

TO: Rep. Lance Kinzer, Chairman
Members of the Committee
House 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: Partial support with suggested amendments (attached) for **HB 2224** - Amending the KRTA
To apply a reasonableness analysis to all but horizontal price fixing

Support for **HB 2225** - Repealing the Kansas Restraint of Trade Act (KRTA)

Opposition for **HB 2275** - Amending KRTA to apply a reasonableness analysis to all but
horizontal conduct (unable to support without significant amendments, attached)

Chairman Kinzer and members of the House 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, and the Coalition for a Competitive 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 overview testimony for our group and you will hear more industry/organization specific comments from a few of our other members, as well. 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, at the request of Chairman Kinzer, reviewed the *O'Brien* decision and its impacts (or potential impacts). Representative 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 3 bills before you today and 2 others in the Senate. The most direct, clear-cut approach is **repeal of the KRTA** as 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. Although amended slightly, the core of the Judicial Council's Option 1 is before you today as **HB 2224**. There is one particular improvement in this bill over their recommendation that we support strongly and that is the use of the phrase "**horizontal price fixing**" (pg. 1, ln. 25). 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 HB 2275, 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.**

We appreciate the work of the Judicial Council, the efforts of Judge Rubin in serving on the subcommittee and Chairman Kinzer's request that they examine KRTA issues after *O'Brien*. Their proposal provided a base from which we could consider these issues further. As we have reviewed the Judicial Council language and HB 2224, we believe the bill would be strengthened through a few amendments. We have **attached a proposed balloon for HB 2224**. These amendments will align HB 2224 with a Senate bill **our group has developed, SB 124**, and subsequent amendments we will propose tomorrow in Senate Judiciary Committee.

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 HB 2224 and in our balloon are carried over for clarification purposes from other federal or state law. We propose adding clarifying amendments for 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 telephone 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 Doebelin with the Kansas Electric Cooperatives, Inc., will provide 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 handful 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.

The above comments on will also provide insight as to why **we oppose HB 2275**. HB 2275 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 balloon/SB 124. For the record, we have included a proposed balloon amendment that would align HB 2275 with our SB 124 and SB 124 proposed amendments, should the Committee elect to move forward with this bill 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 act favorable on**

HB 2225 and repeal the KRTA or act favorably on HB 2224 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 Doeblin 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 Judiciary	House Judiciary	House Commerce, Labor, Eco Devo	House Judiciary	Senate Judiciary	Senate Judiciary
Committee						
Statutes Amended:						
• 50-101	X				X - When lead to increased prices	X - Removes "aids to commerce"
• 50-112	X				X - Change advance, reduce, control cost to increase price	X
• 50-151						X
• 50-504		X				
• 50-508		Repeal				
• 2012 KSA Supp. 66-1,112		X				
• All KRTA (repeal)		X				
Analysis Factors						
Reasonableness Standard	Establishes reasonableness standard; shall not apply to horizontal price-fixing	---	---	Same as SB 123, SB 124	Same as SB 124, HB 2275	Same as SB 123, HB 2275
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 treble 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 and 50-112, and 50-161 and repealing the existing sections.
3 *Be it enacted by the Legislature of the State of Kansas:*

4
5 New Section 1. (a) The purpose of this section, and the amendments
6 to K.S.A. 50-101, ~~and 50-112, 50-115, and 50-161~~ 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)(2), 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 (32) The reasonableness standard described in subsections (b)(1) and (b)(2) shall
25 not apply to any claim of horizontal price-fixing between or among
26 competitors that otherwise violates the Kansas restraint of trade act,
27 K.S.A. 50-101 through 50-162, and amendments thereto.
28 (c) The Kansas restraint of trade act, K.S.A. 50-101 through 50-162,
29 and amendments thereto, shall not apply to:

30 (1) Any association that complies with or becomes subject to the provisions and application
31 of article 16 of chapter 17 of the Kansas Statutes Annotated, and
32 amendments thereto, the cooperative marketing act;
33 (2) any association, trust, agreement or arrangement that complies with is governed ~~they~~ the
34 provisions and application of 7 U.S.C. § 291 et seq., the Capper-Volstead
35 act;
36 (43) any association, trust, agreement or arrangement that complies with is governed ~~they~~ the

Kansas Cooperative Council Amendments to HB 2224
including SB 124 concepts.

(2) Whether an arrangement, contract, agreement, trust, understanding or combination is a reasonable restraint of trade or commerce in view of all of the facts and circumstances, shall include, but not be limited to, an analysis of the following factors: (A) Specific information about the relevant industry; (B) whether the history, nature, and effect of the restraint stimulates or harms interbrand competition; (C) whether there were legitimate business justifications; and (D) whether the defendant involved has market power.

Insert: A manufacturer or wholesaler that also engages in retail sales shall not be considered engaged in horizontal conduct with respect to sales the manufacturer or wholesaler makes to third-party retailers.

Insert: (3) 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; (4) any association that is governed by the provisions and application of article 22 of chapter 17 of the Kansas Statutes Annotated, and amendments thereto, the credit union act;

1 provisions and application of 7 U.S.C. § 181 et seq., the packers and
2 stockyards act; and
3 ~~(54)~~ any franchise agreements or covenants not to compete.
4 (d) If any provision of this section or the application thereof to any
5 person or circumstance is held invalid, the invalidity does not affect other
6 provisions or applications of this section which can be given effect without
7 the invalid provision or application, and to this end the provisions of this
8 section are severable.
9 (e) This section shall be a part of and supplemental to the Kansas
10 restraint of trade act, K.S.A. 50-101 through 50-162, and amendments
11 thereto.
12 Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101.
13 *Except as provided in section 1, and amendments thereto*, a trust is a
14 combination of capital, skill, or acts, by two or more persons, for either,
15 any or all of the following purposes:
16 *First*. To create or carry out restrictions in trade or commerce, ~~or aids to~~
17 ~~commerce~~, or to carry out restrictions in the full and free pursuit of any
18 business authorized or permitted by the laws of this state.
19 *Second*. To increase or reduce the price of merchandise, produce or
20 commodities, or to control the cost or rates of insurance.
21 *Third*. To prevent competition in the manufacture, making,
22 transportation, sale or purchase of merchandise, produce or commodities,
23 ~~or to prevent competition in aids to commerce~~.
24 *Fourth*. To fix any standard or figure, whereby such person's price to
25 the public shall be, in any manner, controlled or established, any article or
26 commodity of merchandise, produce or commerce intended for sale, use or
27 consumption in this state.
28 *Fifth*. To make or enter into, or execute or carry out, any contract,
29 obligation or agreement of any kind or description by which such person
30 shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose
31 of or transport any article or commodity, or article of trade, use,
32 merchandise, commerce or consumption below a common standard figure;
33 (b) agree in any manner to keep the price of such article, commodity
34 or transportation at a fixed or graded figure;
35 (c) in any manner establish or settle the price of any article or
36 commodity or transportation between them or themselves and others to
37 preclude a free and unrestricted competition among themselves or others
38 in transportation, sale or manufacture of any such article or commodity; or
39 (d) agree to pool, combine or unite any interest they may have in
40 connection with the manufacture, sale or transportation of any such article

1 or commodity, that such person's price in any manner is affected. Any such
2 combinations are hereby declared to be against public policy, unlawful and
3 void.

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

5 *Except as provided in section 1, and amendments thereto*, all
6 arrangements, contracts, agreements, trusts, or combinations between
7 persons made with a view or which tend to prevent full and free
8 competition in the importation, transportation or sale of articles imported
9 into this state, or in the product, manufacture or sale of articles of domestic
10 growth or product of domestic raw material, or for the loan or use of
11 money, or to fix attorney or doctor fees, and all arrangements, contracts,
12 agreements, trusts or combinations between persons, designed or which
13 tend to advance, reduce or control the price or the cost to the producer or
14 to the consumer of any such products or articles, or to control the cost or
15 rate of insurance, or which tend to advance or control the rate of interest
16 for the loan or use of moneys to the borrower, or any other services, are
17 hereby declared to be against public policy, unlawful and void.

18 ~~Sec. 4-5, K.S.A. 50-10150-112 and 50-442, 50-115, and 50-161 are hereby repealed.~~
19 ~~Sec. 5-3. This act shall take effect and be in force from and after its~~
20 ~~publication in the Kansas register.~~

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Insert: Sec. 4, K.S.A. 50-161 is hereby amended to read as follows: 50-161(a) As used in this section, the term "person" means any individual, corporation, partnership, firm, company or other association of persons, and such term shall include the state of Kansas and any of its political subdivisions. (b) 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 Statute 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 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 plaintiffs 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.

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
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 ~~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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Kansas Cooperative Council amendments to HB
2275 with provisions of SB 124 with proposed
modifications.

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 or becomes subject to 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 with is governed by the provisions and application of 7 U.S.C. § 291 et seq., the Capper-
 11 Volstead act,
 12 (43) 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 (54) 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 (68) any association that complies with is governed by 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 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
 44

Insert: (3) 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 ~~or to prevent competition in aids 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 or 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 by the borrower, or any other
 39 services, are hereby declared to be against public policy, unlawful and
 40 void.
 41 Sec. 5# K.S.A. 50-101, and 50-112, 50-115, and 50-161 are hereby repealed.
 42 Sec 5-5- This act shall take effect and be in force from and after its
 43 publication in the Kansas register.

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

Sec. 4. K.S.A. 50-161 is hereby amended to read as follows: 50-
 161. (a) As used in this section, the term "person" means any
 individual, corporation, partnership, firm, company or other
 association of persons, and such term shall include the state of
 Kansas and any of its political subdivisions. (b) 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 wherein
 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.



February 20, 2013

Testimony on Kansas Restraint of Trade Act Bills
HB 2224, HB 2225, HB 2275

Melissa Doeblin
Kansas Electric Cooperatives, Inc.

Chairman Lance Kinzer
Kansas State Capitol
300 SW 10th Street, Room 165-West
Topeka, Kansas 66612

Chairman Kinzer, Vice Chairman Bruchman, Ranking Minority Member Pauls, and distinguished members of the House Committee on Judiciary, I want to thank you for this opportunity to testify on behalf of Kansas Electric Cooperatives, Inc. (KEC) concerning the bills on the Kansas Restraint of Trade Act (KRTA) (HB 2224, HB 2225, and HB 2275).

KEC joins and supports the testimony provided by Leslie Kaufman of the Kansas Cooperative Council. This testimony will not repeat testimony she has provided. The purpose of KEC's testimony is to specifically advocate for a clarification to an exemption to KRTA for your rural electric cooperatives (RECs) in Kansas. A balloon amendment is attached, which KEC requests the Committee adopt.

In HB 2224, an exemption is not currently set forth in New Section 1(c) to exempt RECs, and KEC believes such an exemption is necessary. HB 2225 is a repeal of KRTA, and thus no exemptions are contained in the bill. In HB 2275, a partial exemption concerning RECs is set forth in New Section 1(c)(7). The exemption reads:

“(7) any company or corporation that complies with the electric cooperative act, K.S.A. 17-4601 et seq., and amendments thereto; ...”

While this is a good start, the exemption in HB 2275 does not include all RECs in Kansas. There are certain RECs that are governed by and organized under Kansas statutes other than the Electric Cooperative Act. Therefore, KEC requests this Committee, in the final amended form of KRTA, include the following language to clarify an exemption for all RECs in Kansas:

“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.”

This language mirrors language set forth in K.S.A. 2012 Supp. 66-104d(a), which is the definition of an electric cooperative public utility. It adds the phrase "or wholly owned subsidiary thereof" to include one of KEC's members that has become a subsidiary of another REC since that definition was crafted. Each element in the definition of K.S.A. 2012 Supp. 66-104d(a) was carefully worded to include all member-owned electric cooperatives at the time, including retail providers, and generation and transmission (G&T) providers.

I wish also to point your attention to K.S.A. 50-148(b), a statute in KRTA:

50-148. Trade and person defined. As used in this act: (a) "Trade" means the business of buying or selling any commodity of general use within the state; and

(b) "person" or "persons" includes individuals, corporations, limited liability companies, general partnerships, limited partnerships, firms, companies, voluntary associations and other associations or business entities, existing under or authorized by the state of Kansas, or the laws of any other state, territory, or foreign country. *The provisions of this act shall not apply to persons whose business is under the supervision and control of the state corporation commission or the banking department.* [Emphasis added.]

In this statute of KRTA, an exemption is set forth to make the provisions of KRTA not applicable to entities under the supervision and control of the Kansas Corporation Commission. KEC believes RECs are exempt from KRTA under this provision, even if the REC has deregulated from Commission jurisdiction for the purpose of setting rates. As set forth in K.S.A. 2012 Supp. 66-104d(f), deregulated RECs remain under the supervision and control of the Commission with regard to certified service territory; charges, fees or tariffs for transmission services; wire stringing rules; transmission line siting; and sales of power for resale, other than sales between a cooperative that does not provide retail electric service and an owner of such cooperative.

However, KEC still requests this Committee include the full exemption for RECs as set forth above, which would clarify and reduce any uncertainty as to the application of the exemption in K.S.A. 50-148(b), were it to be faced with a legal challenge. KEC believes including this full exemption for RECs would further clarify the intent of the Kansas Judicial Council committees examining this issue to exempt all cooperatives in Kansas from KRTA.

Thank you again for the opportunity to testify on behalf of KEC.

Best,



Melissa Doeblin

Manager of Government Relations
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.

HOUSE BILL No. 2224

By Committee on Judiciary

2-5

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

3
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)(2), 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) The reasonableness standard described in subsection (b)(1) shall
25 not apply to any claim of horizontal price-fixing between or among
26 competitors that otherwise violates the Kansas restraint of trade act,
27 K.S.A. 50-101 through 50-162, and amendments thereto.

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

30 (1) Any association that complies with the provisions and application
31 of article 16 of chapter 17 of the Kansas Statutes Annotated, and
32 amendments thereto, the cooperative marketing act;

33 (2) any trust, agreement or arrangement that complies with the
34 provisions and application of 7 U.S.C. § 291 et seq., the Capper-Volstead
35 act;

36 (3) any trust, agreement or arrangement that complies with the

provisions and application of 7 U.S.C. § 181 et seq., the packers and stockyards act; ~~and~~

(4) any franchise agreements or covenants not to compete;

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

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

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

First. 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.

Second. To increase or reduce the price of merchandise, produce or commodities, or to control the cost or rates of insurance.

Third. To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

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

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which such person shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure;

(b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure;

(c) in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or

(d) agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that such person's price in any manner is affected. Any such combinations are hereby declared to be against public policy, unlawful and void.

; and

(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 Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112.
2 *Except as provided in section 1, and amendments thereto,* all
3 arrangements, contracts, agreements, trusts, or combinations between
4 persons made with a view or which tend to prevent full and free
5 competition in the importation, transportation or sale of articles imported
6 into this state, or in the product, manufacture or sale of articles of domestic
7 growth or product of domestic raw material, or for the loan or use of
8 money, or to fix attorney or doctor fees, and all arrangements, contracts,
9 agreements, trusts or combinations between persons, designed or which
10 tend to advance, reduce or control the price or the cost to the producer or
11 to the consumer of any such products or articles, or to control the cost or
12 rate of insurance, or which tend to advance or control the rate of interest
13 for the loan or use of moneys to the borrower, or any other services, are
14 hereby declared to be against public policy, unlawful and void.
15 Sec. 4. K.S.A. 50-101 and 50-112 are hereby repealed.
16 Sec. 5. This act shall take effect and be in force from and after its
17 publication in the Kansas register.



Since 1894

To: House Committee on Judiciary
Rep. Lance Kinzer, Chair

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **HB 2224, HB 2225, and HB 2275 re the Kansas Restraint of Trade Act**

Date: February 20, 2013

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.

Thank you, Chairman Kinzer and members of the Committee, my name is Aaron Popelka and I am with the Kansas Livestock Association (KLA). KLA appears today as a proponent of HB 2225, a proponent of HB 2224 with an amendment, and an opponent of HB 2275.

As was indicated by previous testimony by Leslie Kaufman, KLA associates our comments with the testimony presented by Ms. Kaufman and a coalition of Kansas businesses. Previous testimony by Ms. Kaufman laid the groundwork on the background of why reform of the Kansas Restraint of Trade Act (KRTA) is necessary. This testimony is to draw the Committee's attention to how failure to act could adversely impact the state's livestock industry. It will also highlight specific amendments to HB 2224 that are necessary to protect the Kansas livestock industry.

The Kansas Supreme Court opinion, *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 273 P.3d 1062 (2012), substantially changed how Kansas courts interpret the KRTA. The legislature must act to return Kansas antitrust law to the certainty that prevailed prior to the *O'Brien* decision. Rather than apply the longstanding reasonableness test to marketing arrangements that exist in the Kansas livestock industry, the *O'Brien* court decided to take a literal interpretation of an antiquated antitrust statute that predated federal antitrust law. If allowed to stand, such an interpretation would put Kansas at a significant disadvantage to other states and run contrary to the governor's and legislature's goal of creating a business friendly atmosphere in the state.

Unlike many businesses, the livestock industry is governed by more than the federal Sherman and Clayton Antitrust Acts. As a reaction to the famous book, *The Jungle*, by Upton Sinclair, Congress enacted the Packers and Stockyards Act of 1921 (PSA). The PSA added additional protections for the livestock and meat industries that did not exist under the previously enacted

federal antitrust statutes. As a result, the PSA dominates the area of antitrust law pertaining to the livestock and meat industries and preempts state antitrust statutes. See *Colorado v. United States*, 219 F.2d 474, 478 (10th Cir. 1954) (stating that "Congress . . . preempted and occupied the entire field with respect to the regulated activities [and] . . . provided for comprehensive regulations with respect to the activities covered by the [Packers and Stockyards] Act.")

To understand our concerns the Committee must first understand how marketing arrangements exist in the livestock industry and have improved consumer choice of product type, quality, and price at the meat case. The fed cattle market has evolved to where an increasing number of cattle are traded based on the value provided to the end user. This system rewards cattle producers who focus on genetics and management practices that deliver the beef products desired by consumers. It allows cattlemen to respond to consumers by finding innovative ways to develop and market premium quality and branded products. These innovative techniques are embodied in the industry marketing arrangements that can stretch from the cow/calf producer, through the cattle feeding industry, to the packing industry. The agreements are geared to specifically deliver to retail meat providers a desired quality and quantity of beef in a given day.

The use of contracts, cooperatives, alliances and joint ventures has been driven not by packers, but by independent cattle producers intent on capturing more of the value from their high quality cattle. The commodity-based marketing system prevalent in the 1980s and 1990s coincided with a 50 percent decline in beef demand. As producer-driven, coordinated marketing programs have been implemented, beef demand has rebounded. A Grain Inspection, Packers & Stockyards Administration (GIPSA) study determined eliminating alternative marketing arrangements would cost cattle producers \$10.5 billion in the first year and \$68 billion over ten years.

Losing or limiting consumer-demanded product means loss of customers and decreased profitability to cattle producers. Alternative marketing arrangements have allowed cattle producers to get paid for the value they add. Without the contracted supply of cattle that meet the requirements of such programs, these programs will go away or be severely reduced in size and scope. This could have a huge impact on the choices our consumers make. It is this result-oriented system which the Kansas Supreme Court has jeopardized with its decision in *O'Brien*.

KLA believes that the best and most efficient means of providing certainty to the industry is to fully repeal the KRTA. As previously indicated, the terms of the PSA preempt the KRTA. Therefore, full repeal of the KRTA would indicate in no uncertain terms that the livestock industry has one set of laws and regulations to comply with, the PSA.

If the Committee desires to retain the KRTA, KLA urges the committee to adopt HB 2224 with the amendment attached to the testimony of Ms. Kaufman and supported by a broad coalition of Kansas businesses. Included in that amendment are two crucial reforms important to KLA members.

First, KLA believes the current PSA exemption language in HB 2224 is flawed, but with a minor change would accurately represent the state of the law and protect the industry from unnecessary litigation. The current exemption contained in HB 2224 states: "The Kansas restraint of trade act . . . shall not apply to . . . any trust, agreement or arrangement that complies with the provisions and application of 7 U.S.C. § 181 et seq., the packers and

stockyards act” KLA believes this exemption language is flawed and proposes that the words “complies with” be replaced with the words “governed by”.

The use of the phrase “governed by” would accurately represent that the KRTA is preempted by the PSA. If the words “complies with” are allowed to remain, it would require our members to make the preemption argument every time a case is brought in state court as a result of a minor technical violation of the PSA that is not a true restraint of trade that the KRTA was intended to prevent. For example, the PSA contains record keeping standards, a duty for certain entities to maintain registration, and scale certifications. Defending KRTA cases predicated on such technical infractions would be a burden on industry and only serve to encumber Kansas courts with cases it should rightfully dismiss under the preemption doctrine. Adding the words “governed by” would decrease the case load of state courts and provide certainty to the industry by stating in statute that it must comply with one set of laws – the PSA.

Second, KLA would like to draw the committee’s attention to the reasonableness factors in the attached amendment to HB 2224. For marketing arrangements that are not directly implicated by the PSA, like feed and other input contracts, it is important that we give trial courts some direction in how to properly weigh the reasonableness of an agreement. This would also allow an appellate court greater ability to review trial court cases that may not comport with the spirit of the reasonableness test. The reasonableness factors, laid out in our proposed amendment to HB 2224 are taken directly from the preeminent U.S. Supreme Court case on determining the reasonableness of a marketing arrangement, *Leegin Crative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

Thank you for the opportunity to submit testimony. KLA urges the committee to either pass HB 2225 favorably or pass HB 2224 with the attached amendment. KLA also stands in opposition to passage of HB 2275, which would not accurately restore the KRTA to pre-*O’Brien* precedence and inaccurately exempt federally preempted activities.

TO: Rep. Lance Kinzer, Chairman
Members of the Committee
House Committee on the Judiciary

FROM: Steven Krikava, Land O'Lakes, Inc.

RE: Support for **HB 2225** - Repealing the Kansas Restraint of Trade Act (KRTA)

Partial support with suggested amendments for **HB 2224** - Amending the KRTA to apply a reasonableness analysis to all but horizontal price fixing

Opposition for **HB 2277**- Amending KRTA to apply a reasonableness analysis to all but horizontal conduct

Thank you very much for the opportunity to present Land O'Lakes perspective and recommendations relative to proposed legislation pertaining to the Kansas Restraint of Trade Act. I have provided some background information about Land O'Lakes and our presence in Kansas at the end of this testimony.

Land O'Lakes view is that if Kansas wants to have a competitive business environment and promote growth of jobs in the state, KRTA should be more closely aligned with federal anti-trust law. There are two specific ways that KRTA sets Kansas apart from federal law and raises concerns from companies that may consider doing business in the state.

First, the legislature should eliminate full consideration in awarding damages under the KRTA. Full consideration means a business must reimburse a successful plaintiff for the full cost of the product (and the plaintiff gets to keep the product) even if the actual damages they suffered were only a small fraction of the purchase price. Kansas is only one of a small handful of states that allows full consideration.

Federal law provides for treble damages plus attorneys' fees and costs, and potential criminal liability. This has proven to be a stiff deterrent to anticompetitive behavior. Full consideration, provided for in the current KRTA, allows for the refund of the full amount paid regardless of the amount of damage actually incurred, plus attorneys' fees and costs. To make matters worse, some insist that it also allows for the recovery of treble damages on top of the full consideration recovery. Full consideration is excessively harsh, unfair, creates an incentive for litigation, and undermines good faith efforts to settle differences out of court. The legislature should abolish it.

The legislature also ought to take action to restore the reasonableness standard to lawsuits brought under the KRTA. This is necessary because of the Kansas Supreme Court's opinion in May 2012 in the case of *O'Brien v. Leegin*. The rule of reason holds that only agreements that unreasonably restrain trade are subject to legal action, and logically requires courts to consider all circumstances before determining whether or not a practice is unlawful

Without the rule of reason, certain common, and supposedly lawful agreements among businesses, are now inherently unlawful in Kansas. This includes everyday agreements such as:

- Joint ventures,
- Many activities of trade associations, including exclusive member benefits, exchanges of information and ethical rules,
- Non-competition agreements, such as contract provisions prohibiting an employee from working for a competitor for a period of time,
- Standards setting agreements, such as technology standards for communication between multimedia devices, or safety standards for a particular industry,
- Agreements between manufacturers and distributors to share the cost of advertising.

Land O'Lakes has direct experience with these issues because it along with several large egg producers is currently involved in litigation under the KRTA with Associated Wholesale Grocers ("AWG"). Our case illustrates both aspects of the problem with the law as it currently stands and is interpreted by the Supreme Court. Moark is a wholly owned subsidiary that's in the business of producing and distributing eggs. A few years ago, organizations like PETA and the Humane Society of the United States (HSUS) pressured the industry to provide more room for hens in layer cages and pressured large egg customers such as Wal-Mart and McDonalds to buy only eggs that were produced under the PETA and HSUS standards. The industry association, United Egg Producers ("UEP"), of which Moark was a member, convened a panel of scientists to study these demands and created a certification program that revised the standard for cage sizes and the number of hens in each cage. Lawsuits brought against Moark and other UEP members charged that the certification program and the new standard were anti-competitive because it allegedly had the effect of reducing egg production.

It's instructive to note that Land O'Lakes and Moark resolved the claims of every customer in the United States except for the one brought by AWG under the KRTA. In Kansas, without the reasonableness standard, the threshold for determining a violation of the act is very low. At the same time, full consideration holds out the prospect of a windfall award, much higher than would be possible under federal law since we believe that AWG has suffered no actual damage. Thus, there is very little room for negotiating a settlement that avoids continued court action.

The distortions in the fair application of the antitrust law caused by the Supreme Court's recent interpretation of the KRTA has also led to Moark bringing a counterclaim against AWG and its members alleging that their activities in collectively purchasing eggs is a violation of the express language of the KRTA. As is evident, the current state of the law in Kansas invites a never ending spiral of claims and counterclaims.

There are two ways for the legislature to resolve the problems with the KRTA and prevent potential forum shopping by those seeking to file cases in Kansas hoping to gain considerably more in damages than allowed in other jurisdictions.

HB 2225 offers the simplest and most straight-forward solution. It repeals KRTA, leaving Kansans and Kansas business owners of all sizes with the option of pursuing claims of anti-competitive behavior under federal law. That approach certainly is appealing to any company like ours that does business in many states, and we support it.

However, if the legislature is not willing to fully repeal KRTA, the second option that we support would be to revise KRTA to address full consideration and the reasonableness standard. We support amendments to HB 2224 that would substantially resolve our concerns with KRTA. The package of amendments submitted by the Kansas Cooperative Council and a broad coalition of ag and other business groups also addresses concerns and clarifications that are important to cooperatives in the state, and we support those as well.

Land O'Lakes opposes AB 2275, which we believe has the support of AWG. That bill totally fails to address the problem of full consideration. Also, while it purports to address the reasonableness standard, it introduces language to legalize AWG's conduct in engaging in group purchasing, without even a reasonableness standard, and continues to make industry standard setting, such as was done by UEP, or the electronics industry in setting the Blu-Ray standard for DVD players for example, per se illegal because all horizontal conduct is expressly excluded from the reasonableness standard.

Thank you for the opportunity to present Land O'Lakes perspective and recommendations on the KRTA. For the background of the committee, here is some information about the company:

Land O'Lakes is a farmer-owned cooperative. Our headquarters are in St. Paul, MN. We operate three major lines of business for the benefit of our farmer-members. We provide a market for our dairy farmer members, processing their milk and marketing value-added, branded dairy products nationwide. That's about one-third of our business. Another third of our business is conducted through our Purina Animal Nutrition operations. This business manufactures and distributes branded, high quality animal feed for livestock producers and animal owners. Our third major business is crop inputs, primarily agricultural seeds and crop protection products, marketed through our Winfield operations.

Kansas is a very important part of the cooperative system that's served by Land O'Lakes. While we don't have any milk producer members in the state, Purina and Winfield distribute animal feed and crop inputs through the independent farm supply and grain marketing cooperatives here. Land O'Lakes has 84 member cooperatives in the state, and our affiliates conduct about \$200 million in business with those cooperatives.

We have about 130 employees in the state with an annual payroll in excess of \$6.5 million. Purina's largest facility in Kansas is a feed mill in Russell. That facility manufactures a high-value, proprietary dairy feed that is distributed throughout our cooperative system nationwide. They have a second feed facility in Wichita. Winfield has operations in Dodge City, Garden City, Inman, and McPherson.

As a cooperative, Land O'Lakes leaders are elected by our farmer-members. We currently have one Kansan on our Board of Directors – Myron Voth, a farmer from Walton. At our annual meeting next week, a second Kansan will join Myron on our Board. He is Stan Stark who manages Farmers Cooperative Co. in Haviland.



**Testimony of
Matt Hickam
Coalition for a Competitive Kansas
Before the
House Committee on Judiciary
February 20, 2013**

Support for **HB 2224** – Repealing the Kansas Restraint of Trade Act (KRTA)

Support with amendment for **HB 2255** – Amending the KRTA to apply a reasonableness analysis to all but horizontal price fixing

Opposition of **HB 2277** – Amending KRTA to apply a reasonableness analysis to all but horizontal conduct

In response to the Kansas Supreme Court’s troublesome decision in *O’Brien v. Leegin* (2012), a wide range of businesses and other groups in Kansas are calling on the legislature to reform the Kansas Restraint of Trade Act (KRTA) this session. At a time when economic growth and job creation are state and national priorities, 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 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.

The last time the Kansas legislature undertook reform of the KRTA was back in 2000. Derek Schmidt, then-Legislative Liaison and Special Counsel to Governor Graves, provided written testimony to both the House and Senate Judiciary Committees, in which he stated:

“[I]t became apparent to us that although the *standards* in current law are sufficient, the enforcement mechanisms, the remedies, and certain other provisions of current law are woefully inadequate. Current Kansas antitrust law is best described as a ‘hodgepodge’ of specific provisions that were created over a period of years. The earliest portion of the law dates from 1889 (See, e.g., K.S.A. 50-112), and most of the law has not been updated since 1923. Frequently, new provisions were piled atop older provisions without reconciling the two. The result is a statute that contains many antiquated, archaic, ill-coordinated and burdensome provisions...”

Just so. With the passage of HB 1462 (1973), the Kansas legislature added just another provision to the KRTA. Codified as K.S.A. 50-801 under Article 8, which is appropriately entitled “Miscellaneous Provisions,” the statute allowed for treble damages in KRTA cases. This statute was piled atop of the older provision contained in K.S.A. 50-115, which allows for “full consideration” damages. While the treble damages was modeled after the federal standard, the antiquated, archaic, ill-coordinated and burdensome “full consideration” provision in K.S.A. 50-115 was retained. Not until the passage of HB 2855 (2000) did the legislature put the two statutes under the same article, moving K.S.A. 50-801 to its current place as codified in K.S.A. 50-161. This history only further confirms that the history of KRTA reform has indeed been ill-coordinated. With the current momentum for KRTA reform this session, the legislature should take this opportunity to resolve the conflict between “full consideration” damages and treble damages as currently codified in the KRTA.

“Full consideration” damages are a relic of 19th Century antitrust law

The notion of awarding “full consideration” damages in private actions for antitrust violations dates back to the 19th Century. Indeed, during the passage of the Sherman Act in 1890, Congress considered including a provision awarding full consideration as damages for violation of federal antitrust law. See Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tulane Law Review 777 (1986-1987). Instead, Congress opted to include treble damages in the Sherman Act, and that has been the measure of damages under federal antitrust law ever since.

In keeping with the history of federal antitrust legislation, Kansas first enacted antitrust legislation in 1889. Unlike the Sherman Act, however, Kansas included “full consideration” damages in its antitrust legislation. The Kansas full consideration statute, K.S.A. 50-115, has remained in substantially the same form ever since 1889, and this even though Kansas antitrust legislation underwent significant revision in 1985 and 2000. While at first glance the lack of reform to K.S.A. 50-115 may suggest its enduring virtue, a better explanation is the historical dearth of private litigation concerning antitrust violations in Kansas courts. Indeed, other than the landmark decision in *O’Brien v. Leegin*, the Coalition is aware of only one other reported Kansas case citing to K.S.A. 50-115, *Winters v. Kansas Hospital Service Association, Inc.*, a 1977 Kansas Court of Appeals case.

Aside from Kansas, five other states currently have “full consideration” statutes: South Carolina, Tennessee, Colorado, Wisconsin, and Indiana (See APPENDIX A). Again, most of these statutes date to the late-19th or early-20th Century. See 1897 (22) 434 [South Carolina]; 1891 Acts, C. 218, § 6 [Tennessee]; L. 1935, c. 52, § 486 [Wisconsin]; Acts 1897, c. 104, s. 5 [Indiana]. Colorado is the only state to add a “full consideration” statute to its books in the last 25 years. See Laws 1992, H.B. 82-1082, § 1.

“Full consideration” damages are not only missing from most other states’ antitrust legislation, but are also completely absent from the rest of Kansas’s statute books (See APPENDIX B). Kansas statutes designed to deter particular types of wrongdoing, including the Kansas Consumer Protection Act, Kansas Uniform Securities Act, Kansas Wage Payment Act, and

Kansas Workers Compensation Act, are all completely devoid of anything approaching “full consideration” as the measure of damages, opting instead for actual or treble damages, specific civil penalties, and reasonable attorney’s fees.

“Full consideration” damages lead to dramatically unjust results

Utilizing “full consideration” as the measure of damages for all Kansas antitrust cases is too crude a remedy for private antitrust litigation. As one academic has noted, the Kansas full consideration statute assumes that antitrust violation result in a rise in prices of 50%. “Suppose a good were competitively priced at \$100, and a cartel then raised its price by \$50, to \$150. If the awarded damages were \$150, this would be treble the damages (i.e., three times the \$50 increment).” Robert Lande, *New Options for State Indirect Purchaser Legislation*, 61 *Alabama Law Review* 472 (2009-2010). The problem, as this academic noted, is that even true cartel overcharges average much less than 50%.

What is more, using “full consideration” as the measure for damages leads judgments arbitrarily unequal to the level of culpability. For example, suppose two companies selling products for \$1,000 violate the KRTA. The violation of the first company resulted in a price increase of \$5, while the violation of the second company resulted in a price increase of \$500. The damages in these cases would be the same: \$1000 for each product sold. Thus, the first company would pay damages 200 times the actual damages inflicted, while the second company would only pay damages 2 times the actual damages inflicted. As this illustration shows, “full consideration” damages punish all violators to the same extent regardless of their level of culpability. Indeed, it is for this very reason that Kansas’s “full consideration” statute has been singled out by one academic, who argued that Kansas’s statute should be preempted by federal law because it is “not based on normal damage principles.” Donald I. Baker, *Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Not Recommend to Others?*, 16 *Loyola Consumer L. Rev.* 379 (2003-2004).

Comparisons between KRTA violators aside, the “full consideration” provision of the KRTA is subject to serious abuse, leading to damages awards crippling to Kansas business. In the modern economy, high-priced items are bought and sold in large quantities at small profit margins. Automobiles are a fitting example. Suppose a car company has an exclusive purchase arrangement with a tire manufacturer, because their tires have achieved a certain level of safety and quality certification. A court subsequently finds this exclusive arrangement to be a violation of the KRTA, and finds that it caused the sale of the \$25,000 car to have been raised by \$10. Under the KRTA, the plaintiff would be entitled to full consideration (the full amount paid for the car), plus treble damages, attorney fees and the plaintiff gets to keep the car. All this, even though the actual damages were only \$10. The potential for such outrageous judgments shows the need to repeal the “full consideration” provision in K.S.A. 50-115. To that end, the Coalition feels that the “treble damages” provision in K.S.A. 50-161 provides for a fairer measure of damages for KRTA violations, while at the same time maintaining serious deterrence to antitrust violations.

Treble damages plus reasonable attorneys fees more than adequately protects consumers and is in accordance with federal law

The Coalition understands the antitrust law is designed primarily to protect consumers from the adverse effects of anticompetitive conduct. To that end, antitrust law has historically contained certain deterrence provisions, such as treble damages and the awarding of reasonable attorneys fees to a successful antitrust plaintiff. Both of these latter remedies are already present in the KRTA. See K.S.A. 50-161. As the experience of federal antitrust litigation shows, these remedies more than adequately protect consumers from antitrust violations while appropriately deterring anticompetitive business conduct. The provision for treble damages in particular accomplishes the dual task of penalizing antitrust violations while awarding successful antitrust plaintiff an appropriately heightened judgment for such violations.

Lastly, eliminating the “full consideration” provisions in K.S.A. 50-115 would bring Kansas law in line with federal statutes. Much of the impetus for KRTA reform at this time has arisen in response to the Kansas Supreme Court’s decision in *O’Brien v. Leegin*, where the Court flaunted federal precedent and set the State of Kansas on a path decidedly hostile to business and economic growth in Kansas. By repealing K.S.A. 50-115, this legislature can take just another step toward making sure that Kansas law retains a semblance of historical antitrust jurisprudence that is both business-friendly and protective of consumers.

**Kansas is 1 of Only 6 States
with a “Full Consideration” Antitrust Damages Statute**

State	Statute/First Enacted	Statutory Language
South Carolina	S.C. Code Ann. § 39-3-30 First enacted: 1897	“Any person who may be injured or damaged by any such arrangement, contract, agreement, trust or combination... may sue for and recover... the full consideration or sum paid... ”
Tennessee	Tenn. Code Ann. § 47-25-106 First enacted: 1891	“Any person who may be injured or damaged by any such arrangement, contract, agreement, trust, or combination... may sue for and recover... from any person operating such trust or combination, the full consideration or sum paid... ”
Colorado	Colo. Rev. Stat. Ann. § 6-4-121 First enacted: 1992	“All contracts or agreements made by any person while a member of any combination, conspiracy, trust, or pool... which are... connected with any violation of this article, either directly or indirectly, shall be void, and no recovery thereon or benefit therefrom shall be had by or for any such person. Any payments made upon... such contract or agreement... may be recovered in an action by the party making the payment...”
Wisconsin	Wis. Stat. Ann. § 133.14 First enacted: 1935	“All contracts or agreements made by any person while a member of any combination or conspiracy... and which... [are] connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payments made upon... such contract or agreement... may be recovered... by the party making any such payment...”
Indiana	Ind. Code Ann. § 24-1-1-5 First enacted: 1897	“Any person or persons or corporations that may be injured or damaged by any such arrangement, contract, agreement, trust, or combination described in Section 1 of this chapter... may sue for and recover... the full consideration or sum paid... for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.”

Survey of Statutes Regarding Treble Damages, Civil Penalties, and Damages for Reasonable Attorneys Fees

Act/Topic	Statute	Statutory Language
Clayton Act – Federal Antitrust	15 U.S.C.A. 15	(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained , and the cost of suit, including a reasonable attorney's fee .
Kansas Consumer Protection Act – Private Remedies	K.S.A. 50-364	<p>(b) A consumer who is aggrieved by a violation of this act may recover, but not in a class action, damages or a civil penalty as provided in subsection (a) of K.S.A. 50-636 and amendments thereto, whichever is greater</p> <p>(e) Except for services performed by the office of the attorney general or the office of a county or district attorney, the court may award to the prevailing party reasonable attorney fees, including those on appeal, limited to the work reasonably performed if:</p> <ul style="list-style-type: none"> (1) The consumer complaining of the act or practice that violates this act has brought or maintained an action the consumer knew to be groundless and the prevailing party is the supplier; or a supplier has committed an act or practice that violates this act and the prevailing party is the consumer; and (2) an action under this section has been terminated by a judgment, or settled.
Kansas Consumer Protection Act – General Civil Penalties Statute	K.S.A. 50-636	<p>(a) The commission of any act or practice declared to be a violation of this act shall render the violator liable to the aggrieved consumer, or the state or a county as provided in subsection (c), for the payment of a civil penalty, recoverable in an individual action, including an action brought by the attorney general or county attorney or district attorney, in a sum set by the court of not more than \$10,000 for each violation. An aggrieved consumer is not a required party in actions brought by the attorney general or a county or district attorney pursuant to this section.</p> <p>(b) Any supplier who willfully violates the terms of any court order issued pursuant to this act shall forfeit and pay a civil penalty of not more than \$20,000 per violation, in addition</p>

APPENDIX B

		<p>to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an order shall retain jurisdiction, and in such cases, the attorney general, acting in the name of the state, or the appropriate county attorney or district attorney may petition for recovery of civil penalties.</p> <p>(c) In administering and pursuing actions under this act, the attorney general and the county attorney or district attorney are authorized to sue for and collect reasonable expenses and investigation fees as determined by the court. Civil penalties or contempt penalties sued for and recovered by the attorney general shall be paid into the general fund of the state. Civil penalties and contempt penalties sued for and recovered by the county attorney or district attorney shall be paid into the general fund of the county where the proceedings were instigated.</p>
<p>Kansas Consumer Protection Act -- Disclaimer or Limitation of Implied Warranties Forbidden</p>	<p>K.S.A. 50-639</p>	<p>(e) A disclaimer or limitation in violation of this section is void. If a consumer prevails in an action based upon breach of warranty, and the supplier has violated this section, the court may, in addition to any damages recovered, award reasonable attorney fees and a civil penalty under K.S.A. 50-636, and amendments thereto, to be paid by the supplier who gave the improper disclaimer.</p>
<p>Kansas Uniform Securities Act</p>	<p>K.S.A. 17-12a509</p>	<p>(b) <i>Liability of seller to purchaser.</i> A person is liable to the purchaser if the person sells a security in violation of K.S.A. 17-12a301, and amendments thereto, or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make a statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:</p> <p>(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court, upon the tender of the security, or for actual damages as provided in paragraph (3).</p> <p>(2) The tender referred to in paragraph (1) may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and</p>

APPENDIX B

		<p>willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph (3). (3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest from the date of the purchase at the rate provided for interest on judgments by K.S.A. 16-204, and amendments thereto, costs, and reasonable attorneys' fees determined by the court.</p>
<p>Kansas Wage Payment Act – Civil Penalty</p>	<p>K.S.A. 44-315</p>	<p>(b) If an employer willfully fails to pay an employee wages as required by K.S.A. 44-314, and amendments thereto, or as required under subsection (a) of this section, such employer shall be liable to the employee for the wages due and also shall be liable to the employee for a penalty in the fixed amount of 1% of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the eighth day after the day upon which payment is required or in an amount equal to 100% of the unpaid wages, whichever is less.</p> <p><i>Note: Kansas Wage Payment Act does not allow employee to recover reasonable attorney fees.</i></p>
<p>Kansas Workers Compensation Act – Failure to Pay Compensation When Due</p>	<p>K.S.A. 44-512a</p>	<p>(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.</p> <p>(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as</p>

APPENDIX B

		<p>provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.</p>
<p>Kansas Workers Compensation Act – General Attorneys Fees Provision</p>	<p>K.S.A. 44-536</p>	<p>(a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in K.S.A. 44-510c, and amendments thereto.</p>
<p>Kansas Workers Compensation Act – Administrative Action for Fraudulent Practices</p>	<p>K.S.A. 44-5,120</p>	<p>(g) If, after such hearing, the director or the commissioner of insurance, in the case of any person licensed or regulated by the commissioner, determines that the person or persons charged have engaged in a fraudulent or abusive act or practice the director or the commissioner of insurance, in the case of any person licensed or regulated by the commissioner, shall issue an order or summary order requiring such person to cease and desist from engaging in such act or practice and, in the exercise of discretion, may order any one or more of the following:</p> <ul style="list-style-type: none"> (1) Payment of a monetary penalty of not more than \$2,000 for each and every act constituting the fraudulent or abusive act or practice, but not exceeding an aggregate penalty of \$20,000 in a one-year period; (2) redress of the injury by requiring the refund of any premiums paid by and requiring the payment of any moneys withheld from, any employee, employer, insurance

APPENDIX B

		<p>company or other person or entity adversely affected by the act constituting a fraudulent or abusive act or practice;</p> <p>(3) repayment of an amount equal to the total amount that the person received as benefits or any other payment under the workers compensation act and any amount that the person otherwise benefited as a result of an act constituting a fraudulent or abusive act or practice, with interest thereon determined so that such total amount, plus any accrued interest thereon, bears interest, from the date of the payment of benefits or other such payment or the date the person was benefited, at the current rate of interest prescribed by law for judgments under subsection (e)(1) of K.S.A. 16-204 and amendments thereto per month or fraction of a month until repayment.</p>
Kansas Workers Compensation Act – Private Action for Fraudulent Practices	K.S.A. 44-5,121	(a) Any person who has suffered economic loss by a fraudulent or abusive act or practice shall have a cause of action against any other person to recover such loss which was paid as benefits or other amounts of money which were paid under the workers compensation act and to seek relief for other monetary damages from such other person based on a fraudulent or abusive act or practice, except that such other monetary damages shall not include damages for nonpecuniary loss.
Actions on insurance policies	K.S.A. 40-256	That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, and including in addition thereto any fraternal benefit society and any reciprocal or interinsurance exchange on any policy or certificate of any type or kind of insurance, if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss , the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: <i>Provided, however,</i> That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.
Actions on insurance policies – fire and casualty	K.S.A. 40-908	That in all actions now pending, or hereafter commenced in which judgment is rendered against any insurance company on any policy given to insure any property in this state against loss by fire, tornado, lightning or hail, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action including proceeding upon appeal to be recovered and collected as a part of the

APPENDIX B

		costs: <i>Provided, however,</i> That when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.
Kansas Public Utilities Act	K.S.A. 66-176	Any public utility or common carrier which violates any of the provisions of law for the regulation of public utilities or common carriers shall forfeit, for every offense, to the person, company or corporation aggrieved thereby, the actual damages sustained by the party aggrieved , together with the costs of suit and reasonable attorney fees , to be fixed by the court. <i>Note: up until 1995, this statute allowed for treble damages plus reasonable attorney fees. See 1995 Kansas Laws Ch. 36 (H.B. 2095).</i>
Bribery	K.S.A. 19-821	No sheriff shall, directly or indirectly, ask, demand or receive, for any service to be by him performed in the discharge of any of his official duties, any greater fees than are allowed by law, on pain of forfeiting treble damages to the party aggrieved , and in being fined in a sum not less than twenty-five dollars nor more than two thousand dollars.
Kansas Cigarette and Tobacco Products Act	K.S.A. 79-3397(c)	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 damages sustained . In addition, any person who is threatened with injury or additional injury by reason of any person's violation 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. In any action commenced under this act, the plaintiff may be allowed reasonable attorney fees and costs. The remedies provided herein shall be alternative and in addition to any other remedies provided by law.
Kansas Liquor Control Act	K.S.A. 41-701(g)	In addition, any supplier, wholesaler, distributor, manufacturer or importer violating the provisions of this section relating to fixing, maintaining or controlling the resale price of alcoholic liquor, beer or cereal malt beverage shall be liable in a civil action to treble the amount of any damages awarded plus reasonable attorney fees for the damaged party. "
Worthless Checks	K.S.A. 60-2610	(a) If a person gives a worthless check, the person shall be liable to the holder of the check for the amount of the check, the incurred court costs, the incurred service charge, interest at the statutory rate and the costs of collection including but not limited to reasonable attorney fees, plus an amount equal to the greater of the following:

APPENDIX B

		<p>(1) Damages equal to three times the amount of the check but not exceeding the amount of the check by more than \$500; or</p> <p>(2) \$100.</p> <p>The court may waive all or part of the attorney fees provided for by this subsection, if the court finds that the damages and other amounts awarded are sufficient to adequately compensate the holder of the check. In the event the court waives all or part of the attorney fees, the court shall make written findings of fact as to the specific reasons that the amounts awarded are sufficient to adequately compensate the holder of the check.</p>
Fair Debt Collection Practices Act	15 U.S.C.A. 1692k	<p>(a) Amount of damages. Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--</p> <p>(1) any actual damage sustained by such person as a result of such failure;</p> <p>(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1,000; or</p> <p>(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector; and</p> <p>(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.</p>
Telephone Consumer Protection Act	47 U.S.C.A. 227	<p>(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--</p> <p>(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,</p> <p>(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or</p> <p>(C) both such actions.</p> <p>If the court finds that the defendant willfully or knowingly</p>

APPENDIX B

		<p>violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.</p>
<p>Lanham Act – Federal Trademark</p>	<p>15 U.S.C.A. 1117</p>	<p>(a) Profits; damages and costs; attorney fees. When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a willful violation under section 1125(c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.</p> <p>(b) Treble damages for use of counterfeit mark. In assessing damages under subsection (a) for any violation of section 1114(1)(a) of this title or section 220506 of Title 36, in a case involving use of a counterfeit mark or designation (as defined in section 1116(d) of this title), the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever amount is greater, together with a reasonable attorney's fee, if the violation consists of</p> <p style="padding-left: 40px;">(1) intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark (as defined in section 1116(d) of this title), in connection with the sale, offering for sale, or distribution of goods or services; or</p> <p style="padding-left: 40px;">(2) providing goods or services necessary to the commission of a violation specified in paragraph (1), with the intent that the recipient of the goods or services would</p>

APPENDIX B

		<p>put the goods or services to use in committing the violation.</p> <p>In such a case, the court may award prejudgment interest on such amount at an annual interest rate established under section 6621(a)(2) of Title 26, beginning on the date of the service of the claimant's pleadings setting forth the claim for such entry of judgment and ending on the date such entry is made, or for such shorter time as the court considers appropriate.</p>
<p>Truth in Lending Act</p>	<p>15 U.S.C.A. 1640</p>	<p>(a) Individual or class action for damages; amount of award; factors determining amount of award. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--</p> <p>(1) any actual damage sustained by such person as a result of the failure;</p> <p>(2)</p> <p>(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of \$500 and a maximum of \$5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures; or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$400 or greater than \$4,000; or</p> <p>(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$500,000 or 1 per centum of the net worth of the creditor;</p>

APPENDIX B

		<p>(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court.</p>
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