THE KANSAS HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

The Problem with O'Brien v Leegin Creative Leather Products

My name is James P. Rankin and I am a partner in the Foulston Siefkin LLP law firm. We represent multiple clients including Leegin products, otherwise known as Brighton Collectibles, Inc. Brighton produces fine nationally and internationally known women's accessory products, such as fashion jewelry, handbags, watches, belts and eyewear. Our clients have adopted pro-competitive polices related to the distribution of their premium brand products, policies that are designed to promote product knowledge and customer service while minimizing the threat of harm to the brand that occurs when some retailers "free ride" from the efforts of others. Such policies, and others, have been recognized by the United States Supreme Court as reasonable and, therefore, lawful under the federal laws.

However, on Friday, May 4, 2012, the Kansas Supreme Court issued an antitrust opinion in the case of *O'Brien v Leegin Creative Leather Products* which overruled 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 jeopardize everyday business activities conducted in Kansas. Such activities are now 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.

Since 1948, the KRTA has been interpreted as permitting many business structures and only restricting 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.

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.

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.

Eleven years later*, Okeberg v. Crable*, 185 Kan. 211 (1959) found a territorial restriction on milk routes was reasonable and lawful.

The Kansas Supreme Court in the *Leegin* decision has now expressly overruled both decisions and has deprived pro-competitive businesses in Kansas of the needed opportunity to demonstrate why their conduct is reasonable and why it should not be declared illegal and void. It is important to keep in mind our client, Brighton, does business primarily with single store retailers operated by small entrepreneurs

living and working in Kansas. Brighton's policies support these small businesses and are important to their survival.

Because the KRTA makes agreements that violate the act VOID, the legislation must avoid the negative economic impact that would flow from countless Kansas contracts being subject to litigation asking the Kansas Judiciary to rule each be held to be unenforceable and void in Kansas. Would every contract have to be re-issued, re-negotiated, and re-signed?

You have before you various bills intended to address this surprising change of course adopted last year by our Supreme Court.

On behalf of our clients, we recognize that all of the bills intended to undo the *O'Brien* holding are well-intentioned and designed to protect legitimate business arrangements such as those vertical integration and product policies used by our clients. We cannot say which bill is best in all particulars. We have worked with the other interested parties in an effort to achieve a compromise fair to all concerned.

We ask that this Committee exercise its best public policy judgment on how to handle the dilemma created by the *O'Brien* decision. And, we urge you to consider two important issues which may not be adequately addressed in one or more of the legislative proposals before you:

1. Please consider how best to protect and validate lawful arrangements, contracts, agreements, trusts, or combinations between persons or entities in place the day before the *O'Brien* decision, and to protect against the business and economic uncertainty created by that decision. As interpreted in the *O'Brien* decision, the Act makes such arrangements; etc. that violate the Act VOID. This creates an issue of the status of all such arrangements; etc. that were in place before the *O'Brien* decision. We recommend that new legislation apply to all arrangements, contracts, agreements, trusts, or combinations between persons, including any that were or could have been rendered void under the *O'Brien* decision. Unreasonable restraints would continue to be illegal and void while business stability and certainty would be preserved for provisions previously adopted.

2. Also, we strongly urge that corrective legislation expressly limit recovery to either treble actual damages or full consideration damages, but not both.

Thank you.