

HUTTON & HUTTON

Law Firm L.L.C.

Mark B. Hutton † ◊
Andrew W. Hutton
Deborah B. McIlhenny
Anne M. Hull
J. Darin Hayes
Blake A. Shuart*

8100 East Twenty-Second Street North, Building 1200
Wichita, Kansas 67226-2312
Mail: Post Office Box 638, Wichita, Kansas 67201-0638
Telephone: 316.688.1166
Facsimile: 316.686.1077

† Also Admitted in Oklahoma,
Missouri, Texas, New York
and the District of Columbia
◊ Certified Nat'l Bd. Trial Advocacy
* Also Admitted in Illinois

Email: Trial.Lawyers@huttonlaw.com
www.huttonlaw.com

Office Tax I.D. # 48-0966751

TO: House Appropriations Committee

FROM: Deborah B. McIlhenny, Esq.
Managing Counsel for Hutton & Hutton Law Firm, L.L.C. (Wichita, KS)

RE: HB 2797

DATE: 11 May 2012

Chairman Rhoades and Members of the Committee:

On May 4 the Kansas Supreme Court issued an opinion in *O'Brien v. Leegin Creative Leather Prods.*, No. 101,000, 2012 WL 1563976 (Kan. May 4, 2012), that explained in clear terms how K.S.A. 50-101 *et seq.*, the Kansas Restraint of Trade Act ("KRTA"), actually works. Having practiced in this field for more than a decade, I believe that the Court got it right.

Special interests groups inside and outside Kansas, who stand to lose under the *O'Brien* Court's ruling, crafted an amendment to the KRTA to benefit themselves, specifically:

An Act concerning the Restraint of Trade:

New Section 1. The purpose of this Act is to correct the erroneous interpretation of the Kansas Restraint of Trade Act, article 1 of Chapter 50 of the Kansas Statutes Annotated, and amendments thereto, made in *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000, 2012 WL1563976 (Kan. Sup. Ct., May 4, 2012), to prevent wasteful litigation that would likely result if that erroneous decision is not corrected, to forestall those potentially affected by that erroneous decision from ceasing or refusing to do business in Kansas in order to avoid potential liability and to minimize conflicts between the Kansas Restraint of Trade Act and Section 1 of Sherman Act, 15 U.S.C. § 1 and reduce uncertainty as to the law applicable to commerce in Kansas.

New Section 2. An arrangement, contract, agreement, trust, understanding or combination shall not be deemed a trust, and shall not be deemed unlawful, void, prohibited, or wrongful under any provision of article 1 of Chapter 50 of the Kansas Statutes Annotated, and amendments thereto, if that arrangement, contract, agreement, trust, understanding or combination is or would be deemed a reasonable restraint of trade or commerce under Section 1 of the Sherman Act, 15 U.S.C. § 1, as interpreted by the federal judiciary. This section shall apply retroactively in any pending or future

litigation.

New Section 3. Any private action to enforce any provision of article 1 of Chapter 50 of the Kansas Statutes shall not be brought as a class action. This section shall apply retroactively in any pending or future litigation.

This amendment effectively repeals the KRTA and denies Kansas consumers the rights that they have had under the law for many years, as the following points indicate:

(1) The "rationale" for this amendment to the Kansas Restraint of Trade Act (KRTA) is flawed, regarding how "uncertainty" about the application of the KRTA necessitates this amendment. The *O'Brien* Court explained rather well how the law applies. The "special interest" groups behind this amendment, who face accountability under the Act, simply do not like the application that the Court expressed, which is insufficient justification under proper legal analysis to amend the law this radically. Further, they do not provide, nor can they provide, empirical data to support their none-too-veiled threat of "wasteful litigation" that would ensue as a result of the *O'Brien* Court's opinion, equally insufficient justification for the amendment.

2. Minimum price fixing hurts Kansas consumers and retailers and subjects them to the control of out of state interests. Price fixing has and always will result in higher consumer prices for consumers to the benefit of the out-of-state manufacturer. For years Kansas antitrust laws have insured that Kansas consumers would not be subject to arbitrary consumer pricing and that retailers and consumers would be able to purchase goods on a truly open and competitive market with prices determined purely by market factors. This new legislation is anti-free-market and harms Kansas consumers and retailers, who ultimately will bear the brunt of business with no accountability.

3. Preventing class action enforcement effectively guts these provisions. Consumers suffer actual harm from price fixing and other anticompetitive activities in Kansas, given that they pay the fixed and/or supracompetitive price. Nonetheless, their harms on an individual basis may not be sufficient to warrant or incentivize a private lawsuit to enforce these laws. Without the economies of scale in class actions, the antitrust and consumer laws in Kansas have absolutely no teeth and become completely obsolete, enabling business to profit inequitably at the expense of consumers. Moreover, aligning the KRTA with federal law may completely eliminate the consumer's right to redress – there is none under federal law.

4. This amendment insidiously usurps the judiciary and ignores the rule of law, merely because big business does not like the law. Yet, its proponents knew that they could not attempt to pass it in the light of day; instead, they chose to try to sneak it in through the back door, apparently hoping that nobody would notice. And they may succeed, given their unified subversion.

5. Retroactive application of this bill is unquestionably unconstitutional and violates due process. Due process is an irreducible minimum under the Constitutions of Kansas and the United States, which every member of the legislature swore to uphold. Yet, these proponents are willing to forego one of the most fundamental elements of a free society in a republic – due process – for the sake of profit and total lack of accountability.

Thus, I oppose this amendment and respectfully ask that this Committee not pass it. It would be very bad indeed to put the interests of the monied few over the rights of the people of Kansas.