Approved: June 30, 2012

_____

(Date)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Kinzer at 12:00 p.m. Friday, May 11, 2012 in 346-S of the Capitol.

All members were present except:
Mitch Holmes
Dan Collins

Committee staff present:
Jason Thompson, Office of Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Nancy Lister, Committee Assistant

Conferees appearing before the Committee:
Dale Rodman, Secretary of Agriculture
Professor Michael Hoeflich, University of Kansas School of Law
Allie Devine, Devine & Donley, LLC
Eric Stafford, Kansas Chamber
Pat Stueve, Seaboard
Mike Beal, Ball's Food Stores
Rex Sharp, Gunderson Sharp & Walke, LLP
Callie Jill Denton, Kansas Association for Justice

Others in attendance:
See attached.

Chairman Kinzer opened the hearing on **HB 2797-Kansas restraint of trade act; rule of reason; class action** and announced that due to the time constraints for holding the hearing and needing to be out of the room in about an hour, he would try to give equal amounts of time to the proponents and opponents, with about 25 minutes allowed for both groups, plus time for the one neutral conferee. Jason Thompson provided a brief overview of the bill.

Secretary Dale Rodman testified in support of **HB 2797** stating, on behalf of the agricultural businesses in the state, contracts are a very critical part of doing business, and a lack of contract integrity would greatly affect the industry in Kansas. Secretary Rodman cited an example of a cheese plant in western Kansas and the company supporting it, Kraft Foods. Although Kraft

does not own the plant nor the milk cows, they are using a series of contracts to provide the basis to produce cheese at a price point on the retail shelf that they can be competitive. Through the system of contracts, the processing and milk producers use these contracts as collateral for the growth of the animal industry in western Kansas and the buildings and factory, so the integrity of the contracts are very important to the business. Mars Corporation, here in Topeka, uses contracts to control the raw material supplies price points to make their products. For example, if they use corn syrup in some of their products, they might buy the corn and have a contract so on certain yields there are certain costs to deliver the corn syrup used in their chocolate candy process. The cattle, hog, and poultry industries are also very integrated in some shape or form to take cost out of the system and to improve the quality and integrity of the finished products customers want. (Attachment 1)

Professor Michael Hoeflich testified in support of **HB 2797** stating he was not testifying on behalf of the University Of Kansas or the School Of Law, but was here speaking as an individual. Professor Hoeflich stated he is the John H. and John M. Kane Distinguished Professor of Law at the University Of Kansas School Of Law, served as Dean of the School Of Law from 1994 until 2000, has taught contract law for more than 30 years, has taught and written about Kansas legal history for the past 18 years. When informed of the *O'Brien v. Leegin Creative Leather Products, Inc.* decision, it was suggested he read it. He was stopped on pages 38 and 39 by what started out as surprise, but very quickly became concern, if not horror. In those two pages, the Supreme Court's decision took a series of steps thatwere unnecessary, unwise, and against the state of Kansas and the Kansas business community. He speaks as a citizen of Kansas who is concerned about our economic development, and he recognizes the Legislature is concerned about protecting small businesses. (Attachment 2)

Professor Hoeflich stated he was very concerned about one potential reading of the *O'Brien* case, and recognized some may feel his reading, as witnessed in his written testimony, is overly broad and alarmist. To that, the Professor stated, "When reasonable lawyers can read an opinion and disagree, even if one side will eventually be proved wrong, it is a certainty that litigation will result." The danger of the *O'Brien* opinion standing as it is now, without some legislative correction, is the potential to void thousands of very traditional, very simple, very important contracts in the state of Kansas, as well as open the floodgate of potential litigation. There are three things the Professor stated he was concerned about on page 38 and 39 of the decision. The opinion, as a whole, is dealing with the statute K.S.A. 50-101, which dates back to 1897. This is significant as it was before there were any federal antitrust statutes. It was a time when statutes like this one were being enacted around the southwest and midwest, and in part, it was because it was the first time in American history that we were beginning to get the kinds of business

conglomerates and trusts that were deemed to be hurtful to the public. In particular, it was the barbed wire trust- the control and distribution of all of the barbed wire in Kansas- which would have a negative impact on farmers and ranchers. It was not legislation that was ever intended to deal with the kinds of contracts that are now put at risk. Professor Hoeflich advised it is significant that the opinion of the court does not deal with the legislative history. The opinion states very clearly that the Legislature is capable of writing laws that are clear and unambiguous, but clear and unambiguous laws still require an understanding of the legislative intent. He suggested the legislative intent was never intended to cover the potentially broad contracts which can now be said to be covered here.

The second point Professor Hoeflich made is the opinion and the proposed legislation speak in terms of federal antitrust doctrine of the rule of reason, the "reasonableness" standard. He stressed it was not a situation where we are trying to add federal interpretive standards to Kansas law. Kansas has had, for 64 years, a "reasonableness" standard applied to these kinds of contract cases. Indeed, the Supreme Court directly overruled significant portions of two very important cases, *Heckard v. Park (1948)* and *Okerberg v. Crable (1959)*. They said if these cases came up in court today, they would be decided differently. The reason they would be decided differently, according to the opinion, is that in both of the cases, the Kansas courts decided it was necessary to say, "Any agreement between two or more people, having anything to do with prices, is, per se, illegal." What the court said in *Heckard* and *Okerberg* is one has to look at the agreements and see if they harm consumers or whether they help consumers and help the economy. Professor Hoeflich wanted to make it very clear the *Heckard* decision was a decision about a music teacher's agreement with his pupil. The *Okerberg* decision was about an agreement involving milk delivery routes and pricing. If ever we would think we would not want to have music teachers or milkmen sued for antitrust price fixing, it is pretty clear. The problem with the opinion is that it is an absolute opinion. It said, "We reject any reasonableness standard. We are going to read K.S.A. 50-101 absolutely rigorously." They are saying there will be nothing for a judge to ask other than, "Was this an agreement between two or more people?" and "Did it establish prices?" When the reasonableness standard is taken out, it takes away the ability to distinguish between the thousands of everyday contracts that make perfect sense and the few that may be problematic.

Professor Hoeflich provided one additional example, sharing he has a friend who is a potter in Lawrence. She feels strongly that she wants everyone to be able to afford her pots. She doesn't just want to sell to wealthy art collectors. She goes around the stores in Lawrence and advises the store owners, "I want you to sell my pots but for no more than $15 dollars, because I want people to be able to purchase the pots and put them in their houses." As he reads the *O'Brien* opinion, this agreement would be subject to a court challenge under K.S.A. 50-101. That is

wrong. It is bad for the economy and bad for the state. He conceded it is possible he is reading it broadly, but he has been a lawyer 33 years, has dealt with a lot of lawyers, and trained thousands of them, and said that if he has learned anything about lawyers, it is worth saying again, "If you have the vaguest possibility- let alone a reasonable interpretation- to bring a lawsuit, you are going to do it." This is the nature of our system as it stands now. If there is really no danger here with the opinion, then pass **HB 2797** and make sure there is no danger, because nothing will be lost by that. But if the proposed bill is not passed, and there really is a danger, and folks around Kansas who are doing business suddenly find themselves getting sued, there is a problem. Regardless of whether they win or lose, it is expensive and frightening. Professor Hoeflich stated if the bill is not passed, it will really harm the business community, and this is why he is here today.

Chairman Kinzer advised he would try and allow for questions after everyone had a chance to testify.

Allie Devine testified in support of **HB 2797** stating she was representing the National Cattlemen's Beef Association and a number of livestock producers who have contractual arrangements with processors. The body of law that governs most of the livestock transactions is the Packers and Stockyards Act. The last two and one-half years has been spent debating and discussing federal law and federal proposed regulations, further defining what competitive injury is and what the rule of reasonableness means in our industry. There are six federal courts of appeals that have looked at the Packers and Stockyards Act as a flow through from the Sherman Antitrust Act and have found the rule of reason is what should balance the issues within the industry. So now we have a case in Kansas, that throws into question what is or is not a lawful action verses the body of law we have been governed under for the last 30 years, if not longer. The most recent cases have been in the last 15 years, coupled with a federal regulation that has now been withdrawn from the administration that sought to further define it. Ms. Devine asked the Committee, "What is the new standard, and what is the new standard under Kansas law?" Ms. Devine added, "The Professor just said was there an agreement and did it establish price?" Ms. Devine offered, "Doesn't every transaction in a flowing market affect price? Doesn't every sale affect price? What contracts are acceptable and which are not?" She is here today to say we need clarity and the insertion of the rule of reason analysis would help bring that clarity back to the situation. (Attachment 3)

Chairman Kinzer directed the Committee's attention to written testimony in support of **HB 2797** submitted by Jeff Jordan (Attachment 4); Ron Seeber, on behalf of the Kansas Association of Ethanol Processors (Attachment 5); Randy Stookey, on behalf of the Kansas Grain & Feed Association and Kansas Agribusiness Retailers Association; and Leslie Kaufman, Kansas Cooperative Council (Attachment 6).

Chairman Kinzer stated he would allow questions for about 10 minutes for the proponents.

Representative Rubin inquired of Professor Hoeflich regarding Section 1, Subsection (c), which states, "The provisions of this section shall apply retroactively in any pending or future litigation," in regards to current litigation filed, does he understand the Professor's testimony to be the reasonableness standard was recognized and applied in Kansas up until the *O'Brien* decision of last week? Professor Hoeflich stated the case came down very quickly, but his reading of the case is *Heckard* had a reasonableness standard apply as did *Okerberg*. Professor Hoeflich stated he thought that was proof of the law until this week. He indicated precisely it was on page 39 where the decision specifically overrules that portion of the *Heckard* and *Okerberg* decisions, which applied the reasonableness standard. That means, as he reads it for now, and as far as this decision is concerned, reasonableness is no longer an inquiry a court would ask about a contract. The Professor offered he is assuming the three years stems from the three year statute of limitations on pursuing contracts in Kansas. As he would understand it under *O'Brien*, with the overruling of *Heckard* and *Okerberg*, any contract that is open under the three year contract could be challenged. Saying that, Professor Hoeflich expressed it is going to be retroactive, to protect existing contracts that were made by people assuming the law was stable and should be upheld. Representative Rubin clarified with the Professor that he wanted to be sure- not to pull the rug out from under litigants- whether it would be fair to say the Bar in Kansas, the attorneys in Kansas, litigants, and pending cases should have been fully aware of the application of the reasonableness standard in these kinds of cases? Professor Hoefllich stated he could not speak for the Bar, but acknowledged the judges in Shawnee County, who decided the case in a lower court, certainly thought it applied. To the Professor's knowledge, neither *Heckard* nor *Okerberg* had been repealed prior to Monday's release of the decision and that is why the Court specifically overruled the reasonableness standard in its decision.

Representative Colloton stated that even Justice Prior, at the outset, said that in her opinion there is precious little precedent in Kansas at all, and we have deferred to this, even though the reasonableness standard has been recognized. Justice Six, in his written testimony, raises this issue about retroactivity. Representative Colloton expressed her concern regarding retroactivity and has had an amendment drawn to eliminate that, because she does not want to somehow jeopardize or affect pending lawsuits and this is what Justice Six said. Chairman Kinzer asked whether Representative Colloton was referring to a letter from Justice Six or former Attorney General Stephen Six. Representative Colloton clarified former Attorney General Stephen Six stated, about retroactivity, "This will spur unnecessary litigation [about retroactivity] that will consume judicial resources to decide the Constitutionality of retroactively eliminating rights that have existed in Kansas for decades." Representative Colloton advised she did not want to affect the law in lawsuits, and the amendment she was thinking was that it will be retroactive, except for those cases that have been filed. Professor Hoeflich stated he was not a constitutional lawyer,

but even recognizing there may be a question of ethical constitutionality of retroactivity- and he was not saying there was- if one assumes this is possible, there still has to be a balance of the possibility of litigation over the constitutionality of the provision against the possibility of litigation against people who have, in good faith, entered into agreements in the last three years, never expecting the court would make this kind of, what he considers to be a fairly radical change, in the way courts have been interpreting contract law.

Representative Colloton asked Professor Hoeflich to address the class action idea, removing the class action, as this does. She stated under the Attorney General, the Consumer Protection Act could bring actions of a general nature to enforce good policy against predatory practices. Professor Hoeflich stated he did not write the bill, and his focus has primarily been on the potential interpretations of *O'Brien*, but what he would say about the class action is pretty simple- if it is really not a problem, why not have it in there? The Professor stated he did not want to sound too folksy, but it is like the lion saying to the lamb, "I'm not hungry. It's okay. Come on in." What he worries about and could see the justification for that prohibition is if one is talking about class actions brought against major corporations. That is one thing. If one is talking about class actions brought against music teachers, artists, or ranchers that is another thing. The interpretation of *O'Brien* would allow a whole expanded group of people to suddenly become the targets for litigation. It is bad enough getting sued by one person, but getting sued by a class of people could be devastating.

Representative Brookens inquired of Professor Hoeflich regarding his testimony that we do not really need to look to federal rule, and it is not the expectation to look to federal law or the Sherman Act, as we look for what is reasonable and what is not reasonable. Representative Brookens asked the Professor if he had concerns about the bill, specifically lines 22 through 26, referring to Section 1 of the Act, essentially drawing the entire Act in it. Professor stated no, he actually does not have a concern. He does not feel importing the federal standard of the rule of "reasonableness" into Kansas law is innovative or letting federal encroachment on state rights happen because we have already done so. The court already had the reasonableness standard in *Okerberg* and *Heckard*. On the other hand, he agreed with Justice Prior when she said, "There is not a lot of precedent about these kinds of cases in Kansas." There have not been a lot of Kansas cases and there have been a lot of cases in federal courts on these kinds of issues, and since the federal judiciary has developed this idea of reasonableness to a much finer degree than the Kansas courts have, it makes perfect sense to adopt it. The Professor stated he does not think there is anything wrong with the federal standard, as they are a bit ahead of us. The alternative would be to reinstitute *Okerberg* and *Heckard* and have the court develop the reasonableness standard, which means the folks from agriculture would say it will create a lot of uncertainty.

Representative Ward stated he thought the Chair is trying to be fair, but when a bill of this complexity is ginned up, antitrust law is a very complex area of the law. Just by the people sitting here wanting to testify, it is evidence the bill has many intricate details, and while there may not be a lot of Kansas law, there is a lot of law out there that defines many of the terms. The Committee is taking significant steps on this bill, and then they have 10 minutes to ask questions of the proponents, and 10 minutes to ask questions of the opponents, and in a day or two, the Committee may get to vote on it. This is a really bad way to make law, and it will have significant bad impact.

Representative Ward advised Professor Hoeflich he was concerned with his argument that smart lawyers arguing before judges is a bad idea, especially with multi-state and multi-national contracts being debated. They are not talking about a music teacher in this case. They are talking about an out-of-state corporation that was vertically price fixing with its retailers and the question to ask would be whether Kansas retailers should be able to determine the price to compete against Wal-Mart, which is on the edge of town, or should the company in Utah be able to decide this. Taking it to the national or multi-national level, if China decides they are going to bring their products to the United States but they are going to be able to set the price and are going to use this law to prevent a Kansas retailer from going to court and saying, "No, you shouldn't really be able to fix the price in Kansas purchases." Representative Ward stated while he respects Professor Hoeflich, to say we are talking about a music teacher or a milk route is really to not provide the depth and complexity of the multi-national environment that we are talking about in antitrust.

Professor Hoeflich stated he would like to say three things about Representative Ward's comments and question. He did not say it was a bad idea for smart lawyers to talk about things in front of courts. He said, "I know one of the opponent's arguments has been my reading of the opinion is too broad and that there is no danger." He also said, "Smart lawyers can disagree about how to read a judicial opinion and if smart lawyers can disagree, then smart lawyers can also bring litigation." He does not at all want to keep people from arguing it. He agrees with Representative Ward this bill affects multi-national corporations and it can involve very significant antitrust issues. His concern is the opinion can also affect music teachers and potters, and the way the decision has been written allows a very broad reading so that the K.S.A. 50-101 could be applied to lots of people. The Professor offered it seems the answer to that very broad potential is to allow judges, who are also very smart folks who know the law, to decide whether a particular agreement should be deemed to violate the statute. The best way to empower judges to do this is to have them be able to use a rule of reason. The federal standard is a good one and worth importing into Kansas law. This way, we are not saying that no one can sue but we are allowing the judge to say, "You, music teacher, shouldn't get sued. You, multi-national corporation, yes you can get sued." Professor Hoeflich stated he is really not talking about the

Leegin case. He is talking about what he perceives to be a potentially dangerous breadth in that opinion. It seems to me this bill is not saying, no you cannot sue. The judge can say, "Hey look, this was not intended for music teacher contracts."

Representative Ward stated because of the way this is being presented now- the decision comes down on Monday, they have a bill on Tuesday, it sounds like sour grapes, "I lost a lawsuit, and by gosh, I'm not going to take this sitting down. I'm going to the legislature." That is a concern. Half the people who stand before the Supreme Court lose. He asked the Professor if he could tell him why this is different. Professor Hoeflich stated, "You do know I didn't lose. I didn't have anything to do with it." Representative Ward expressed they called the Professor because he is a smart guy. Professor Hoeflich offered, "Well, they called me because they wanted me to look at it and quite honestly, if I had thought different, I would not be here today. I think I can be independent. But I will say I agree it is really bad that the Supreme Court issued a decision which, in the body of the decision, said if the legislature wants it differently, it should change it. I do not think they should have done this four days before the end of the nominal Session, but they did. The fact is if we do not act on it now, it is not going to get acted on until January, and a lot of lawsuits can be filed between now and January. The way I think of this is remembering the little Dutch boy and the dyke. The ocean is pushing against the dyke and there is a hole. You have got to stick your finger in the dyke, in order for the whole city to not be flooded. Come back in January, review the situation, look again at the legislation, if you must, and if you want to make changes, do it then. But if nothing is done now, at least in my opinion, a whole lot of Kansans and a whole lot of contracts are at risk for the next six months or so. That, I think, is a bad thing."

Chairman Kinzer thanked the Professor and stated the Professor made the point he was going to make, which is this process is unusual and not ideal, and it has also been thrust upon us by the Court's determination, with respect to timing, not ours. Chairman announced he will now take neutral testimony.

Eric Stafford testified as neutral on **HB 2797** advising over the last four days the Chamber has seen a lot of information come in about the impact of this decision on the business community in Kansas, and their main mission, in the realm of protecting legal reform, is protecting and improving the fairly strong legal environment in our state. There have been several bills worked this session that make positive steps that have already gone on to the Governor. With this decision, he keeps reading from national attorneys and various articles about the breadth of the decision, and its impact, and many have said it is overreaching of the courts to determine legislative intent. They have seen this in other areas, such as work comp, where the courts have said the Legislature is silent on this issue. Reading through the decision, Mr. Stafford advised he saw a paragraph that mirrored a case in work comp from a couple of years ago, the *Bergstrom*

decision, where the courts said the Legislature was silent on it. Mr. Stafford stated they have received conflicting feedback from members. This morning, multiple members left voice mails on both sides, and the Chamber wants to make sure the Legislature goes about this the right way. Some of their members' objections are not necessarily trying to reverse the decision, just trying to make sure things are handled in the best way. There are some comments from some members that do not necessarily apply to this case, dealing with retail price agreements. From their comments, it seemed this bill would mandate retail price agreements, and that is not the case. The Kansas Chamber would ask the Committee to take the time to be sure we are going about this in the right way before moving forward. (Attachment 7)

Chairman Kinzer advised the Committee would hear from opponents at this time.

Patrick Stueve testified in opposition to **HB 2797** advising he was not in-house counsel for Seaboard but represents Seaboard, the Association of Wholesale Grocers and other large and small companies in Kansas on antitrust issues. He is a proud 1987 graduate from the University of Kansas School of Law, and has been practicing in the antitrust area on both sides for the past 25 years. The Association of Wholesale Grocers is wholesale retailers located in Kansas City, Kansas that employs over 1,000 Kansans, doing about $6 billion in sales annually. Seaboard Corporation is located in Merriam, Kansas, and is one of three Fortune 500 companies located in Kansas. Mr. Stueve has spoken with the general counsels for both companies and stated he is authorized to speak on their behalf today. (Attachment 8)

Mr. Stueve stated their principle concern is the solution to the problems that have been identified. There appears to be the proverbial "throwing the baby out with the bathwater". It is important to understand the opinion involved retail price maintenance agreements. The Supreme Court made clear that the restraints of trade, which were an issue with *Heckard* and *Okerberg,* did not involve horizontal or vertical price agreements, which were an issue in the *Leegin* case. They went out of their way to quote it in the opinion- to point that out. What is at issue is the application of the rule of reasonableness standard to those retail price maintenance agreements. What the Supreme Court said was, "Look, we've got this statute which is all contracts, with respect to price fixing, and are prohibited under the Kansas Restraint of Trade Act (KRTA). We have two older Kansas Supreme court opinions that specifically found there was a *pro se* violation, if there are retail price maintenance agreements." The *Heckard* and *Okerberg* cases were not retail price maintenance agreements, so the Court made it clear those cases would suggest a rule of reasonableness standard apply to retail price maintenance agreements. The Court made clear they relied on the plain language of the Kansas statute. Mr. Stueve offered, from a lawyer who is advising clients both large and small, he wants a court that is going to

follow the language of a plain statute. There may be folks here who say they do not agree with this interpretation. In advising a client, to be able to rely on the statute and the plain language, it says all agreements related to price are prohibited. That is going to be the advice given to his client.

Mr. Stueve stated the solution is very simple. It is not to do what is proposed here, which is to incorporate all federal law related to the Sherman Act under Section (1) into Kansas, and Kansas courts are supposed to determine what is or would be federal law. That is what this bill requires Kansas courts to do now. For example, if there is an antitrust issue related to price fixing, there are eleven circuits in the federal court system. The second circuit may have one position, and the ninth circuit may have another position, so what is a Kansas state court supposed to do? The *Leegin* decision is a perfect example. This came down in 2007 and it resolved a number of conflicts among a number of circuits related to retail price maintenance agreements. The suggestion that, by incorporating all federal law under Kansas law, we are somehow preventing litigation or reducing litigation, Mr. Stueve submitted, as someone who is out there advising their clients and litigating in federal court all of the time, this is not going to resolve or reduce the number of cases filed, it is only going to increase litigation. What the Legislature did in the 1950s was pass specifically authorized retail price maintenance agreements. If it is the will of this Legislature, pass a law that will make it clear that, contrary to the interpretation of the Kansas Supreme Court, it is the intent that retail price maintenance agreements are permissible, or the rule of reason analysis will apply to retail price maintenance agreements. This would cover Professor Hoeflich's example of the artist who is out there in Lawrence insisting whoever is going to resell her pottery that it would be at a minimum price. That would be covered under this legislation. From a legal advisor's standpoint, from advising multi-million dollar companies, Mr. Stueve advised he would much rather be looking at a statute that says, " I can do X," rather than trying to predict what the Kansas courts believe the federal courts' position is on a particular antitrust issue applicable to a Kansas act.

Mr. Stueve expressed that Seaboard and Associated Wholesale Grocers agree with this and are very concerned about the proposed solution to address the problem. The suggestion this is going to be applied to contracts beyond retail price maintenance agreements is alarmist. The court went out of its way to make clear the *Okerberg* and *Heckard* agreements were different from the agreements that were at issue in the *Leegin* case. There are well accepted principles of *stare decisis* that only the holding of the case and the particular issues that were at play in that case are going to be binding on courts and parties on a going forward basis. But again, if legislation is drafted that permits or specifically says rule of reason analysis will apply to these types of agreements, it is going to prevent even the hypothesized litigation by this court speaking on that topic. As Professor Hoeflich pointed out, "Good lawyers are going to litigate this issue of

retroactivity because it is raising substantive issues, raising procedural issues, and the issue is going to be litigated heavily if there is a provision which allows retroactivity. I think it is the hope of the Legislature not to pass legislation that is going to generate wasteful litigation."

Mike Beal testified in opposition to **HB 2797** stating he was the CFO and operates as general counsel for Ball's Food Stores in Kansas, who is a retail grocer and member of the Associated Wholesale Grocers, and operates 20 stores on the Kansas side of the state line. His main concern with the Legislature is what Representative Ward stated, that we may be operating in haste. The business community loves certainty to the extent they can get it through any of the statutes. Mr. Beal expressed that his reading of the proposed statute is the same as Mr. Stueve's, which is to incorporate the federal judicial interpretation of what is reasonable, and having to worry about- from circuit to circuit- what that means, does not give any certainty. He is aligned with the National Beef Council, any of the retailers and business alliances that believe there is a need for more certainty. Mr. Beal expressed he has long believed that any time we act in haste, the law of consequences comes back to bite us, and we have seen it in federal legislation and in state legislation. The ability to enact legislation that may incorporate retroactivity can be done next January, when the Legislature returns to session, but to squeeze it through the legislative process in the final days to address a concern, in his view, is overblown. He shares Mr. Stueve's views on the interpretation of the decision, and to him, it is just not good practice. He would welcome more participation and more comment in looking at ways to address this Supreme Court case. If we deal with the issue of retroactivity, and whether or not it is permissible, it will be the Kansas Supreme Court that has the last say on it. No written testimony was provided.

Chairman advised if anyone appearing before the Committee had not had the opportunity to prepare written testimony, he would appreciate it if they would do so and forward a copy to his office, and he would distribute it to the Committee.

Rex Sharp testified in opposition to **HB 2797** stating he does litigation in the antitrust arena and has done so for the last 10 years in Kansas and all over the United States. He is very familiar with the federal law and Kansas law. Kansas law sets the line for the bright line test. If we want to know whether a contract is legal, Kansas law will tell us. The rule of reason will not. This will be an issue that will have to be fought out with a jury and a team of expensive economists, with one group pontificating it is pro-business and the other group indicating they are anti-business. Mr. Sharp stated this is not what we want- further litigation. The rule of reason is uncertainty, per se, unless we are willing to fund judiciary like the federal courts do, where they have a full-time magistrate to handle matters, a full-time researcher, and full-time clerks- we have seen their court houses. They are nothing like what state judges have. That is the reason

bright line's simple clear test is not only good in court, but is incredibly important in business itself. The rule of reason is a gray area that we do not want to go into. (Attachment 9)

Mr. Sharp stated he does some class actions. He represents some small businesses and individuals who really would not have any access to court unless they were in a class action. He agrees the class action rules have been strengthened and tightened. Kansas follows the rule under K.S. A. 60 -220 (f), that once the class is certified, it is not the end of the story. They go immediately to the appellate courts so it can review things before going for a class action to decide whether it is legitimate or not. This was of concern to the business community, and the Kansas Legislature acted on it to provide some certainty that the case is a class action before it moves forward. Of course, class actions are important in the private enforcement of antitrust laws because the Kansas Attorney General simply does not have enough staff to handle all of the issues that would come before the courts and the state of Kansas to protect the economy. Consequently, this group should continue the class action aspect because it is indispensible to providing access to court, and it is doing nothing that the other courts have not done, including the federal courts that allow class actions. So not only do other states allow for class actions, the federal law does as well.

Mr. Sharp stated, with respect to the retroactivity, he expects it would be determined to be unconstitutional by the courts because we have vested rights that have already been litigated and are already in front of court, and we cannot just pull the rug out from under them. However, let us assume that was not the case. What is the intention of the Legislature wanting to put a stop to current litigation? Are there particular cases the Legislature is worried about, or is it just this one case the Legislature is concerned about? There are a number of cases, not only in Kansas state court, but also in Kansas federal court and in courts all over the United States involving Kansas law. Are we intending to pull the rug out from a whole host of litigants, many of whom we do not know. Mr. Sharp advised he does not think this is the intent of the Legislature, and not the intent of the commentators who are in favor of the bill either. They tended to be more focused on existing contracts not being changed. Now in respect to this, Mr. Sharp expressed he did not see anything greatly different about this particular decision. This is a decision granted from the Supreme Court who has not had a decision on the Kansas antitrust law in a number of years. But that's not to say there have not been a number of decisions made on Kansas antitrust law. There are decisions made every day on Kansas antitrust law and good jurists in our system. Kansas district courts have been handling these issues for years, and interestingly enough, have come out the same way as the Kansas Supreme Court, because they followed the statute that says, "These types of contracts, in which there is collusion, in which someone is trying to drive up prices, in which they are trying to get together with their competitor and drive out other businesses, those are illegal, they are void, and cannot be tolerated." Consequently, class actions or other

individuals have been able to sue and put a stop to that kind of action, ensuring that the competitiveness of the Kansas market is going to remain, and that is what this particular law has been doing for almost 100 years. It is also exactly what we want to continue to happen, and this holding that came down from the Kansas Supreme Court will continue to do that. If there are any minor instances where this Legislature wants to address them, in his opinion, and as was eluded to earlier, do it with a scalpel and not a meat cleaver, and do it over time so there is an opportunity to hear from all types of business interests in this particular instance. Mr. Sharp also offered he thought it was unusual to hear from the Kansas Chamber saying they have some members who are in favor and some who are against. Perhaps the two groups could get together and figure out if there is a targeted minor nuance that might need some changing in the future. Mr. Sharp expressed this is not it and urged the Committee not to pass this bill.

Callie Jill Denton testified in opposition to **HB 2797** stating she was appearing for the Kansas Association for Justice. She acknowledged that everyone has heard from the experts, and she is not one of them, but she did want to represent the trial lawyers of the organization to ask the Committee to slow down in reviewing this issue. This is a huge and important area of the law. The Legislature has been vigilant in regulating the restraint of trade, and it deserves a lot more time. She echoed the sentiments of the other opponents in saying let us just take some time to look at this more closely and, as Mr. Sharp said, use a scalpel and not a meat cleaver. She offered to help work on behalf of the Kansas Association of Justice with the Kansas Legislature and the other parties on those efforts. (Attachment 10)

Representative Colloton asked Mr. Stueve about eliminating the retroactivity as to pending lawsuits and the prohibition on class actions stating she understands the substantive piece of whether they should just whole heartedly be adopting federal law. If the Committee is doing something as a stop-gap measure until we can more fully discuss the standard in Kansas, would this take care of the immediate issue adequately? She stated we want class actions to be able to be filed and we do not want to affect pending litigation, as it is what it is under past law. Mr. Stueve stated his suggestion with a stop gap would be to narrowly tailor the stop gap to say the rule of reason would apply to these types of agreements, rather than incorporating the federal law applicable to all Sherman Act cases. Representative Colloton clarified that they would definitely include language to allow class actions to continue to be filed going forward and make some sort of statement regarding pending lawsuits so they would not be affected. Mr. Stueve stated his clients have not taken any position with respect to class action. His only point, with respect to retroactivity, was so this Committee would be aware there is going to be litigation if that provision is in there.

Chairman Kinzer directed the Committee's attention to written testimony in opposition to

HB 2797 from former Attorney General Steven Six (Attachment 11) and Deborah McIlhenny, Managing Counsel for Hutton & Hutton Law Firm, LLC. (Attachment 12)

Chairman Kinzer closed the hearing on **HB 2797**.

Chairman Kinzer stated the Committee will not be working the bill today but would let everyone know if it is going to be worked.

The meeting was adjourned at 1:04 p.m.