

TESTIMONY re: HB 2340
House Judiciary Committee
Presented by Scott Nehrbass
On behalf of
Kansas Association of Defense Counsels
February 12, 2007

Mister Chairman, Members of the Committee:

My name is Scott Nehrbass. I am the President of the Kansas Association of Defense Counsels and I appreciate the opportunity to provide written testimony in support of HB 2340.

HB 2340 would repeal K.S.A. 50-115, the full consideration remedy for antitrust claims alleging illegal pricing. The full consideration statute is an archaic and draconian measure dating back to 1889 that creates windfalls by providing plaintiffs with the entire purchase price for any item that was subject to illegal pricing activity, no matter how much consideration they paid and no matter how little the price was actually advanced. This remedy is distinctively anti-business and harmful. In virtually all other areas of trade regulation, the punishment is intended to “fit the crime.” Not so with K.S.A. 50-115. If this statute were not already on the books, it is hard to imagine how anyone could propose “full consideration” as a potential remedy for an antitrust violation and gain the support of anyone except trial lawyers.

As currently configured, Kansas’s antitrust remedies (trebling full consideration) has spawned a cottage industry of bringing class action antitrust lawsuits by indirect purchasers seeking to collect windfalls and extort settlements from businesses doing business in Kansas.

The justification for the repeal of such an obviously-flawed remedy is self-evident. If you buy an automobile for \$20,000 that was priced \$1,000 higher because local dealers agreed not to discount off of sticker price, for example, you have been damaged by exactly \$1,000. The full consideration statute, however, provides that you could recover the full \$20,000 and the trebling of those damages would result in an award of \$60,000 – more than 60 times the actual damages. That is like getting the car for free plus \$40,000 extra. Because of the patently unfair and disproportionate effect of K.S.A. 60-115, those opposing HB 2340 should be challenged to justify the retention of the full consideration statute.

Opponents of HB 2340 have previously advanced several arguments in favor of retaining the full consideration remedy where someone has purchased an item whose price has been illegally advanced: (1) it is needed to make the injured party whole; (2) it is needed to deter others from engaging in similar conduct; (3) it promotes settlements; and (4) “innocent” businesses are not hurt by the full consideration remedy. Each of these arguments is flawed.

Trebled Damages Makes Injured Plaintiffs Whole – Full Consideration Creates Windfalls

First, even after K.S.A. 50-115 is repealed, injured parties will continue to have remedies that more than makes them “whole.” K.S.A. 50-161 is the tried and true trebled damages remedy that fully compensates plaintiffs. Even without full consideration as a remedy, Kansas law allows

individuals or businesses who prove they are injured by anticompetitive behavior to (1) calculate the amount of their damages, then (2) treble them, and (3) recover their attorney fees and costs.

Trebled damages more than makes injured persons “whole.” For example, if they suffer \$10,000 in illegal overcharges, they recover \$30,000 plus the costs of litigation. The result actually puts the injured party in a better position than if there had not been illegal pricing in the first place. Trebled damages not only makes them whole, it creates a financial incentive for them to pursue valid claims against wrongdoers.

Trebled Damages Is An Effective Deterrent – Full Consideration Is Overkill

Similarly, full consideration is neither necessary nor more effective in deterring illegal pricing than traditional antitrust remedies. Trebled damages is a time-proven deterrent to anticompetitive behavior. The federal antitrust statute, 15 U.S.C. § 15, and almost every state’s antitrust laws, have used trebled damages as a strong deterrent against illegal pricing activity for a century or more. There is no evidence whatsoever that the existence of a full consideration statute in Kansas serves to prevent illegal pricing behavior any more reliably than trebled damages remedies.

Trebled damages, by definition, penalizes wrongdoers by a factor of three times the injury they inflicted. For example, suppose two retail gasoline stations in Anywhere, Kansas conspire to increase the price of gasoline from \$2.00 per gallon to \$2.10 per gallon (an advancement of \$.10 per gallon or 5%) for a period of 60 days, during which each of them sells 200,000 gallons of gasoline. Consumers in Anywhere will have collectively bought 400,000 gallons of gasoline for \$840,000 – having been overcharged by \$40,000 by the conspiring stations. Under the traditional trebled damages remedy, the consumers would recover three times that amount – or \$120,000 plus their attorneys fees. Since the illegal behavior only netted each dealer \$20,000 in extra profits, there is a strong deterrent effect of knowing that discovery of their conduct will cost them \$60,000 and they will not only pay their own attorneys, but the plaintiffs’ attorney fees as well.

Without HB 2340, however, the combination of the full consideration remedy and trebled damages, will literally drive both dealers out of business for what is a relatively modest transgression of advancing gasoline prices by ten cents a gallon for a few weeks. In the above example, the full consideration remedy would allow Anywhere consumers to recover the full amount spent on gasoline, \$840,000, as their damages, which trebled amounts to **\$2,520,000** in damages, plus plaintiffs’ attorney fees. Virtually no gasoline retailer could withstand a multi-million dollar judgment for activity which netted **\$40,000** in illegal profits.

Trebled damages deters. Kansas effectively deters other unlawful activity, without a full consideration remedy, by using similar multiples of actual damages. Besides the treble damages remedy for antitrust violations, Kansas provides for up to doubling of actual damages for willful misappropriations of trades secrets, plus attorneys fees. K.S.A. 60-3322(b). For torts committed willfully, wantonly or maliciously, Kansas provides for punitive damages as a deterrent to unwanted behavior. K.S.A. 60-3702. However, even here, Kansas has placed some reasonable limits on the amount of such punitive damages, striking a balance between the need for

punishment and deterrence and the crippling effects of unbounded damages. For example, punitive damages are limited to \$5 million or 1½ times the amount of profit the defendant gained from his misconduct, whichever is greater.

Consequently, in other areas of Kansas law, exemplary damages are already limited to between 1½ times the defendant's profits (for general punitive damages) to 2 times actual damages (for trade secret misappropriation). Those are substantial deterrents to anyone. Repealing K.S.A. 50-115 would leave the trebled damages provisions in place, providing a sufficient deterrent.

Trebled Damages Promotes Settlements – Full Consideration Is Not Needed

The clear rationale behind the argument that full consideration promotes settlements is that defendants, faced with a potentially business-crippling judgment for trebled full consideration, will cave in and pay significant sums of money in cases that may have little merit or little actual injuries. For example, if the Kansas Legislature passed a law that said all successful plaintiffs alleging employment discrimination will be awarded a minimum of \$10 million dollars, you can be sure that (a) more employment lawsuits will be filed, and (b) most employment lawsuits would settle before trial, regardless of merit. Even a questionable claim, with only a 5% chance of success would have substantial settlement value if an employer knew there was a chance of a ten million dollar-plus judgment. Yet, the Kansas Legislature does not pass punitive measures solely to induce plaintiffs to file claims and then settle them.

The full consideration statute is no different. It creates misplaced incentives to bring and settle cases, even those without merit. As currently structured, antitrust plaintiffs alleging illegal pricing are permitted to recover the entire cost of the item purchased and, according to some Kansas courts, the full consideration is also trebled – meaning that the damages will be three times the price paid.

For example, if a Kansas farmer purchases a combine for \$100,000 and he alleges that the price was advanced by \$10,000 because of collusion by area farm implement dealers, he can bring a claim for full consideration and trebled damages, plus attorney fees. Under current Kansas law, he could recover the full consideration, \$100,000. Thus, if he can prove his claim, he will receive \$300,000 after trebling, plus attorneys fees. Plus, he keeps the combine.

His actual injury, if his allegations are true, is only \$10,000. He may have little, if any, evidence that anyone actually did anything wrong, but may have a “hunch” or heard rumors that there was a “deal” that prevented price competition. Even a nuisance complaint, lacking a factual basis, will have settlement value of thousands of dollars under such circumstances. Causing unmeritorious claims to be filed and then “settle” is not a proper purpose or use of the full consideration remedy.

On the other hand, if full consideration is repealed, defendants will still have strong incentives to settle valid claims for illegal pricing due to the presence of the treble damages remedy and the attorney fee provision of K.S.A. 60-161. In the above example, the dealer who has collusively increased his price by \$10,000, faces \$30,000 in trebled damages, plus paying for both sides' attorneys fees. Unless the defendant has a high probability of succeeding at trial, the trebled

damages provision will induce settlement. Indeed, in antitrust cases brought under federal statutes or in states where trebled damages are the remedy, meritorious claims routinely settle before trial. Repealing K.S.A. 60-115 will not cause more antitrust cases to go to trial, although it may cause fewer frivolous or marginal cases to be filed in the first place.

Full Consideration Harms Law Abiding Businesses

It has also been argued that K.S.A. 50-115 “is not a problem” for anyone who does not violate the antitrust laws so it should not be repealed. By that logic, seizing one’s automobile as a penalty for speeding “is not a problem” for anyone who abides by the speed limits and a \$10,000 civil penalty for bouncing a check “is not a problem” for someone who keeps their checkbook balanced.

The current penalty – trebled full consideration – does harm legitimate companies and threatens their very survival when facing such a lawsuit. They are harmed when they are forced to settle dubious claims because of the risk, however slight, of a crippling trebled full consideration judgment. An antitrust violation can occur when a misguided rogue employee engages in collusive behavior, without the knowledge or consent of the company. Should the company be forced out of business by the full consideration statute? And, being human, there are occasional lapses in judgment even by senior management of companies. They should be held accountable for antitrust violations – and they are by trebling the actual damages suffered by injured consumers.

Repeal of the full consideration statute is not an endorsement of illegal pricing activity nor does it encourage illegal behavior. Trebled damages is a powerful tool that deters violations, punishes those who violate the law, and fairly compensates consumers.