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Testimony before the House Judiciary Committee on HB 2224, HB 2225 and HB 2275
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Opponent

My name is Robert Coykendall. I am a graduate from the University of Kansas School of Law, and also received a Master's Degree in Economics from KU. For the last 31 years I have practiced law with the Wichita firm of Morris, Laing, Evans, Brock & Kennedy, Chtd. I am counsel for the Plaintiff class in the case entitled *O'Brien v. Leegin Creative Leather Products, Inc.* recently decided by the Kansas Supreme Court. I also acted as counsel for the Plaintiff and argued the case *PSKS Inc. v. Leegin Creative Leather Products, Inc.* before the United States Supreme Court. As a Kansas consumer, a Kansas businessman, and a law practitioner with experience in antitrust laws, I am interested in seeing the existing Kansas Restraint of Trade Act preserved.

I write to you in opposition HB 2224, HB 2225 and HB 2275, which seek to overturn portions of the *O'Brien* decision, and which seek to dramatically overhaul the Kansas Restraint of Trade Act ("KRTA"). The KTRA was the first Kansas Consumer Protection Act, and has served to protect Kansas consumers and businesses since its enactment. The KRTA has been in force in Kansas since the late 1800's, even before the passage of the federal Sherman and Clayton antitrust statutes. The KRTA has since its establishment provided important protection for Kansas consumers and Kansas retailers from anticompetitive conduct, primarily of businesses and interests located outside the state of Kansas.

The benefits of vigorous competition in our economy are well recognized, and competition is indeed the backbone of our economic and commercial systems in the country. By the same token, agreements and combinations that weaken or eliminate competition, whether they are agreements to eliminate price competition like in the *O'Brien* case, or agreements not to compete in public bidding process, are equally fundamentally damaging to our economic and commercial systems.

The KRTA has provided important protection for local Kansas markets and local Kansas interests to insure local markets benefit from the most vigorous of competition, protections that the federal antitrust laws do not and cannot provide. The KRTA has been relied on in recent years by numerous local Kansas businesses and consumers, including members of the livestock industry and local school districts as well as local consumers, businesses and retailers, to provide protection from, and a means of receiving compensation for persons injured by, anticompetitive

conduct. The benefit locally is substantial and highly important to local businesses, industries and consumers. The amendments offered by the referenced bills substantially undermine those strong local protections, bowing instead to interests from outside the State.

The *O'Brien* case concerns allegations of price fixing. As such, much of the controversy surrounding the KRTA has focused on price fixing. Although under federal law judges apply the "rule of reason" to allegations of vertical price fixing, price fixing between actors at different levels of the distribution chain such as a manufacturer and a retailer, *O'Brien* held that such arrangements are illegal as a matter of law, or "per se" under Kansas law provided by the KRTA. There are good reasons to maintain this rule that have received little discussion in a rush to legislate on this issue in the last two sessions.

Nothing is more telling than actual, real-world experience with legalized price fixing. In previous decades, states were allowed to, and Kansas did, pass laws permitting manufacturers to require retailers to sell products at the manufacturers' fixed price. These were called "Fair Trade" laws. These laws, which allowed manufacturers to engage in express price fixing, were designed to keep consumer prices from plummeting, such as what was witnessed at the time of the Great Depression. Fair Trade price fixing regimes were so successful that they substantially elevated prices and maintained them free from competition. The experience resulted in reduced competition and dramatic increases in consumer prices. Studies at the time showed that consumer prices in states like Kansas that passed "Fair Trade" laws permitting price fixing were higher than in states where price fixing was not permitted during this period, and that increased prices during the period of Fair Trade laws cost consumers between $1.5 billion to $3.0 billion dollars per year.

In the era of Fair Trade laws, many retail businesses did not like being told by out-of-state manufacturers or distributors what prices they could charge their customers. It was, in part, that animosity toward limits on their business decision that led to the repeal of those laws. The ability of a merchant to determine what price they want to charge is a basic freedom that the KTRA preserves for those businesses.

The proponents of the referenced bills advocate installing the federal "rule of reason" analysis, or some version like it. Despite its innocuous name, the "rule of reason" is an analysis that has proven to almost uniformly favor the proponent of an accused restraint, most often an out of state manufacturer like the defendant in *O'Brien*. Recent studies have shown that the proponent of the accused restraint is victorious 99.5% of the time overall in rule of reason cases; 97% of these cases being decided at the very outset during the pleading stage before any discovery can be taken, and just over 2% even progressing through discovery only to be rejected at summary judgment prior to trial. Less than 1% of these cases receive a trial on the merits. This is a nearly fool-proof assurance of victory for the price-fixer, which is a 180 degree change from the law as it has existed under the KRTA for years.

Attempting to write in "reasonableness" to the antitrust laws also represents a fundamental change in the balance of decision making between the legislature, which has in the past enacted laws that tell businesses what practices are permitted or not permitted, and the Courts, which historically defer to the legislature's determinations on matters of competitive policy. The "reasonableness" standard no longer gives clear guidance to businesses, and it tells the Courts: "Go figure out what conduct is proper or not -- you set the policy." Businesses are left to wonder whether their conduct would be seen as "unreasonable" and prohibited, and the Courts are presented with having to figure out proper competitive policy – a task that they are frankly not equipped to handle.

As discussed above, the burden of these price fixing practices in these instances are the Kansas consumers, who should be assured that when they purchase goods and services it is at a competitive price, local Kansas businesses and retailers who simply want to charge a competitive price as demanded by their customers, and the system as a whole which is robbed of basic competition.

The proposed bills therefore seek to shift from per se prohibition of price fixing all the way in the opposite direction to what is for all practical purposes wholesale legality and legitimacy of price fixing. This is a startling policy sea change when one considers that the legislature had the opportunity to revisit and change the rules governing the KRTA, including the rule regarding price fixing, as recently as 2000.

Finally, any bill seeking a full repeal of the KRTA is an attempt to strip Kansas businesses and consumers of any legal protection from unfair competition and practices at the state level. Such a bill plainly does not have the best interest of Kansans in mind and should be rejected off hand.

I respectfully request that the House Judiciary Committee not pass HB 2224, HB 2225 and HB 2275.