

SESSION OF 2012

**SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR
SENATE BILL NO. 291**

As Amended by House Committee of the Whole

Brief*

House Sub. for SB 291 would indicate its purpose is to correct the interpretation of the Kansas Restraint of Trade Act (KRTA) made in *O'Brien v. Leegin Creative Leather Products, Inc.*, No 101,000, 2012 WL 1563976 (Kan. Sup. Ct. May 4, 2012) and would endorse Kansas Supreme Court opinions interpreting the KRTA issued prior to May 4, 2012 as consistent with legislative intent and viable precedent. Additionally, it would state the Legislature intended the doctrine of the rule of reason be applied in cases involving an arrangement, contract, agreement, trust, understanding, or combination under the KRTA, as articulated by the Kansas Supreme Court prior to May 4, 2012.

Further, it would add a new section to the KRTA stating an arrangement, contract, agreement, trust, understanding, or combination would not be deemed a trust and would not be deemed unlawful, void, prohibited, or wrongful under the KRTA if it is a reasonable restraint of trade or commerce. To be a reasonable restraint of trade or commerce, the restraint must be reasonable in view of all the facts and circumstances of the particular case and not contravene public welfare. The provisions of the bill would expire June 30, 2013 and the bill would indicate any provision held invalid would be severable from the remaining provisions. The bill would be in effect upon publication in the *Kansas Register*.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Background

SB 291, as introduced, would have made several changes in or related to the Kansas Uniform Trust Code. The House Committee on Judiciary amended the bill by adopting a substitute with the amended contents of HB 2797.

HB 2797 was introduced in response to a recent decision of the Kansas Supreme Court, *O'Brien v. Leegin Creative Leather Products, Inc.*, which rejected the application of the federal "rule of reason" doctrine to lawsuits brought under the KRTA, such that an antitrust plaintiff need not demonstrate the unreasonableness of a defendant's trade restraint to show a statutory violation. Further, the case overruled the application of such doctrine in *Okerberg v. Crable*, 185 Kan. 211, 341 P.2d 966 (1959), and *Heckard v. Park*, 164 Kan. 216, 188 P.2d 926 (1948).

In the House Committee on Judiciary, Secretary of Agriculture, Dale Rodman; Professor Michael H. Hoeflich, Kansas University School of Law; and representatives of the National Cattlemen's Beef Association, Kansas Grain and Feed Association, Kansas Agribusiness Retailers Association, and the Kansas Cooperative Council offered testimony in support of the bill. A representative of the Kansas Chamber gave neutral testimony. Former Kansas Attorney General Steve Six, representatives of Seaboard, Ball's Food Stores, the Kansas Association for Justice and local attorneys offered testimony in opposition to the bill.

A subcommittee was appointed to give further consideration to the bill. The subcommittee recommended amending the bill by modifying the language of the "Whereas" clause to express legislative intent. Further, rather than application of the Sherman Act, it recommended a restraint be considered reasonable if it is reasonable in view of all the facts and circumstances of the particular case and does not contravene public welfare. These factors are based on *Okerberg* and *Heckard*. It also recommended removal of the class action and retroactivity provisions and addition of a

severability clause and a June 30, 2013 sunset date. After adopting the subcommittee's recommendation, the full committee agreed to strike the sunset date.

The House Committee of the Whole amended the bill by restoring the June 30, 2013 sunset date and adding a "Whereas" clause concerning the applicability of Kansas case law interpreting the KRTA prior to the May 4, 2012 issuance of the *O'Brien* opinion.

No fiscal note is available for HB 2797.