

As Amended by House Committee

{As Amended by Senate Committee of the Whole}

As Amended by Senate Committee

Session of 2013

SENATE BILL No. 124

By Committee on Judiciary

2-5

1 AN ACT concerning the Kansas restraint of trade act; amending K.S.A.
2 50-101, 50-112, **50-158** and 50-161 and repealing the existing sections;
3 **also repealing K.S.A. 50-108 and 50-115.**
4

5 *Be it enacted by the Legislature of the State of Kansas:*

6 New Section 1. (a) The purpose of this section, and the amendments
7 to K.S.A. 50-101 and, 50-112, **50-158 and 50-161** by this act, is to clarify
8 and reduce any uncertainty or ambiguity as to the application of the
9 Kansas restraint of trade act and applicable evidentiary standards to certain
10 types of business contracts, agreements and arrangements that are not
11 intended to unreasonably restrain trade or commerce and do not
12 contravene public welfare.

13 ~~(b) (1) Except as provided in subsection (b)(3), an arrangement,~~
14 ~~contract, agreement, trust, understanding or combination shall not be~~
15 ~~deemed a trust pursuant to the Kansas restraint of trade act, K.S.A. 50-101~~
16 ~~through 50-162, and amendments thereto, and shall not be deemed~~
17 ~~unlawful, void, prohibited or wrongful under any provision of the Kansas~~
18 ~~restraint of trade act, K.S.A. 50-101 through 50-162, and amendments~~
19 ~~thereto, if that arrangement, contract, agreement, trust, understanding or~~
20 ~~combination is a reasonable restraint of trade or commerce. An~~
21 ~~arrangement, contract, agreement, trust, understanding or combination is a~~
22 ~~reasonable restraint of trade or commerce if such restraint is reasonable in~~
23 ~~view of all of the facts and circumstances of the particular case and does~~
24 ~~not contravene public welfare.~~

25 ~~(2) Whether an arrangement, contract, agreement, trust,~~
26 ~~understanding or combination is a reasonable restraint of trade or~~
27 ~~commerce in view of all of the facts and circumstances, shall include, but~~
28 ~~not be limited to, an analysis of the following factors:~~

29 ~~(A) Specific information about the relevant industry;~~

30 ~~(B) whether the history, nature, and effect of the restraint stimulates~~
31 ~~or harms interbrand competition;~~

32 ~~(C) whether there were legitimate business justifications; and~~

1 (D) whether the defendant involved has market power.

2 (3) The reasonableness standard described in subsections (b)(1) and
3 (b)(2) shall not apply to any claim of horizontal price-fixing between or
4 among competitors that otherwise violates the Kansas restraint of trade act,
5 K.S.A. 50-101 through 50-162, and amendments thereto. A manufacturer
6 or wholesaler that also engages in retail sales shall not be considered
7 engaged in horizontal conduct with respect to sales the manufacturer or
8 wholesaler makes to third-party retailers.

9 **(b) Except as otherwise provided in subsections (c) and (d), the**
10 **Kansas restraint of trade act shall be construed in harmony with ruling**
11 **judicial interpretations of comparable federal antitrust law by the United**
12 **States supreme court.**

13 (1) Except as provided in subsection (b)(3), an arrangement,
14 contract, agreement, trust, understanding or combination shall not be
15 deemed a trust pursuant to the Kansas restraint of trade act and shall
16 not be deemed unlawful, void, prohibited or wrongful under any
17 provision of the Kansas restraint of trade act if that arrangement,
18 contract, agreement, trust, understanding or combination is a
19 reasonable restraint of trade or commerce. An arrangement, contract,
20 agreement, trust, understanding or combination is a reasonable
21 restraint of trade or commerce if such restraint is reasonable in view
22 of all of the facts and circumstances of the particular case and does
23 not contravene public welfare.

24 (2) Whether an arrangement, contract, agreement, trust,
25 understanding or combination is a reasonable restraint of trade or
26 commerce in view of all of the facts and circumstances, shall include,
27 but not be limited to, an analysis of the following factors:

28 (A) Specific information about the relevant industry;

29 (B) whether the history, nature, and effect of the restraint
30 stimulates or harms interbrand competition;

31 (C) whether there were legitimate business justifications; and

32 (D) whether the defendant involved has market power.

33 (3) The reasonableness standard described in subsections (b)(1)
34 and (b)(2) shall not apply to any claim of horizontal price-fixing
35 between or among competitors that otherwise violates the Kansas
36 restraint of trade act. A manufacturer or wholesaler that also engages
37 in retail sales shall not be considered engaged in horizontal conduct
38 with respect to sales the manufacturer or wholesaler makes to third-
39 party retailers.

40 **(c) The Kansas restraint of trade act shall not be construed to**
41 **prohibit:**

42 **(1) Actions or proceedings concerning intrastate commerce;**

43 **(2) actions or proceedings by indirect purchasers pursuant to**

1 ~~*K.S.A. 50-161, and amendments thereto;*~~

2 ~~*(3) recovery of damages pursuant to K.S.A. 50-161, and*~~
 3 ~~*amendments thereto;*~~

4 ~~*(4) any remedy or penalty provided in the Kansas restraint of trade*~~
 5 ~~*act, including, but not limited to, recovery of civil penalties pursuant to*~~
 6 ~~*K.S.A. 50-160, and amendments thereto; and*~~

7 ~~*(5) any action or proceeding brought by the attorney general*~~
 8 ~~*pursuant to authority provided in the Kansas restraint of trade act, or*~~
 9 ~~*any other power or duty of the attorney general provided in such act.*~~

10 ~~*(c) (d)*~~ The Kansas restraint of trade act, K.S.A. 50-101 through 50-
 11 162, and amendments thereto, shall not *be construed to* apply to:

12 (1) Any association that is ~~governed by~~ *complies with* ~~or becomes~~
 13 ~~subject to~~ the provisions and application of article 16 of chapter 17 of the
 14 Kansas Statutes Annotated, and amendments thereto, the cooperative
 15 marketing act;

16 (2) any association, trust, agreement or arrangement that is governed
 17 by the provisions and application of 7 U.S.C. § 291 et seq., the Capper-
 18 Volstead act;

19 (3) any corporation organized under the electric cooperative act,
 20 K.S.A. 17-4601 et seq., and amendments thereto, or which becomes
 21 subject to the electric cooperative act in any manner therein provided; or
 22 any limited liability company or corporation, or wholly owned subsidiary
 23 thereof, providing electric service at wholesale in the state of Kansas that
 24 is owned by four or more electric cooperatives that provide retail service
 25 in the state of Kansas; or any member-owned corporation formed prior to
 26 2004;

27 (4) any association that is governed by the provisions and application
 28 of article 22 of chapter 17 of the Kansas Statutes Annotated, and
 29 amendments thereto, the credit union act;

30 (5) any association, trust, agreement or arrangement that is governed
 31 by the provisions and application of 7 U.S.C. § 181 et seq., the packers and
 32 stockyards act;

33 ~~*(6) any association that complies with the provisions and*~~
 34 ~~*application of article 15 of chapter 17 of the Kansas Statutes Annotated,*~~
 35 ~~*and amendments thereto, the cooperative societies act;*~~

36 ~~*(7) any group purchasing organization or group purchasing*~~
 37 ~~*cooperative engaged in coordinated purchasing activities designed to*~~
 38 ~~*obtain lower prices or increase efficiencies for its members so long as it*~~
 39 ~~*does not possess monopoly power;*~~ and

40 ~~(6)~~ ~~(8)~~ ~~((6))~~ any franchise agreements or covenants not to compete.

41 ~~(d)~~ (e) If any provision of this section or the application thereof to
 42 any person or circumstance is held invalid, the invalidity does not affect
 43 other provisions or applications of this section which can be given effect

1 without the invalid provision or application, and to this end the provisions
2 of this section are severable.

3 ~~(e) (f)~~ This section shall be a part of and supplemental to the Kansas
4 restraint of trade act, ~~K.S.A. 50-101 through 50-162, and amendments~~
5 ~~thereto.~~

6 Sec. 2. K.S.A. 50-101 is hereby amended to read as follows: 50-101.
7 *Except as provided in section 1, and amendments thereto*, a trust is a
8 combination of capital, skill, or acts, by two or more persons, for either,
9 any or all of the following purposes:

10 *First.* To create or carry out restrictions in trade or commerce, ~~or aids to~~
11 ~~commerce~~, or to carry out restrictions in the full and free pursuit of any
12 business authorized or permitted by the laws of this state.

13 *Second.* To increase or reduce the price of merchandise, produce or
14 commodities, or to control the cost or rates of insurance.

15 *Third.* To prevent competition in the manufacture, making,
16 transportation, sale or purchase of merchandise, produce or commodities,
17 ~~or to prevent competition in aids to commerce.~~

18 *Fourth.* To fix any standard or figure, whereby such person's price to
19 the public shall be, in any manner, controlled or established, any article or
20 commodity of merchandise, produce or commerce intended for sale, use or
21 consumption in this state.

22 *Fifth.* To make or enter into, or execute or carry out, any contract,
23 obligation or agreement of any kind or description by which such person
24 shall: (a) Bind or have to bind themselves not to sell, manufacture, dispose
25 of or transport any article or commodity, or article of trade, use,
26 merchandise, commerce or consumption below a common standard figure;

27 (b) agree in any manner to keep the price of such article, commodity
28 or transportation at a fixed or graded figure;

29 (c) in any manner establish or settle the price of any article or
30 commodity or transportation between them or themselves and others to
31 preclude a free and unrestricted competition among themselves or others
32 in transportation, sale or manufacture of any such article or commodity; or

33 (d) agree to pool, combine or unite any interest they may have in
34 connection with the manufacture, sale or transportation of any such article
35 or commodity, that such person's price in any manner is affected. Any such
36 combinations are hereby declared to be against public policy, unlawful and
37 void.

38 Sec. 3. K.S.A. 50-112 is hereby amended to read as follows: 50-112.
39 *Except as provided in section 1, and amendments thereto*, all
40 arrangements, contracts, agreements, trusts, or combinations between
41 persons made with a view or which tend to prevent full and free
42 competition in the importation, transportation or sale of articles imported
43 into this state, or in the product, manufacture or sale of articles of domestic

1 growth or product of domestic raw material, or for the loan or use of
2 money, or to fix attorney or doctor fees, and all arrangements, contracts,
3 agreements, trusts or combinations between persons, designed or which
4 tend to advance, reduce or control the price or the cost to the producer or
5 to the consumer of any such products or articles, or to control the cost or
6 rate of insurance, or which tend to advance or control the rate of interest
7 for the loan or use of moneys to the borrower, or any other services, are
8 hereby declared to be against public policy, unlawful and void.

9 **Sec. 4. K.S.A. 50-158 is hereby amended to read as follows: 50-158.**

10 ***The provisions of article 1 of chapter 50 of the Kansas Statutes Annotated,***
11 ***and amendments thereto, and the provisions of K.S.A. 50-158 through 50-***
12 ***160 K.S.A. 50-101 through 50-162 and section 1, and amendments***
13 ***thereto, may be cited as the Kansas restraint of trade act.***

14 ~~Sec. 4.~~ **5. K.S.A. 50-161 is hereby amended to read as follows: 50-**
15 **161. (a) As used in this section, the term "person" means any individual,**
16 **corporation, partnership, firm, company or other association of persons,**
17 **and such term shall include the state of Kansas and any of its political**
18 **subdivisions.**

19 (b) **(1) Except as provided in K.S.A. 12-205, and amendments**
20 **thereto, any person who may be damaged or injured by any agreement,**
21 **monopoly, trust, conspiracy or combination which is declared unlawful by**
22 **~~any of the acts contained in chapter 50 of the Kansas Statutes Annotated,~~**
23 **~~and amendments thereto, relating to unlawful acts, agreements,~~**
24 **~~monopolies, trusts, conspiracies or combinations in restraint of trade, the~~**
25 **Kansas restraint of trade act shall have a cause of action against any**
26 **person causing such damage or injury. Such action may be brought by any**
27 **person who is injured in such person's business or property by reason of**
28 **anything forbidden or declared unlawful by ~~this~~ the Kansas restraint of**
29 **trade act, regardless of whether such injured person dealt directly or**
30 **indirectly with the defendant. (2) The plaintiff in any action commenced**
31 **hereunder in the district court of the county wherein such plaintiff resides,**
32 **or the district court of the county of the defendant's principal place of**
33 **business, may sue for and recover **either but not both: (A) treble the****
34 ***actual* damages sustained; or (B) upon a showing of willful or wanton**
35 **conduct by the defendant, the full consideration or sum paid by such**
36 **person for any goods, wares, merchandise and articles included in or**
37 **advanced or controlled in price by such defendant, or the full amount**
38 **of money borrowed ~~or such damages as provided for in K.S.A. 50-115,~~**
39 **~~and amendments thereto, but not both.~~ (3) In addition, any person who is**
40 **threatened with injury or additional injury by reason of any person's**
41 **violation of ~~such acts~~ the Kansas restraint of trade act may commence**
42 **an action in such district court to enjoin any such violation, and any**
43 **damages suffered may be sued for and recovered in the same action in**

1 addition to injunctive relief. Any suit for injunctive relief against a
2 municipality shall be subject to the provisions of K.S.A. 12-205, and
3 amendments thereto.

4 (c) In any action commenced under this section, the plaintiff may be
5 allowed reasonable attorney fees and costs. The remedies provided herein
6 shall be alternative and in addition to any other remedies now provided by
7 law.

8 **New Sec. 6. Section 1 and the amendments to K.S.A. 50-101, 50-**
9 **158 and 50-161 by this act shall be applied retroactively to any cause**
10 **of action premised on any provision of the Kansas restraint of trade**
11 **act repealed by this act, and any such cause of action that has accrued**
12 **as of March 1, 2013, shall be abated, but such causes of action that**
13 **were pending in any court before March 1, 2013, shall not be abated.**
14 **All other non-remedial provisions of this section shall be applied**
15 **prospectively.**

16 Sec.-~~5~~-~~6~~~~7~~. K.S.A. 50-101, 50-112, ~~50-108~~, ~~50-115~~, ~~50-158~~ and 50-
17 161 are hereby repealed.

18 Sec.-~~6~~-~~7~~~~8~~. This act shall take effect and be in force from and after its
19 publication in the ~~Kansas register~~ *statute book*.