cooperatives, Inc.

Kansas Electric Cooperatives, Inc. (KEC) is the Kansas statewide service organization for 29 electric distribution cooperatives and three generation and transmission cooperatives. Formed on August 18, 1941, and headquartered in Topeka, KEC represents the interests and provides needed services and programs to electric cooperatives that serve member/consumers within the state. KEC functions for the mutual benefit of its members to promote rural electrification and foster the principles on which electric cooperatives were founded.

The Kansas Grain and Feed Association (KGFA)

The KGFA is a voluntary state-wide trade association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas.

Kansas Agribusiness Retailers Association (KARA)

KARA's membership includes over 700 agribusiness firms that are primarily retail facilities which supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers.

Kansas Livestock Association (KLA)

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,500 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, dairy production, grazing land management and diversified farming operations.

Kansas Credit Union Association (KCUA)

For more than 75 years, the Kansas Credit Union Association has been dedicated to assisting Kansas credit unions in meeting the needs of their members and furthering the success of the credit union movement. Kansas credit unions are not-for-profit financial cooperatives whose sole purpose is to serve the financial needs of their 626,000+ member-owners.

Kansas Bankers Association (KBA)

The Kansas Bankers Association's membership includes 99% (286 of 289) of the commercially chartered banks in Kansas. KBA member banks employ more than 13,400 Kansans that provide financial services in more than 400 towns and cities across the state.

Kansas Farm Bureau (KFB)

KFB is the state's largest general farm organization representing more than 40,000 farm and ranch families through our 105 county Farm Bureau Associations.

Kansas Association of Ethanol Processors (KAEP)

The Kansas Association of Ethanol Processors (KAEP) is a state-wide trade association that represents the majority of ethanol processors in Kansas, which together produce nearly 500 million gallons of ethanol annually. Kansas' ethanol processing facilities bring millions of dollars of revenue and economic development to Kansas communities.

Coalition for a Competitive Kansas

The Coalition for a Competitive Kansas advocates for a fair and reasonable regulatory framework to govern business practices in our state. Specifically, the Coalition seeks legislative reform of the Kansas Restraint of Trade Act (KRTA), which, as currently written and interpreted, makes Kansas a less attractive state in which to operate a business. The Coalition believes that, by bringing the KRTA in line with federal law, Kansas can ensure a welcoming operating environment for business and remain competitive among neighboring states.

Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas)

Petroleum Marketers and Convenience Store Association of Kansas (PMCA of Kansas), a statewide trade association representing over 300 independent Kansas petroleum distribution companies and convenience store owners throughout Kansas.

**Summary of Key Points – 2013 KRTA Reform Bills
(2-20-13)**

Options in our order of preference (regarding bills as originally introduced):

- 1) HB 2225 -- all out repealer bill
 - a. straight forward, leaves Kansas/Kansans with a federal remedy, reasonableness analysis, and case history
 - b. gets rid of problems with Kansas' system of layered damages: full consideration + treble damages + attorneys' fees

- 2) SB 124 – ag/co-op/related interests' work product
 - a. most straight-forward approach of all the non-repealer bills in terms of addressing ag/co-op/related interests' concerns
 - b. articulates a reasonableness analysis and provides a short guide to court on what to consider under that analysis (consistent with federal case law)
 - c. uses "horizontal price fixing" not "horizontal conduct" (that is very important to us as we believe "horizontal price fixing" is well accepted legal language and "horizontal conduct" is largely undefined, but arguably broader than where state was pre-*O'Brien*)
 - d. provides clarification on exemptions related to cooperatives and actions/entities governed by the federal Packers & Stockyards Act
 - e. uses "governed by" not "complies" language on exemptions
 - f. as introduced, HB 124 amends damages provisions to allow either full consideration OR treble damages, but not both. We propose an amendment to eliminate full consideration.

- 3) HB 2224 -- modification of the Judicial Council's recommendation Option 1
 - a. articulates a reasonableness standard (but does not provide the guide to court on what to consider under the analysis)
 - b. use "horizontal price fixing" not "horizontal conduct"
 - c. has co-op and PSA exemptions (but we would like to tweak as noted below)
 - d. need to amend bill slightly to align with SB 124:
 - i. exemptions:
 1. clarification on rural electric co-ops (RECs) and credit unions (CUs)
 - ii. need "governed by" not "complies" on exemptions (other than the REC and ag marketing co-ops)
 - iii. need to address damages to eliminate full consideration

- 4) We prefer above approaches rather than SB 123/HB 2275 (same language in these two bills)
 - a. bills would need more significant adjustments to align with SB 124 and our proposed modifications to SB 124
 - b. "negotiated" agreement between AWG and attorneys for PING golf and Brighton but does not address all the concerns of ag/co-ops/ related interests
 - c. uses "horizontal conduct" not "horizontal price fixing"
 - d. uses "complies" not "governed by"
 - e. purchasing group exemption of concern – "group purchasing organization" and "monopoly power", to our knowledge, are undefined

For additional information, you may contact the following individuals/organizations:

Kansas Cooperative Counsel -- Leslie Kaufman 785-220-4068
Kansas Electric Cooperatives, Inc. -- Melissa Doebelin 785-766-3002
Kansas Livestock Assoc. -- Aaron Popelka 785-806-7714, Myndee Reed 785-633-7840
Kansas Grain & Feed Assoc./Kansas Agribusiness Retailers Assoc. -- Randy Stookey 785-220-5211

Bill Number	HB 2224	HB 2225	HB 2258 (same as 2225)	HB 2275	SB 123	SB 124
House of Origin	House	House	House	House	Senate	Senate
Committee	Judiciary	Judiciary	Commerce, Labor, Eco Devo	Judiciary	Judiciary	Judiciary
Statutes Amended:						
• 50-101	X			X - When lead to increased prices	X - When lead to increased prices	X - Removes "aids to commerce"
• 50-112	X			X - Change advance, reduce, control cost to increase price	X - Change advance, reduce, control cost to increase price	X
• 50-161		X	X			X
• 50-504		Repeal	Repeal			
• 50-508		X	X			
• 2012 KSA Supp. 66-1,112		X	X			
• All KRTA (repeal)		---	---			
Analysis Factors				Same as SB 123, SB 124	Same as SB 124, HB 2275	Same as SB 123, HB 2275
Reasonableness Standard	Establishes reasonableness standard; shall not apply to horizontal price-fixing	---	---	Broad application, horizontal conduct	Broad application, horizontal conduct	Narrow application, horizontal price-fixing
Horizontal Price Fixing / Conduct	Price Fixing	Repeal	Repeal	Conduct	Conduct	Price Fixing
Exemptions:						
• Coop Marketing Act	X			X	X	X
• Capper-Volstead	X - Does not include associations			X	X	X
• Packers/Stockyards	X - Does not include associations			X	X	X
• Franchise Agreements & Covenants Not To Compete	X			X	X	X
• Cooperative Societies Act				X	X	
• Group Purchasing				X	X	
• Electric Cooperative Act				X	X	X
• Rural Electric Cooperatives						X
• Credit Union Act				X	X	X
Complies with / Governed by	Complies with	---	---	Complies with	Complies with	Governed by
Damages	---	---	---	---	---	Allows trable damages or full consideration, but not both
Effective Date	Kansas Register					
Notes						

1 AN ACT concerning the Kansas restraint of trade act; amending K.S.A.
2 50-101, 50-112, 50-115, and 50-161 and repealing the existing sections.

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4 *Be it enacted by the Legislature of the State of Kansas:*

5 New Section 1. (a) The purpose of this section, and the amendments
6 to K.S.A. 50-101 and 50-112 by this act, is to clarify and reduce any
7 uncertainty or ambiguity as to the application of the Kansas restraint of
8 trade act and applicable evidentiary standards to certain types of business
9 contracts, agreements and arrangements that are not intended to
10 unreasonably restrain trade or commerce and do not contravene public
11 welfare.

12 (b) (1) Except as provided in subsection (b)(3), an arrangement,
13 contract, agreement, trust, understanding or combination shall not be
14 deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101
15 through 50-162, and amendments thereto, and shall not be deemed
16 unlawful, void, prohibited or wrongful under any provision of the Kansas
17 restraint of trade act, K.S.A. 50-101 through 50-162, and amendments
18 thereto, if that arrangement, contract, agreement, trust, understanding or
19 combination is a reasonable restraint of trade or commerce. An
20 arrangement, contract, agreement, trust, understanding or combination is a
21 reasonable restraint of trade or commerce if such restraint is reasonable in
22 view of all of the facts and circumstances of the particular case and does
23 not contravene public welfare.

24 (2) Whether an arrangement, contract, agreement, trust,
25 understanding or combination is a reasonable restraint of trade or
26 commerce in view of all of the facts and circumstances, shall include, but
27 not be limited to, an analysis of the following factors:

28 (A) Specific information about the relevant industry;

29 (B) whether the history, nature, and effect of the restraint stimulates
30 or harms interbrand competition;

31 (C) whether there were legitimate business justifications; and

32 (D) whether the defendant involved has market power.

33 (3) The reasonableness standard described in subsections (b)(1) and
34 (b)(2) shall not apply to any claim of horizontal price-fixing between or
35 among competitors that otherwise violates the Kansas restraint of trade act,
36 K.S.A. 50-101 through 50-162, and amendments thereto. A manufacturer
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1 or wholesaler that also engages in retail sales shall not be considered
2 engaged in horizontal conduct with respect to sales the manufacturer or
3 wholesaler makes to third-party retailers.

4 (c) The Kansas restraint of trade act, K.S.A. 50-101 through 50-162,
5 and amendments thereto, shall not apply to:

6 (1) Any association that is governed by or becomes subject to the
7 provisions and application of article 16 of chapter 17 of the Kansas
8 Statutes Annotated, and amendments thereto, the cooperative marketing
9 act;

10 (2) any association, trust, agreement or arrangement that is governed
11 by the provisions and application of 7 U.S.C. § 291 et seq., the Capper-
12 Volstead act;

13 (3) any corporation organized under the electric cooperative act,
14 K.S.A. 17-4601 et seq., and amendments thereto, or which becomes
15 subject to the electric cooperative act in any manner therein provided; or
16 any limited liability company or corporation, or wholly owned subsidiary
17 thereof, providing electric service at wholesale in the state of Kansas that
18 is owned by four or more electric cooperatives that provide retail service
19 in the state of Kansas; or any member-owned corporation formed prior to
20 2004;

21 (4) any association that is governed by the provisions and application
22 of article 22 of chapter 17 of the Kansas Statutes Annotated, and
23 amendments thereto, the credit union act;

24 (5) any association, trust, agreement or arrangement that is governed
25 by the provisions and application of 7 U.S.C. § 181 et seq., the packers and
26 stockyards act; and

27 (6) any franchise agreements or covenants not to compete.

28 (d) If any provision of this section or the application thereof to any
29 person or circumstance is held invalid, the invalidity does not affect other
30 provisions or applications of this section which can be given effect without
31 the invalid provision or application, and to this end the provisions of this
32 section are severable.

33 (e) This section shall be a part of and supplemental to the Kansas
34 restraint of trade act, K.S.A. 50-101 through 50-162, and amendments
35 thereto.

36 Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101.
37 *Except as provided in section 1, and amendments thereto, a trust is a*
38 *combination of capital, skill, or acts, by two or more persons, for either,*
39 *any or all of the following purposes:*

40 *First. To create or carry out restrictions in trade or commerce, or aids to*
41 *commerce, or to carry out restrictions in the full and free pursuit of any*
42 *business authorized or permitted by the laws of this state.*
43 *Second. To increase or reduce the price of merchandise, produce or*

Insert: complies with

1 commodities, or to control the cost or rates of insurance.
2 *Third.* To prevent competition in the manufacture, making,
3 transportation, sale or purchase of merchandise, produce or commodities,
4 ~~or to prevent competition in aids to commerce.~~
5 *Fourth.* To fix any standard or figure, whereby such person's price to
6 the public shall be, in any manner, controlled or established, any article or
7 commodity of merchandise, produce or commerce intended for sale, use or
8 consumption in this state.
9 *Fifth.* To make or enter into, or execute or carry out, any contract,
10 obligation or agreement of any kind or description by which such person
11 shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose
12 of or transport any article or commodity, or article of trade, use,
13 merchandise, commerce or consumption below a common standard figure;
14 (b) agree in any manner to keep the price of such article, commodity
15 or transportation at a fixed or graded figure;
16 (c) in any manner establish or settle the price of any article or
17 commodity or transportation between them or themselves and others to
18 preclude a free and unrestricted competition among themselves or others
19 in transportation, sale or manufacture of any such article or commodity; or
20 (d) agree to pool, combine or unite any interest they may have in
21 connection with the manufacture, sale or transportation of any such article
22 or commodity, that such person's price in any manner is affected. Any such
23 combinations are hereby declared to be against public policy, unlawful and
24 void.
25 Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112.
26 *Except as provided in section 1, and amendments thereto, all*
27 *arrangements, contracts, agreements, trusts, or combinations between*
28 *persons made with a view or which tend to prevent full and free*
29 *competition in the importation, transportation or sale of articles imported*
30 *into this state, or in the product, manufacture or sale of articles of domestic*
31 *growth or product of domestic raw material, or for the loan or use of*
32 *money, or to fix attorney or doctor fees, and all arrangements, contracts,*
33 *agreements, trusts or combinations between persons, designed or which*
34 *tend to advance, reduce or control the price or the cost to the producer or*
35 *to the consumer of any such products or articles, or to control the cost or*
36 *rate of insurance, or which tend to advance or control the rate of interest*
37 *for the loan or use of moneys to the borrower, or any other services, are*
38 *hereby declared to be against public policy, unlawful and void.*
39 Sec. 4. K.S.A. 50-161 is hereby amended to read as follows: 50-161.
40 (a) As used in this section, the term "person" means any individual,
41 corporation, partnership, firm, company or other association of persons,
42 and such term shall include the state of Kansas and any of its political
43 subdivisions.

1 (b) Except as provided in K.S.A. 12-205, and amendments thereto,
 2 any person who may be damaged or injured by any agreement, monopoly,
 3 trust, conspiracy or combination which is declared unlawful by any of the
 4 acts contained in chapter 50 of the Kansas Statutes Annotated, *and*
 5 *amendments thereto*, relating to unlawful acts, agreements, monopolies,
 6 trusts, conspiracies or combinations in restraint of trade, shall have a cause
 7 of action against any person causing such damage or injury. Such action
 8 may be brought by any person who is injured in such person's business or
 9 property by reason of anything forbidden or declared unlawful by this act,
 10 regardless of whether such injured person dealt directly or indirectly with
 11 the defendant. The plaintiff in any action commenced hereunder in the
 12 district court of the county wherein such plaintiff resides, or the district
 13 court of the county of the defendant's principal place of business, may sue
 14 for and recover treble the actual damages sustained ~~or such damages as~~
 15 ~~provided for in K.S.A. 50-115, and amendments thereto, but not both~~. In
 16 addition, any person who is threatened with injury or additional injury by
 17 reason of any person's violation of such acts may commence an action in
 18 such district court to enjoin any such violation, and any damages suffered
 19 may be sued for and recovered in the same action in addition to injunctive
 20 relief. Any suit for injunctive relief against a municipality shall be subject
 21 to the provisions of K.S.A. 12-205, and amendments thereto.

22 (c) In any action commenced under this section, the plaintiff may be
 23 allowed reasonable attorney fees and costs. The remedies provided herein
 24 shall be alternative and in addition to any other remedies now provided by
 25 law.
 26 Sec. 5. K.S.A. 50-101, 50-112, 50-115 and 50-161 are hereby repealed.
 27 Sec. 6. This act shall take effect and be in force from and after its
 28 publication in the Kansas register.
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Insert (d) The provisions of this act shall be construed in harmony
 with ruling judicial interpretations of comparable federal
 antitrust statutes.

1 AN ACT concerning the Kansas restraint of trade act; amending K.S.A.
2 50-101, and 50-112, 50-115, and 50-161 and repealing the existing sections.
3

Amendments by Kansas Cooperative Council to SB 123
with provisions of SB 124 as modified.

4 *Be it enacted by the Legislature of the State of Kansas:*

5 New Section 1. (a) The purpose of this section, and the amendments
6 to K.S.A. 50-101 and 50-112 by this act, is to clarify and reduce any
7 uncertainty or ambiguity as to the application of the Kansas restraint of
8 trade act and applicable evidentiary standards to certain types of business
9 contracts, agreements and arrangements that are not intended to
10 unreasonably restrain trade or commerce and do not contravene public
11 welfare.

12 (b) (1) Except as provided in subsection (b)(3), an arrangement,
13 contract, agreement, trust, understanding or combination shall not be
14 deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101
15 through 50-162, and amendments thereto, and shall not be deemed
16 unlawful, void, prohibited or wrongful under any provision of the Kansas
17 restraint of trade act, K.S.A. 50-101 through 50-162, and amendments
18 thereto, if that arrangement, contract, agreement, trust, understanding or
19 combination is a reasonable restraint of trade or commerce. An
20 arrangement, contract, agreement, trust, understanding or combination is a
21 reasonable restraint of trade or commerce if such restraint is reasonable in
22 view of all of the facts and circumstances of the particular case and does
23 not contravene public welfare.

24 (2) Whether an arrangement, contract, agreement, trust,
25 understanding or combination is a reasonable restraint of trade or
26 commerce in view of all of the facts and circumstances, shall include, but
27 not be limited to, an analysis of the following factors:

28 (A) Specific information about the relevant industry;

29 (B) whether the history, nature, and effect of the restraint stimulates
30 or harms interbrand competition;

31 (C) whether there were legitimate business justifications; and

32 (D) whether the defendant involved has market power.

33 (3) The reasonableness standard described in subsections (b)(1) and
34 (b)(2) shall not apply to any claim of horizontal conduct between or
35 among competitors that otherwise violates the Kansas restraint of trade act,
36 K.S.A. 50-101 through 50-162, and amendments thereto. A manufacturer
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1 or wholesaler that also engages in retail sales shall not be considered
 2 engaged in horizontal conduct with respect to sales the manufacturer or
 3 wholesaler makes to third-party retailers.
 4 (c) The Kansas restraint of trade act, K.S.A. 50-101 through 50-162,
 5 and amendments thereto, shall not apply to:
 6 (1) Any association that complies with the provisions and application
 7 of article 16 of chapter 17 of the Kansas Statutes Annotated, and
 8 amendments thereto, the cooperative marketing act;
 9 (2) any association, trust, agreement or arrangement that complies
 10 withis governed by the provisions and application of 7 U.S.C. § 291 et seq., the Capper-
 11 Volstead act;
 12 (3) any association, trust, agreement or arrangement that complies
 13 with is governed by the provisions and application of 7 U.S.C. § 181 et seq., the packers
 14 and stockyards act;
 15 (4) any franchise agreements or covenants not to compete;
 16 ~~(5) any association that complies with the provisions and application~~
 17 ~~of article 15 of chapter 17 of the Kansas Statutes Annotated, and~~
 18 ~~amendments thereto, the cooperative societies act;~~
 19 ~~(6) any group purchasing organization or group purchasing~~
 20 ~~cooperative engaged in coordinated purchasing activities designed to~~
 21 ~~obtain lower prices or increase efficiencies for its members so long as it~~
 22 ~~does not possess monopoly power;~~
 23 ~~(7) any company or corporation that complies with the electric~~
 24 ~~cooperative act, K.S.A. 17-4601 et seq., and amendments thereto; and~~
 25 ~~(8) any association that complies with the provisions and application~~
 26 ~~of article 22 of chapter 17 of the Kansas Statutes Annotated, and~~
 27 ~~amendments thereto, the credit union act;~~
 28 (d) If any provision of this section or the application thereof to any
 29 person or circumstance is held invalid, the invalidity does not affect other
 30 provisions or applications of this section which can be given effect without
 31 the invalid provision or application, and to this end the provisions of this
 32 section are severable.
 33 (e) This section shall be a part of and supplemental to the Kansas
 34 restraint of trade act, K.S.A. 50-101 through 50-162, and amendments
 35 thereto.
 36 Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101.
 37 Except as provided in section 1, and amendments thereto, a trust is a
 38 combination of capital, skill, or acts, by two or more persons, for either,
 39 any or all of the following purposes:
 40 First. To create or carry out restrictions in trade or commerce, or aide to
 41 commerce, or to carry out restrictions in the full and free pursuit of any
 42 business authorized or permitted by the laws of this state.
 43 Second. To increase or reduce the price of merchandise, produce or

Insert: (5) any corporation organized under the electric cooperative act, K.S.A. 17-4601 et seq., and amendments thereto, or which becomes subject to the electric cooperative act in any manner therein provided; or any limited liability company or corporation, or wholly owned subsidiary thereof, providing electric service at wholesale in the state of Kansas that is owned by four or more electric cooperatives that provide retail service in the state of Kansas; or any member-owned corporation formed prior to 2004;

1 commodities, ~~when such conduct may lead to increased prices~~, or to
2 control the cost or rates of insurance.

3 *Third.* To prevent competition in the manufacture, making,
4 transportation, sale or purchase of merchandise, produce or commodities,
5 ~~to prevent competition in acts to commerce.~~

6 *Fourth.* To fix any standard or figure, whereby such person's price to
7 the public shall be, in any manner, controlled or established, any article or
8 commodity of merchandise, produce or commerce intended for sale, use or
9 consumption in this state.

10 *Fifth.* To make or enter into, or execute or carry out, any contract,
11 obligation or agreement of any kind or description by which such person
12 shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose
13 of or transport any article or commodity, or article of trade, use,
14 merchandise, commerce or consumption below a common standard figure;
15 (b) agree in any manner to keep the price of such article, commodity
16 or transportation at a fixed or graded figure;

17 (c) In any manner establish or settle the price of any article or
18 commodity or transportation between them or themselves and others to
19 preclude a free and unrestricted competition among themselves or others
20 in transportation, sale or manufacture of any such article or commodity; or
21 (d) agree to pool, combine or unite any interest they may have in
22 connection with the manufacture, sale or transportation of any such article
23 or commodity, that such person's price in any manner is affected. Any such
24 combinations are hereby declared to be against public policy, unlawful and
25 void.

26 Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112.

27 *Except as provided in section 1, and amendments thereto,* all
28 arrangements, contracts, agreements, trusts, or combinations between
29 persons made with a view or which tend to prevent full and free
30 competition in the importation, transportation or sale of articles imported
31 into this state, or in the product, manufacture or sale of articles of domestic
32 growth or product of domestic raw material, or for the loan or use of
33 money, or to fix attorney or doctor fees, and all arrangements, contracts,
34 agreements, trusts or combinations between persons, designed or which
35 tend to ~~advance~~ ~~reduce or control~~ ~~increase~~ the price of the ~~cost~~ to the
36 producer or to the consumer of any such products or articles, or to control
37 the cost or rate of insurance, or which tend to advance or control the rate
38 of interest for the loan or use of moneys to the borrower, or any other
39 services, are hereby declared to be against public policy, unlawful and
40 void.

41 Sec. 5. 4. K.S.A. 50-101 and 50-112, 50-115, 50-161 are hereby repealed.
42 Sec. 56. This act shall take effect and be in force from and after its
43 publication in the Kansas register.

Return to current law language: insert: advance,
reduce or control the price or the cost

New Section 4. Except as provided in K.S.A. 12-205, and amendments thereto,
any person who may be damaged or injured by any agreement, monopoly,
trust, conspiracy or combination which is declared unlawful by any of the
acts contained in chapter 50 of the Kansas Statutes Annotated, and
amendments thereto, relating to unlawful acts, agreements, monopolies,
trusts, conspiracies or combinations in restraint of trade, shall have a cause
of action against any person causing such damage or injury. Such action
may be brought by any person who is injured in such person's business or
property by reason of anything forbidden or declared unlawful by this act,
regardless of whether such injured person dealt directly or indirectly with
the defendant. The plaintiff in any action commenced hereunder in the
district court of the county wherein such plaintiff resides, or the district
court of the county of the defendant's principal place of business, may sue
for and recover treble the actual damages sustained. In
addition, any person who is threatened with injury or additional injury by
reason of any person's violation of such acts may commence an action in
such district court to enjoin any such violation, and any damages suffered
may be sued for and recovered in the same action in addition to injunctive
relief. Any suit for injunctive relief against a municipality shall be subject
to the provisions of K.S.A. 12-205, and amendments thereto.
(c) In any action commenced under this section, the plaintiff may be
allowed reasonable attorney fees and costs. The remedies provided herein
shall be alternative and in addition to any other remedies now provided by
law.