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ALERT | Helping You Do Business In Today's Legal Environment

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Hinkle has a national reputation for helping clients with every facet of business litigation. We also can help you before litigation ever arises and, in many cases, help position you to avoid litigation events through strategic planning. As a part of our service to you, we will be sending out this monthly bulletin with newsworthy items and best practice tips for your business.

Restraint on Trade

In February, a bill was introduced in the Kansas Senate to reform the Kansas Restraint of Trade Act in response to a May 2012 Kansas Supreme Court decision, addressing pricing agreements. The Bill was passed by the Senate in late February and heard in the House on March 13. The bill would adopt the Federal "rule of reason" approach to determining if a vertical pricing agreement is an invalid restraint on trade.

Pricing agreements are generally divided into two categories for legal purposes, horizontal and vertical. Horizontal pricing agreements involve an agreement between manufacturers while vertical pricing agreements involve minimum resale price agreements, or an agreement between a manufacturer and its distributors. Historically, both horizontal and vertical pricing agreements were considered a per se violation of federal antitrust law. In other words, the existence of a pricing agreement violated the law, with no analysis into the reasonableness of the agreement or its effect on the market. However, in 2007, the U.S. Supreme Court determined that vertical pricing agreements are no longer a per se antitrust violation under Federal law, while horizontal pricing agreements continue to be a per se violation. The Kansas Supreme Court decision in O'Brien affected both vertical and horizontal resale price agreements, making both a per se violation of Kansas law, regardless of the agreement's actual effect on the industry or competition.

In O'Brien, the Kansas Supreme Court held that any arrangement, contract, agreement, or combination designed to advance, reduce, or control prices, or that tends to advance, reduce, or control prices, is illegal and a per se violation of the Kansas Restraint of Trade Act. Additionally, the Court determined that a relationship rising to the level of an agreement is not necessary, nor is a showing that the arrangement succeeded in increasing prices; it is sufficient to show that the purpose was to fix prices. The decision also expressly denied the applicability of Federal case law regarding restraint of trade, such as the well-accepted federal "rule of reason." The rule of reason has been adopted by the U.S. Supreme Court and requires the factfinder to weigh all of the surrounding circumstances to determine whether a restrictive practice should be prohibited as an unreasonable restraint on competition. The Federal rule of reason looks at factors such as the relevant business, the restraint's history, nature, and affect, the market power, and market

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structure. Thus, ultimately, the Kansas Supreme Court has imposed a more strict requirement for complying with Kansas Antitrust laws than that required under federal antitrust law, which places a heavier burden of compliance on anyone who wants to do business in Kansas.

Since the O'Brien decision the Kansas Legislature has been studying whether the "rule of reason" should be adopted in Kansas and the best way to effect such a change. The proposed legislation currently advancing through the Senate and House mandates that the Kansas Restraint of Trade Act be construed in harmony with federal interpretations of antitrust law. The bill would, in effect, replace the per se standard with a the federal reasonableness standard. The bill also proposes limits on treble damages historically available, which would be limited to triple the actual damages suffered.

The Kansas legislature has proposed several bills aimed at correcting the Kansas Supreme Court decision with no successful action thus far. Soon we should know whether the House of Representatives will approve Senate Bill 124 adopting the federal rule of reason approach.

Elsewhere in the nation, most courts have published opinions or legislatures have enacted statutes that recognize that state antitrust provisions should be interpreted in line with the federal antitrust provisions. Although some states have determined that their state antitrust laws are not always interpreted in line with the federal rules, no state other than Kansas has held that vertical pricing agreements are per se violations of state antitrust law since the U.S. Supreme Court's application of the rule of reason. Sixteen states have enacted statutes specifically outlawing pricing agreements, rather than outlawing restraint on trade generally. However, as mentioned above, most states have expressly recognized that they will defer to federal law to interpret these statutes.