

Approved: June 30, 2012

(Date)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Kinzer at 1:28 PM on Wednesday, May 16, 2012 in 346-S of the Capitol.

All members were present.

Committee staff present:

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

No Conferees appeared before the Committee.

Others in attendance:

See attached list.

Chairman Kinzer thanked the Subcommittee for reviewing **HB 2797-Kansas restraint of trade act; rule of reason; class actions**, a fairly complex issue. Chairman Kinzer announced that the plan today will be to receive an overview of the work of the Subcommittee from Subcommittee Chairman Representative Brookens. Chairman Kinzer noted the Committee should have a copy of the Subcommittee's report (Attachment 1). The Chairman stated he would entertain questions regarding the Subcommittee's report and then would ask the Committee what their pleasure was in regards to the Subcommittee's recommendation.

Chairman Kinzer stated, due to the shortness of time, **SB 291** would be a potential vehicle to advance **HB 2797**, if that was the consensus of the Committee.

Representative Brookens stated the Subcommittee met numerous times. The observation and first issue they struggled with was whether they should act and if there was time to act. The conclusion was, by consensus, that the Subcommittee was on the same page, which was important. Without the *O'Brien v. Leegin Creative Leather Products, Inc.*, No. 101,000, 2012 WL 1563976 (Kan. Sub. Ct. May 4, 2012) case, many of the fears that have surfaced would not have been on people's radar at all- people just would not have thought of them. Because of that decision, it puts front and center throughout every industry in Kansas the issues at hand and creates uncertainty where we thought Kansas law was relatively certain. This is why the

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Subcommittee believed doing nothing was not a viable option, and therefore, they proceeded.

Representative Brookens showed the Committee a mock-up of **HB 2797** with balloons. (Attachment 2) They took the preamble, itself, and added a second whereas clause. In Section 1, they removed the part that said we adopt the federal law. Our concern was twofold: the federal law is incredibly cumbersome and far reaching, and as they heard in the testimony, it varies depending upon the circuit one sits in. More importantly, our goal was that the law hold still as it was the day before the *O'Brien* decision came down. We are not doing that if we say we follow federal law. It is a completely a different step. What we felt the Subcommittee should do is rearticulate what Kansas law is. Consequently, we state in the third balloon down, an arrangement or contract is a reasonable restraint if the restraint is reasonable in view of all the facts and circumstances, and does not contravene public welfare in Kansas. It takes the *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959) and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948) cases and puts them front and center, taking the peanut of these cases distilling it in Section 1, the third balloon. The Subcommittee then believed they should not be attempting to input the law as it pertains to class actions, so they left the law alone by striking the section on class actions. By striking it does not mean it strikes class actions. It means class actions are still permissible. Then, to make it clear, if the Supreme Court, in reviewing this law, were to believe one section of it was unconstitutional, the last balloon on the page, which sets out (b) and (c), is designed to make it clear that if one section is unconstitutional, the rest of the bill continues. The Subcommittee also struck language that talked about retroactivity, on lines 30 and 31. All they are stating is the law of Kansas was and is *Okerberg* and *Heckard* essentially.

The Subcommittee got bogged down for a while on the issue of a bright line test, but in truth, if one looks at the first, second, and third balloons, an arrangement, contract, trust, or combination is a reasonable restraint if it is reasonable in view of all the facts and circumstances and does not contravene the public welfare. In many of the cases, it is still very bright line, because if it contravenes public welfare, which a price-fixing case would, one does not even get to the issue of what is reasonable. If it is price-fixing, it is going to contravene public welfare and one is done. Because of this and the complexity, the Subcommittee, at the suggestion of the revisor, created the same language into a substitute bill, and it is in front of you in a three-page context. (Attachment 3) It does the same thing, but, for your examination, based upon the bill, we felt you should be able to compare it side by side, but this is rolled into a substitute bill, which we are proposing. This is the report from the Subcommittee.

Chairman Kinzer thanked Representative Brookens for the report and stated they would entertain questions from the Committee.

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Representative Patton stated the provision the Subcommittee indicated was added dealt with one part which, if it was unconstitutional, the rest would remain in effect. He asked if there a section the Subcommittee thought may be considered unconstitutional. Representative Brookens stated initially, when they were dealing with the issue of retroactivity, absolutely. That is always front and center as a constitutional issue, and this would be lines 30 and 31, which were struck. We believe there is nothing impending that would likely be unconstitutional. We tried to steer clear of these issues. At the same time, we are saying the law was, is, and the intent of the Legislature was, as indicated in the preamble, that in regards to restraint of trade, the rule of reason does apply. We had discussed the possibility of putting in the rule of reason, as articulated in previous cases, which may put that more front and center. We believe this is a constitutional way to do this. It is up to the court of Kansas to decide does this apply in a current case or not.

Representative Ryckman asked if someone would summarize this so he can explain it to someone else. Representative Brookens directed Representative Ryckman to the third balloon, stating the rule in Kansas has two parts. First, a restraint of trade is a reasonable restraint if the restraint is reasonable when you consider all the facts and circumstances. That is one of the cases, *Okerberg*, and secondly, if the circumstances of that case do not contravene the public welfare. We are saying this is what we thought the law was, and we are stating that is what the law is. We are reasserting where we were before *O'Brien* came out.

Chairman Kinzer said all sorts of agreements have the effect of, on their face, an impact upon economic relationships, trade, prices, and those sorts of things. The question is does the mere existence of the contract or relationship create a violation of the statute, or should the court further inquire as to whether that relationship is reasonable? Does the relationship have a harmful impact or is it a reasonable impact? If it is harmful, then there is still the potential for a violation, and if it is reasonable, then it doesn't.

Representative Bowman questioned the use of the word "reasonableness". Chairman Kinzer stated these cases are so fact specific that we allow the finders of fact to determine what that means in relationship to the case and to reach a conclusion. Chairman Kinzer advised there would be people looking at this issue during the off session and during the next session to make sure the statute is doing what it is intended to do and has the effect for Kansas that is desired.

Representative Kuether questioned if this was the case, why does the Committee need to pass this bill at this time. Representative Brookens stated the reality is, without the *O'Brien* case coming up, which reversed *Okerberg* and *Heckard*, we thought we had a pretty well settled law. The *O'Brien* decision turned the world upside down for every business relationship. *O'Brien* stands for the notion that every contract has a bright line decision. If it restrains any trade, it is

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absolutely void. This means you cannot have a franchise, for example, because every franchise comes with a territory required. For example, a man builds a Gambino's Pizza in Marion, Kansas, and he wants to build one in Hillsboro, Kansas. However, the franchise rights were sold to someone else, so this man cannot build one. That is a restraint of trade and there is the potential for every contract to become void, and anyone can go to court and challenge these types of contracts between now and the end of December.

Representative Kuether stated she thinks this is where we are going- with lots of litigation going forward. What she is struggling mightily with is this is a decision that came down on May 4, 2012. This bill was read in on the 90th day of the Session, and here we are on May 16th and she does not think it is her job to overturn that court decision. Representative Kuether stated she did not think this is the appropriate way to be acting on this bill at this time, and asked that her statement become part of the record of the minutes.

Chairman Kinzer acknowledged he would take that as a statement for the record. He asked if there were any additional questions of the Subcommittee. Seeing none, Chairman Kinzer stated they would move forward with the formal process of working the bill. If people have comments pro or con about the bill, then he will take them then.

Chairman Kinzer suggested the Committee consider a motion to insert the recommendations of the Subcommittee into the shell of **SB 291-Amendments to the uniform trust code**, removing the existing bill language.

Representative Brookens moved, Representative Smith seconded, to amend SB 291 to remove all existing language. Motion carried.

Representative Brookens moved, Representative Smith seconded, to amend SB 291 by inserting Sub HB 2797 language. Motion carried.

Representative Brookens moved, Representative Smith seconded, to recommend Sub SB 291 favorably for passage.

Representative Colloton stated the *O'Brien* case should not have presented too much of a problem. Retail price maintenance agreements, where the prices are fixed for what a product may be sold for, are pretty much per se illegal. The problem was the Supreme Court went on to say that it was overruling these two other cases, the basic overall view of reasonableness in assessing economic market situations in Kansas. That, particularly with regards to livestock, the farming, the agricultural businesses, the franchises in Kansas, really created an ambiguity of do we have any rule of reason in Kansas or not. The restraint of trade statute lays out very specific

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fact situations, including price fixing, retail maintenance agreements, and other things that are illegal. Because of the way the Supreme Court's opinion was written, it really did add a huge ambiguity of whether agreements could be entered into. Just by their nature, any agreement can affect the market and could affect trade, but indeed should be analyzed under a rule of reason. This is what the Subcommittee did, for the benefit of the marketplace and the certainty of contracts, and the validity of contracts that have been entered into- those in force, that have been in force for many years, or that will be entered into. We are not changing prior law in Kansas but understand Kansas law is pretty tough. What is listed out as violations or restraints of trade in that statute, and there are a lot of different fact situations, those are illegal. We think that statute is clear. We just wanted to make sure that the old Kansas law, established in 1897, which the Supreme Court said was no longer in effect, would still be in effect. We put us back to where we were before the *O'Brien* decision. This is what we have been trying to do.

Representative Rubin concurred with everything Representative Brookens and Representative Colloton said as to the need for this legislation. Without it, most businesses in Kansas will find it extremely difficult, if not impossible, to do business because the *O'Brien* decision and its effect would render void most of the types of heretofore universally accepted reasonable contractual arrangements and agreements between businesses- not just on setting prices, but on many things, such as non compete clauses and territorial arrangements. The fundamental basis for conducting business in any state, and certainly in the state of Kansas, has been under law pre-existing *O'Brien* for one-hundred years, since the Kansas Restraint of Trade Act in 1897. The Kansas Supreme Court, Justice Beier writing for the majority, invited, indeed asked us to express our intent if it was different than their decision. Representative Rubin suggested to the Subcommittee to take another look at the whereas clauses. They took the Supreme Court up on its request that if our intent is indeed different than what they interpreted, we say so. We used the language from that part of the decision, from *O'Brien*, which came out two weeks ago. Under the pattern for interpretation of statutes the court has firmly established, we are loathe to read unwritten elements into otherwise clear legislative language. The rule of reasonableness developed over one hundred years under the Kansas Restraint of Trade Act, by virtue of court decisions, and it is not explicitly stated anywhere in the Restraint of Trade Act in 1897. The same thing is true at the federal level with the Sherman Act, but we are dealing with state law now. In reading a little bit further on from Justice Beier's opinion, "If the legislature had wanted to make such a showing (part of the Anti-trust action- in other words, the rule of reasonableness), it certainly is capable of doing so. In the absence of the policy message such a legislative addition would send, we have no confidence in the soundness of the *Heckard* language, which was overturned." Because the Supreme Court asked what our intent was, it was the unanimous conclusion of the Subcommittee that a reasonableness standard did exist in Kansas by virtue of case decisions before the *O'Brien* decision. We took them up on their offer and are expressing that intent. The reason for the sunset that was proposed and is now included in the substitute bill

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is we wanted to put the law back to the status quo before *O'Brien* and allow the next legislative session to consider more fully whether we need a more extensive revision of the Kansas Restraint of Trade Act. There is certainly not the time nor the reason to do that now, but in order that business can be transacted in Kansas as it has, under the Kansas Restraint of Trade Act as it had for the last one hundred years, we wanted to put this status quo back for the interim until we can consider the issue further.

Representative Ward stated he agreed with the speaker who said this is not the way to run a train-late bill, last day- brought by the people who lost a lawsuit. To say there is universal agreement on what we are doing here does not accurately reflect this state. There are still serious disagreements by smart people about the need to go forward. Representative Ward advised to his thinking, so much economic activity is confidence- whether to make the investment, whether to get involved with contracts, to do franchises. Serious people who are involved with economic involvement said that this would have an economic chilling effect on people for the next six to eight months- until the next legislative session- in making economic investments. Whether this is true or not, so much of it is mental and confidence. Representative Ward expressed he wanted to make sure it is clear in our records both in terms of minutes- so that when lawyers go to court- they will know our intent was not to make a significant change in Kansas law and was not to do anti-trust in 48 hours on the back of an envelope- but also to really say we think the reasonable standard was involved before the *O'Brien* case and it should remain a factor that lawyers can take to court and judges can evaluate. We are going to take a look because our anti-trust statutes are over a hundred years old and commerce has changed significantly in the last hundred years. That is why, as part of this recommendation, we are asking the judicial council, the smart lawyers who do this on a day-to-day basis, to come together and evaluate our law, evaluate the *O'Brien* case and other decisions, and give us some other recommendations, perhaps even a legislative summary to work in tandem-by the way we are trying to explain it- as it is a really complicated area of the law. It is very hard to say it in ten words or thirty seconds-so the opportunity to make a mistake is great- so from my legislative perspective, this bill is just to put a hold on what the law is or what we thought it was so that we did not stifle economic activity, because of a fear there was a big change in the law, where there was not.

Representative Meier stated she was doing more reading regarding anti-trust law and ran across a couple of things that she was not sure if it affected Kansas law or not, or whether the *O'Brien* case was really final. She read about a case in 2007 where the U.S. Supreme Court ruled that they need to apply, on a case by case approach, the rule of reason, to assess the impact of competition when looking at maintenance agreements instead of doing automatic or per se violations. So the *O'Brien* case in Kansas seems to be the opposite of that. Also, she was reading up on the federal Packers and Stockyards Act, which is pretty comprehensive in covering

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the cattle industry and poultry industry. She questioned whether the *O'Brien* case was really final.

Chairman Kinzer advised as to our state law, the federal cases Representative Meier was looking at are interpreting federal law, but the *O'Brien* case is definitive word by our Kansas Supreme Court as to Kansas law. He expressed he thought Representative Meier is right in terms of reading the *O'Brien* case as being at variance with those cases she was looking at and said at the conclusion of most, it is at variance with past rulings of our own court as to state law.

Representative Patton stated he is concerned about how hard it is to pass a bill. There are 10,000 different ways to stop a bill and only one way to get it passed. We're saying the next six months we are going to keep the old law, and then we are going to revert back to a radical change in the law. This is not the legislative intent. Our intent is to establish this has been the law, is now the law, and will be the law. Representative Patton suggested the interim committees should look at it, should do an in-depth discussion, and perhaps a bill should be introduced in the next session and we should affirmatively decide whether we need these statutes, whether it should be the policy, and go through the whole process. Maybe we will need to make a change. But if the intent of this bill is to keep the law as it is, this is how we need to communicate it.

Representative Patton moved, Representative Bowman seconded, to amend Sub SB 291 to strike all of Section 1 (c) which states, "The provisions of this section will expire on June 30, 2013."

Representative Ward stated he rises in opposition to this amendment. The Subcommittee put this sunset in for a reason. It is really hard to pass a bill, and if we do not put a mechanism in place that forces the legislature to look at it, then it will not get done. No one wants to talk about anti-trust law. The only thing harder is school finance, KPERs, or maybe workers comp. These are the kinds of issues legislators hate to talk about, and they are incredibly complicated. You can get five lawyers to start talking, the eyes start watering, and there is strong dispute whether we are changing law or reaffirming old law. If the folks feel they are winning with this bill, they have no motivation to come to the table and negotiate a new bill next year. They will say we got what we wanted. We are happy. Whereas, if the sunset is in the bill, everybody comes to the table next year. It is very common to have sunsets in bills and then, if there is not a resolution, it is fairly common to extend the sunset for another year so they can continue to study the issue. Representative Ward expressed the sunset is an important part of getting this bill through, at this time, so he opposes the amendment.

Representative Brookens stated this very issue did come up and Representative Ward has very succinctly and accurately stated the discussion of the Subcommittee and why the sunset was put in. At one time they considered the year 2015, then 2014, and the final consensus was 2013,

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because they wanted to make sure this was front and center next year. We want to make sure we do not leave businesses hanging, not knowing what we are going to do, or whether we are going to do it. At the time, recognizing the *O'Brien* case did create such an ambiguity of intolerable proportions, this was a chilling effect in the other direction. Consequently, they put the sunset in, yet reaffirmed law as it stood. Representative Brookens stated he would oppose the motion as well.

Representative Kuether stated she is rising in opposition of this amendment. There is a timetable that we should be looking at because this is pending in court, as it has been remanded to the district court, and she believes the Committee needs to let the courts do their job and we should not be doing it for them, which she reiterated earlier. Representative Kuether stated she rises in opposition of this amendment and will still vote no against the bill.

Representative Bowman stated he thought we were putting ourselves in a box, assuming it is going to be looked at in the next session. He questioned what would happen if they cannot get the bill through next session.

Representative Patton closed asking the Committee to vote for this amendment. He asked the Committee to imagine if they were going to bring a new franchise company to Kansas and create a whole new line of products and see this sunset rule. Why would anyone make this kind of investment in Kansas if in six months the contracts will be void- one would probably move to another state. This creates an uncertainty that could be devastating, and moved his amendment.

Representative Patton moved, Representative Bowman seconded, to amend **Sub SB 291** to strike all of Section C, which states, "The provisions of this section will expire on June 30, 2013."
Motion carried 10 to 7.

Representative Patton moved, Representative Suellentrop seconded, to recommend **Sub SB 291** favorably for passage as amended.

Representative Ward stated by taking out the sunset clause in the bill, it does change the status to something new and he can no longer support the bill. He thinks we should take much more time before jumping into a big change in anti-trust law in the last seconds of the Session, and made substitute motion to table the bill. Chairman Kinzer stated the motion is non-debatable.

Representative Ward moved to table **Sub SB 291**. Motion failed 6 to 11.

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*Representative Patton moved, Representative Suellentrop seconded, to recommend **Sub SB 291** favorably for passage as amended. Motion carried.*

Chairman Kinzer adjourned the meeting 2:07 p.m.