

NOT DESIGNATED FOR PUBLICATION

No. 108,988

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SUE O'BRIEN,
Individually and on Behalf of a Class of All Other
Similarly Situated Individuals,
Appellants,

v.

LEEGIN CREATIVE LEATHER PRODUCTS, INC.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed April 4, 2014. Reversed and remanded with directions.

Robert W. Coykendall and Will B. Wohlford, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, for appellants.

James M. Armstrong, Timothy B. Mustaine, and Jeffery A. Jordan, of Foulston Siefken LLP, of Wichita, and *Rohit K. Singla, Jeffrey Y. Wu, and Gregory M. Sergi*, of Munger, Tolles & Olson, LLP, of Los Angeles, California, for appellees.

Before HILL, P.J., LEBEN and BRUNS, JJ.

LEBEN, J.: In 2004, a class-action lawsuit was filed against Leegin Creative Leather Products, Inc.—now known as Brighton Collectibles—alleging violation of the Kansas Restraint of Trade Act for conspiring with retailers to fix prices. In May 2012, the Kansas Supreme Court reversed the grant of summary judgment in Brighton's favor and sent the case back for the district court to consider Brighton's

pending motion to decertify the class—that is, to prevent the class from proceeding as a group. In November 2012, the district court significantly modified the class by limiting it to those who bought Brighton luggage from an exclusive Brighton luggage seller, effectively excluding almost all of the original class (those who had bought any Brighton product from any retailer). On appeal, Sue O'Brien—the class' named representative—argues that the district court abused its discretion by deciding to modify the class based on erroneous legal conclusions and for failing to analyze the statutory factors of K.S.A. 2013 Supp. 60-223.

We conclude that the district court abused its discretion in several respects:

- The court based its ruling on erroneous legal assumptions under the Kansas Restraint of Trade Act, K.S.A. 50-101 *et seq.*
- The district modified the class based on the erroneous legal conclusion that the class must be structured so that all of the issues presented could be resolved with common answers. The correct standard requires a showing that questions common to the class must predominate over questions individual to each class member, a standard that acknowledges that individual questions may exist without automatically precluding class certification.
- The court failed to rigorously analyze the predominance and superiority factors under K.S.A. 2013 Supp. 60-223(b)(3)(A)-(D) as directed by the Kansas Supreme Court.

The decisions required on the motion to decertify the class are ones that the district court exercises discretion over. We will remand the case to the district court to give further consideration to the motion in accordance with the guidance set out in this opinion.

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FACTUAL AND PROCEDURAL BACKGROUND

We begin with a review of the factual background, which we summarize from the facts set out by our Supreme Court in its decision, *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 322-30, 277 P.3d 1062 (2012), the facts summarized in the district court opinion on remand, and some other relevant facts from the record before us.

Brighton Collectibles, Inc., is a designer, manufacturer, and retailer of fashion accessories and luggage. (Brighton Collectibles resulted from a merger between Leegin Creative Leather Products, Inc., and Brighton Retail, Inc., in 2005.) Brighton maintains retail stores of its own called "Brighton Collectibles" and markets its accessories to independent retailers.

The first Brighton Collectibles store opened in 1999, and there are more than 100 stores nationwide. In 2006, Brighton opened a Brighton Collectibles store in Johnson County; that store carries only Brighton products and, as far as our record reflects, is the only Brighton-owned store in Kansas. All other Brighton products in Kansas are sold through independent retail outlets—more than 100 in number, usually small boutiques or specialty stores.

Since 1997, Brighton has provided its retailers with copies of its suggested pricing and promotional policy. The pricing policy calls for retailers to sell Brighton products for an amount equal to twice the wholesale price—called the "keystone" amount—plus \$1 to \$10 depending on the item. Brighton ships its products to retailers with tags displaying its manufacturer's suggested retail price. Under the policy, retailers may discount out-of-season products and products that won't be reordered. Individual retailers decide for themselves whether to discount these products.

Four independent retailers swore in affidavits that they had no agreement with Brighton to sell Brighton products at the suggested price and that they voluntarily chose to follow the policy. Three Kansas retailers swore that they wouldn't have sold Brighton products for a lower price even without the policy.

Since 1998, Brighton has offered a "Heart Store" incentive program to certain retailers. A retailer must apply to be a Heart Store, which differs from ordinary independent retailers in that Heart Stores agree to display Brighton products in a dedicated section and to service Brighton products regardless of where they were bought. Fewer than 5 percent of Brighton's retailers are Heart Stores.

In 2001 and 2002, Brighton required the retailers to sign a Heart Store application stating, in relevant part: "I . . . agree to . . . [s]ell Brighton products for the suggested price every day, 365 days a year. You are encouraged to close-out markdown styles you do not plan to re-order as long as you do not advertise Brighton close-outs in any form of advertising." Applications since 2003 haven't included the language about the pricing or discount policy. The application indicated that Brighton reserved the right to withdraw benefits from Heart Stores that don't represent Brighton "in a positive and quality manner." There were six Heart Stores in Kansas in 2001 and 2002: Aida's (Wichita), Cummings Carousel (Dodge City), Carla's Wild at Heart (Wichita), The Etc. Shop (Lawrence), Finishings for Her (Overland Park), and Saffee's (Overland Park).

Brighton also required that retailers sign separate agreements to sell Brighton luggage. In 2003, the luggage application required a signature after this statement: "By signing this agreement you are committing to having at least 5 styles of luggage on the floor at all times, this contract supersedes all others. You

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also agree that you will sell the luggage at the suggested retail price." The language requiring an agreement to sell luggage at the suggested retail price didn't appear in luggage applications before or after 2003. Fewer than 5 percent of Brighton retailers sell Brighton luggage, and six Kansas retailers were accepted as luggage stores in 2003. Three of the six luggage stores were also Heart Stores—Aida's, Cummings Carousel, and The Etc. Shop—in addition to The Closet (Beloit), The Button Hole (McPherson), and Jean Scene, Inc. (Pittsburg).

Jerry Kohl, the Brighton owner and president, testified in a deposition that "we require everybody to charge the same price" and said that he believed that most retailers complied with the policy. Kohl testified that Brighton documented potential violations of the pricing policy and that a retailer might be terminated from selling Brighton products for willfully disregarding the pricing policy. Another Brighton executive, Laura Young, declared that Brighton had never made a comprehensive effort to discover violations of the pricing policy and stated that Brighton had never determined that any Kansas retailer violated its pricing policy.

But Brighton did maintain a file of "Pending Pricing Issues," where it kept complaints from retailers and advertisements of discounted Brighton products. Several complaints had been made and investigated:

- The file contained a retailer complaint and a newspaper ad for a competing retailer in Lawrence in 1998.
- Brighton computer logs showed that there was a complaint and investigation into possible unauthorized discounting at an Anthony retailer in 2003. A Brighton representative visited the store and determined there was no discounting.
- Another log showed a retailer complaint about a competing retailer advertising a Brighton sale in Marysville with a note that a Brighton representative would be notified.

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Young said that the policy had been enforced against retailers in states other than Kansas. Young also said that Brighton had never promised to enforce its pricing policy against other retailers as an incentive for a retailer to become a Heart Store or luggage store.

Gregory Gundlach, an expert witness for O'Brien, concluded that Brighton's pricing policy necessarily raised the prices that consumers paid for its products. Gundlach also concluded that Brighton's pricing policy limited price competition among retailers, which resulted in consumers being denied potential savings. Gundlach concluded that Brighton engaged in vertical and horizontal price-fixing that resulted in injury to consumers.

Another expert witness for the plaintiffs, Christopher Pflaum, estimated that 19 percent of Brighton's Kansas sales were discounted by 10 percent or more. Pflaum provided a chart that the district court read to indicate that 40 to 50 percent of Brighton's sales were discounted from 1 to 9 percent. William Myslinski, an expert witness for Brighton, found that 41 percent of Brighton products sold in 2004 weren't sold to any Kansas retailers the next year, which he said meant that 41 percent of all products were eligible to be discounted under the pricing policy (which allowed discounting products that weren't being reordered).

Pflaum estimated the total damages to Kansas consumers at \$29.7 million as of 2005. Pflaum's damage calculation was based on undiscounted total sales, which he estimated at 81 percent of total sales, a figure that excluded the 19 percent of sales that were discounted by 10 percent or more.

In 2004, Lindsay Hall filed a class-action suit against Leegin Creative on behalf of more than 20,000 Kansas customers. The suit alleged illegal price-fixing under the Kansas Restraint of Trade Act, citing violations of K.S.A. 50-101 and

K.S.A. 50-112. In 2005, the class was certified to include all buyers of Brighton products in Kansas: "All persons who, in the period from January 1, 1997, or to the date of trial, have purchased any Brighton product in the State of Kansas from any Brighton retailer."

In October 2006, Leegin moved for summary judgment (a ruling that given undisputed facts the plaintiffs could not win the lawsuit), alleging that Hall lacked standing because her claims were time-barred under a 3-year statute of limitations. In December 2006, the district court agreed, applying a 3-year statute of limitations and dismissing Hall as the named plaintiff because her purchases were made before 2001. Sue O'Brien was substituted as the new class representative: O'Brien had purchased a bracelet, necklace, and other jewelry with the Brighton brand in 2006.

In 2008, Brighton filed a motion for summary judgment and a separate motion to decertify the class. In July of that year, the district court granted summary judgment in favor of Brighton, finding that the plaintiffs could not prove that they suffered an antitrust injury as a matter of law. As a result, the district court determined it no longer needed to address Brighton's motion and declared it moot.

O'Brien appealed, and her motion to transfer the case from this court to the Kansas Supreme Court was granted. In May 2012, the Kansas Supreme Court reversed the district's court grant of summary judgment, reinstated the suit, and sent the case back to the district court for resolution of the pending motion for decertification of the class. *O'Brien*, 294 Kan. 318, Syl. ¶¶ 6, 10-11.

On November 15, 2012, on remand, the district court granted in part and denied in part Brighton's motion to decertify the class. Instead of decertifying the

entire class, the district court modified the class by narrowing it to include only those who had bought Brighton luggage. As a result, the modified class is: "All persons who, in the period from April 13, 2001 to the date of trial, have purchased any Brighton luggage product in the State of Kansas from any Brighton luggage store retailer."

This court granted O'Brien's application for an interlocutory appeal so that the class-certification ruling could be reviewed on appeal before the case proceeded to trial.

STANDARD OF REVIEW ON APPEAL

We review a district court's decision to certify—or decertify—a class for abuse of discretion. See *Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, 352, 292 P.3d 289 (2013); *Chamberlain v. Farm Bureau Mut. Ins. Co.*, 36 Kan. App. 2d 163, 177, 137 P.3d 108, rev. denied 282 Kan. 788 (2006). District courts receive substantial discretion in determining whether a class should be certified. *O'Brien*, 294 Kan. at 331. Similarly, because a district court retains the ability to modify the definition of a class at any time before final judgment, an order modifying the class definition is also reviewed for abuse of discretion. See *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 293 Kan. 285, 308, 263 P.3d 767 (2011); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 877-78 (11th Cir. 1986).

In abuse-of-discretion review, the district court's decision may be set aside for any of three reasons: (1) the discretionary call is so arbitrary or unreasonable that no reasonable person would agree with it; (2) the decision was made based on legal error; or (3) the decision was based on a factual error. *Critchfield Physical Therapy*, 293 Kan. at 292. We review the legal questions independently, without

any required deference to the district court. See *City of Wichita v. Denton*, 296 Kan. 244, 255, 294 P.3d 207 (2013).

Since this case involves the application of class-action legal standards, we also note that the district court's decision must show application and rigorous analysis of the factors set out in the Kansas class-action statute, K.S.A. 2012 Supp. 60-223. *Critchfield*, 293 Kan. at 292. This "rigorous analysis" may require the district court to look beyond the plaintiff's pleadings, but the factual inquiry doesn't require an actual determination of the merits of the plaintiffs' claims. See *Dragon v. Vanguard Industries, Inc. (Dragon I)*, 277 Kan. 776, 780-82, 89 P.3d 908 (2004). The failure to rigorously analyze the K.S.A. 2013 Supp. 60-223 factors is itself an abuse of discretion, as is the failure to carefully evaluate the legitimacy of the plaintiffs' allegations and evidence supporting class treatment. *Farrar v. Mobil Oil Corp.*, 43 Kan. App. 2d 871, 876, 234 P.3d 19, rev. denied 291 Kan. 910 (2010). But if the district court evaluates the proper factors, its decision will be granted deference on appeal. *O'Brien*, 294 Kan. at 360.

A NOTE ABOUT THE ANTITRUST LAW APPLIED IN THIS CASE

Before we address the issues before us, we make one additional note about the Kansas law applied here. In direct response to the Kansas Supreme Court's earlier decision in this case, the Kansas Legislature made significant amendments to the Kansas Restraint of Trade Act, effective April 18, 2013. That statute now allows for "reasonable restraint of trade" and has declared that its provisions will be "construed in harmony" with the United States Supreme Court's antitrust decisions. K.S.A. 2013 Supp. 50-163(b), (c). In addition, the legislature repealed K.S.A. 50-108 and K.S.A. 50-115, the statutes that provided for actual damages and what are called full-consideration damages, which we will discuss later in this opinion. See L. 2013, ch. 102, sec. 7. And the legislature declared that its new

provision allowing reasonable restraint of trade should apply retroactively except for cases, like this one, that were pending before April 18, 2013. K.S.A. 2013 Supp. 50-164.

The end result is that most of *O'Brien's* precedential value is limited to this case and any other case that was already pending before April 18, 2013. Accordingly, our opinion in this case will have very limited precedential value going forward regarding issues arising under the Kansas Restraint of Trade Act. We provide this note as a caution to the reader: We are discussing the law as it stood before April 18, 2013, not afterward. This may also suggest an end date for membership in any class in this case, but that is not an issue presented in this appeal.

ANALYSIS

The district court decided to analyze the case by separating potential claims by who the seller was (looking separately at Heart Store sellers, luggage sellers, and all other sellers) and by whether the products were sold at the manufacturer's suggested retail price or at some discount. For products sold at the suggested price, the district court also looked separately at transactions in which the price *could* have been discounted, even if it wasn't. We will start, then, with the district court's conclusions regarding these different groups:

- For people buying from luggage sellers at the suggested retail price, the district court noted that "the luggage store agreements did not allow for any discounting." Accordingly, the court concluded that "the claims involving luggage store purchases depend on common contentions [that] can be resolved with common answers," and those purchasers remained in the class.

- For people buying from Heart Stores at the suggested retail price, the district court concluded that Brighton had "a defense with respect to items that were eligible for discount" and that "there does not appear to be a way to segregate these purchases." The court decided to remove from the class those plaintiffs who had bought items at full retail price from Heart Stores.
- For people buying from other independent sellers (the vast majority of the stores selling Brighton products) at the suggested retail price, the district court noted that Brighton did not have a signed agreement with each of these sellers to sell the products at the suggested price, and the defendants have submitted affidavits from some retailers "that they set the price . . . independently" of Brighton's pricing policy. The court said that the "pertinent question" before it was "whether the Plaintiff can prove with *common evidence* that *all* retail sales of Defendant's products at [the suggested retail price] at *all* non-Heart Store and non-luggage sellers was the result of an unlawful combination" under the Kansas Restraint of Trade Act. Since Brighton had presented affidavits from some retailers saying that they weren't part of any illegal agreement, the court concluded "that issues central to the validity of the Plaintiff's class-wide claim that the Defendant's [pricing] policy was [an illegal one] as to all retailers cannot be resolved with one answer." The district court removed those who had made purchasers from these other independent sellers from the class.
- Finally, for people who bought any product at less than the suggested retail price (*i.e.*, purchases at a "discount"), the court said that there was a "big difference between an item that was sold at 10% off [the suggested price], and an item that was sold for less than the retailer's wholesale cost." The court found that there was "no way to determine with common evidence which purchase[s] at discount resulted in anti-trust injury." The district court removed those who had made purchases at anything less than the suggested retail price from the class.

The district court concluded that "[t]he only way for the Court to structure a class such that the issues presented are capable of resolution with common answers is to limit the class to those persons who purchased any Brighton luggage product in the State of Kansas from any Brighton luggage store retailer."

The district court based its analysis regarding these subgroups upon some assumptions. Among the most important are:

- That purchasers have no antitrust injury if they bought products at any price less than the suggested price.
- That class members cannot prove any damage if a retailer offered some discount from the suggested price.
- That purchasers cannot present common evidence of their claim if some retailers say that they set prices independently.
- That the case can proceed as a class action only if all of "the issues presented are capable of resolution with common answers."

As a matter of law, each of these assumptions is in error, and the district court's decision—based on significant but erroneous legal rules—is therefore an abuse of discretion. In addition, even beyond these incorrect presumptions, the district court has not performed the rigorous analysis that's required of the factors relevant to class certification.

I. The District Court's Analysis Is Based on Erroneous Legal Propositions.

We begin our legal analysis by noting that more than one antitrust statute provides a basis for recovery by class members. As our Supreme Court explained, the plaintiffs have more than one legal theory—and more than one statute authorizing recovery—upon which they may proceed. See *O'Brien*, 294 Kan. at 334-41. Liability may arise under either K.S.A. 50-101 or K.S.A. 50-112, and each liability provision has its own provision for damages. See K.S.A. 50-108; K.S.A.

50-115; see also K.S.A. 50-161(b) (also providing a cause of action against anyone causing "damage or injury" by violation of Kansas Restraint of Trade Act).

K.S.A. 50-108 provides that "any person that may be damaged" by an illegal agreement under K.S.A. 50-101 may recover "such damages sustained, together with reasonable attorney fees." K.S.A. 50-115 provides that "any person injured or damaged" by an illegal arrangement or agreement under K.S.A. 50-112 may recover "the full consideration or sum paid by such person for any goods, wares, merchandise and articles included in or advanced or controlled in price by such combination . . . [in restraint of trade]."

There's an obvious difference between the two recovery provisions: While K.S.A. 50-108 provides for recovery of "damages sustained" if a person has been "damaged," K.S.A. 50-115 provides that any person "*injured or damaged*" may recover the amount paid for goods sold in violation of K.S.A. 50-112.

The use of a different term ("injured") in K.S.A. 50-115 is meaningful. K.S.A. 50-101 and 50-108 allow someone who has been "damaged" to recover the "damages sustained" from price-fixing activity. K.S.A. 50-112 and K.S.A. 50-115 allow someone who has been "injured or damaged" by arrangements "designed" to or that "tend to" fix prices to recover the "full consideration or sum paid" for the goods.

If the class members can show a violation of K.S.A. 50-112, then they do not have to show that the price they paid was specifically higher or lower than it otherwise might have been—K.S.A. 50-115 provides that they may recover the purchase price paid for the goods. Calculation of the amount paid doesn't require that a fact-finder determine what the price would have been in the absence of a

violation of K.S.A. 50-112. See *In re Western States Wholesale Natural Gas*, 633 F. Supp. 2d 1151, 1159-60 (D. Nev. 2007).

Nor does K.S.A. 50-112 require proof of a specific agreement with every seller to charge a fixed price for every product. K.S.A. 50-112 specifically contains very broad language covering agreements that merely "tend to" limit competition:

All arrangements, contracts, agreements, trusts, or combinations between persons made with a view or which tend to prevent full and free competition in the . . . sale of articles . . . and all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost . . . to the consumer of any such products or articles . . . or any other services, are hereby declared to be against public policy, unlawful and void."

In its decision, our Supreme Court confirmed that under this section, "a plaintiff does not have to show a relationship rising to the level of an agreement. . . . [I]t is enough to show that the arrangement is 'designed to' or 'tends to' control prices; again, *a plaintiff does not have to show that the arrangement actually succeeds in increasing prices.*" (Emphasis added.) *O'Brien*, 294 Kan. at 335.

When the case was before our Supreme Court, it determined that the plaintiffs had presented sufficient evidence to avoid summary judgment. See 294 Kan. at 336-41. The court recognized that the plaintiffs had to show both a violation of either K.S.A. 50-101 or K.S.A. 50-112 and also "that the class has been injured or damaged by Brighton's pricing combination or arrangement." 294 Kan. at 338. The court's discussion of whether the class had been injured or damaged did not differentiate between those two concepts and did not further discuss the differences between K.S.A. 50-108 and K.S.A. 50-115. As a practical

matter, if the plaintiffs could show *damage*, that would satisfy both K.S.A. 50-108 (allowing recovery of "damages sustained" for anyone who was "damaged") and K.S.A. 50-115 (allowing recovery of the price paid for anyone "injured or damaged"), since damages makes a person eligible to recover under either statute.

In that context, the court concluded that there was "adequate circumstantial evidence that consumers actually paid prices for Brighton goods inflated by its pricing combinations or arrangements with retailers." 294 Kan. at 340-41. Accordingly, our Supreme Court reversed the district court's grant of summary judgment to Brighton.

But the Supreme Court's lack of separate analysis of the differences between K.S.A. 50-108 and K.S.A. 50-118 in this section of its opinion does not eliminate class members' potential for recovery even if the prices were *not* affected by the alleged attempt to control them. So long as there was an arrangement "'designed to' or 'tend[ing] to' control prices," 294 Kan. at 335, there's a violation of K.S.A. 50-112 and that makes recovery of the price paid for the goods available under K.S.A. 50-115. The district court's ruling does not acknowledge this possibility.

Brighton argues that the Supreme Court's statement referenced above—that "consumers actually paid prices for Brighton goods inflated by its pricing combinations or arrangements with retailers"—means that the plaintiffs "must prove injury to each class member." While that's mostly true—to recover, class members must have *either* damage or injury—Brighton really argues from the quoted statement that the class members must show *damage* from sales at a fixed or artificially inflated price. Under K.S.A. 50-112 and K.S.A. 50-115, however, they need not do so. See *O'Brien*, 294 Kan. at 335 ("a plaintiff does not have to show that the arrangement actually succeeds in increasing prices").

Let's suppose, though, that the plaintiffs choose to proceed at trial under K.S.A. 50-101 and K.S.A. 50-108 (which allow those "damaged" to recover "damages sustained"), rather than under K.S.A. 50-112 and K.S.A. 50-115. Even in that case, the district court has once again "set[] too high a bar" for what the plaintiffs must show. See *O'Brien*, 294 Kan. at 340.

- Even if some items were discounted, there is still evidence that the discount was from an artificially inflated base price. In a price-fixing case, purchasers may still be found to have suffered damages even if they paid at a discount, so long as the alleged conspiracy resulted in an artificially inflated list price. See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 287 F.R.D. 1, 61 (D.D.C. 2012); *In re Univ. Serv. Fund Tel. Billing Practices Lit.*, 219 F.R.D. 661, 675-76 (D. Kan. 2004); *In re Commercial Tissue Products*, 183 F.R.D. 589, 595 (N.D. Fla. 1998); *In re Indus. Diamonds Antitrust Litigation*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996).
- What of situations where items were *not* discounted but individual retailers indicated that they had the ability to discount them? The district court excluded such claims because it concluded that Brighton had a viable defense "with respect to items that were eligible for discount." Once again, if there is an antitrust claim when discounts *are* given—because they were made from an artificially inflated price—then a claim should exist when discounts *are not* given but the price was artificially inflated. This would be the case even though an individual retailer said it had authority to discount the product, so long as there was some violation of K.S.A. 50-101 or K.S.A. 50-112 in connection with the setting of the price. See *In re Univ. Serv.*, 219 F.R.D. at 675-76; *In re Indus. Diamonds*, 167 F.R.D. at 383.

Brighton argues that the district court's exclusion of certain products was similar to what the federal court did in *In re Indus. Diamonds*, 167 F.R.D. at 383-

84, where the court denied class certification for customers who bought products for which the defendant didn't set list prices. But the products in that case were developed specifically for those customers, and the defendant had set prices based on production costs and individual negotiations with each purchaser. In other words, the excluded products in *In re Indus. Diamonds* really had no list price. That's not the case here—none of the items at issue were custom made for specific customers. Rather, the evidence suggests that Brighton's suggested price formed the basis for both discounted and nondiscounted sales.

We turn next to the requirements for class certification, which also formed part of the stated basis for the district court's ruling. One of the requirements for class certification is predominance, *i.e.*, that questions of law or fact common to class members predominate over questions affecting only individual members. K.S.A. 2013 Supp. 60-223(b)(3). The predominance requirement means that common questions must be more significant than individual ones, but it does not require that *all* issues in the suit have common answers and common evidence.

The district court went off track on this point based on a quotation from our Supreme Court's decision in *Critchfield*. Significantly, though, it took language from *Critchfield* that actually talks about a separate class-action requirement—commonality—and then applied it to consideration of the predominance requirement:

"The predominance inquiry of K.S.A. 60-223(b)(3) 'tests whether proposed classes are sufficiently *cohesive* to warrant adjudication by representation.' *Farrar*, 43 Kan. App. 2d at 875. 'Thus, predominance "require[s] more than a common claim.'" *Id.* at 876, quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 187 (3rd Cir. 2001). Plaintiff must 'demonstrate that the proposed class members have suffered the same injury and their claims must depend on a common contention that is capable of class-wide

resolution, meaning that determination of its validity will resolve an issue that is central to the validity of each of the claims with one answer.' *Critchfield*, 293 Kan. at 295, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)."

The district court's quotation from *Critchfield* omitted the words that show a different context: "*Commonality requires a plaintiff to demonstrate that the proposed class members have suffered the same injury*" (Emphasis added.) 293 Kan. at 295. And *Critchfield*'s summation derives directly from the U.S. Supreme Court's discussion of commonality. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (beginning discussion with "[t]he crux of this case is commonality"). Commonality and predominance aren't the same thing. See *Farrar*, 43 Kan. App. 2d at 875-76 ("The predominance inquiry . . . [is] . . . a standard 'far more demanding' than the commonality requirement of Fed. R. Civ. Proc. 23[a]."); accord *Wal-Mart*, 131 S. Ct. at 2556 (acknowledging that commonality and predominance inquiries shouldn't be blended); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009) (observing that "the district court improperly conflated the commonality determination with a review for predominance"); 1 Newberg on Class Actions §3:27, pp. 259-60 (5th ed. 2011) ("Class actions logically can, and sometimes do, easily surmount the relatively low bar of commonality while falling short of the more stringent standard for predominance.").

Several of the district court's key conclusions tied back to the commonality language quoted from *Critchfield*, with the district court interpreting that to require that all claims be resolved with "one answer":

- "As such, the claims involving luggage store purchases depend on common contentions which can be resolved with common answers."

- "The point being that issues central to the validity of the Plaintiff's class-wide claim that the Defendant's [retail price] policy was more than a unilateral policy as to all retailers cannot be resolved with one answer."
- "Consequently, although it might be possible to segregate discount purchases from [suggested retail price] purchases, there is no way to determine with common evidence which purchase at discount resulted in anti-trust injury."
- "The only way for the Court to structure a class such that the issues presented are capable of resolution with common answers is to limit the class to those persons who purchased any Brighton luggage product in the State of Kansas from any Brighton luggage store retailer."

Commonality requires only one common contention that is capable of classwide resolution. *Critchfield*, 293 Kan. at 295. At the class-certification stage, a plaintiff isn't even required to prove that all or most class members suffered injury. *Anderson Office Supply v. Advanced Medical Assocs.*, 47 Kan. App. 2d 140, 158-59, 273 P.3d 140 (2012). But commonality was not contested by Brighton by the time the case came back to the district court. As our Supreme Court noted in *O'Brien*, Brighton challenged on appeal only the district court's finding that the class met the predominance requirement. 294 Kan. at 359.

What the district court did require—that all issues be capable of resolution with common answers—simply isn't the law. See *Critchfield*, 293 Kan. at 297 (recognizing that some class members may eventually be determined to fall within statutory liability exceptions); *Dragon I*, 277 Kan. at 793 (noting that "the presence of individual questions, while tending to diminish the weight of class facts, does not necessarily defeat a prima facie showing that the class prerequisites are satisfied"); *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (noting that predominance requirement is met where common issues "are more substantial"

than issues subject to individualized proof); 1 Newberg on Class Actions § 3:20, p. 237 ("Rule 23[a][2] does not require that all questions of law or fact raised in the litigation be common.").

In the antitrust context, the United States Court of Appeals for the Seventh Circuit considered a similar issue in *Messner v. Northshore University Health-System*, 669 F.3d 802 (7th Cir. 2012). The district court in *Messner* had denied class certification based on the court's conclusion that predominance wasn't shown because hospital patients couldn't prove that the defendant hospital raised its prices at uniform rates, affecting all class members to the same degree. The Seventh Circuit reversed, holding that uniformity among class members wasn't required for class certification. 669 F.3d at 808 ("In essence, it is important not to let a quest for perfect evidence become the enemy of good evidence."). The court said that predominance only required that common evidence could show that most of the class suffered some antitrust injury. 669 F.3d at 818. The court concluded that "the district court asked not for a showing of common questions, but for a showing of common answers to those questions. Rule 23(b)(3) does not impose such a heavy burden." 669 F.3d at 819.

In effect, the district court denied class certification to most of the class because of the mere existence of one or more individual questions. That's contrary to the law and, thus, an abuse of discretion.

II. *The District Court Abused Its Discretion by Failing to Rigorously Analyze Required Class-Certification Factors.*

We have already noted that a district court must rigorously analyze the statutorily established factors for determining whether a class should be certified

(or, in this case, decertified). See *Critchfield*, 293 Kan. at 292. In its earlier opinion in this case, our Supreme Court recognized that it had explained the rigorous-analysis requirement after the district court's initial class-certification ruling (perhaps explaining the district court's lack of findings), but the court concluded that the district court's inadequate findings made it impossible to provide meaningful appellate review. *O'Brien*, 294 Kan. at 361-62. The court returned the case to the district court for further consideration of the motion to decertify the class, giving "the parties and the district judge . . . the opportunity to ensure creation of a record adequate to support any future appropriate appellate review." 294 Kan. at 362. The court also specifically directed that the district court's consideration be "under the guidance of this court's opinions in" *Dragon I*, 277 Kan. at 778-93, and *Dragon v. Vanguard Industries (Dragon II)*, 282 Kan. 349, 360-64, 144 P.3d 1279 (2006). *O'Brien*, 294 Kan. at 363.

K.S.A. 2013 Supp. 60-223(a) requires generally that a class action may proceed only if four basic requirements are met: (1) numerosity (claims so numerous that joinder is impracticable), (2) commonality (common questions of law or fact), (3) typicality (representative party's claims are typical of others' claims), and (4) adequate representation (named plaintiff or defendant will adequately protect interests of class members). In addition, in our case, the court must also determine that the requirements set out in K.S.A. 2013 Supp. 60-223(b)(3)—predominance and superiority—have been met:

"(b) *Types of class actions.* A class action may be maintained if the prerequisites of subsection (a) are satisfied and if:

....

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A)

The class member's interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

By its language, this statute requires that the court find that common questions predominate (the predominance requirement) and that handling the suit as a class action is superior to other methods of handling the case (the superiority requirement). The statute then provides four "matters" that are pertinent to "these findings." Brighton argues that these four subjects relate only to the superiority requirement, but the use of the plural "findings" indicates that the four listed factors relate to the trial court's consideration of both predominance and superiority. See *Dragon II*, 282 Kan. at 355 ("K.S.A. 2003 Supp. 60-223(b)(3) includes a list of factors pertinent to a court's examination of the predominance and superiority requirements: [quoting factors (A)-(D)]." [Emphasis added.]); *Dragon I*, 277 Kan. at 778-79 (same); accord 7AA Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d §1780 (2005).

Brighton does argue that O'Brien has waived any challenge to the adequacy of the district court's findings by failing to ask that court for more findings. See K.S.A. 2013 Supp. 60-252(b). Generally, there must be an objection to inadequate findings to give the district court the opportunity to correct them, and without an objection, omissions in findings generally aren't considered on appeal. *Dragon II*, 282 Kan. at 356. But in *Dragon II* the court concluded that an appellate court still may consider remand if the lack of specific findings precludes meaningful review. 282 Kan. at 356. Moreover, we note that Brighton didn't object to the adequacy of the district court's findings in its initial, 2005 class-certification order, yet it was deemed not to have waived that issue on appeal. *O'Brien*, 294 Kan. at 361-62.

In the context of this case, we find the district court's findings inadequate to meaningfully review its exercise of discretion in decertifying most of the class. We have already indicated that its decision was based on several assumptions that were incorrect as a matter of law. Once those bases for its decision are eliminated, there's not much left for us to review.

Generally, a district court should try to address the four factors set out in K.S.A. 2013 Supp. 60-223(b)(3)(A)-(D) as part of its rigorous analysis. A complete failure to address the factors would be an abuse of discretion. See *Vega*, 654 F.3d at 1277-78; *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). In the context of this case, our Supreme Court expressly noted that the district court's 2005 certification decision had not directly addressed "the [four] statutory factors" in K.S.A. 60-223(b)(3). *O'Brien*, 294 Kan. at 361. Clearly, some of them favor O'Brien, such as the interest of class members in pursuing separate actions: It's unlikely that any class member would pursue an individual lawsuit because it wouldn't be economically feasible to make such a small claim. See *Critchfield*, 293 Kan. at 301; 2 Newberg on Class Actions § 4:69 (5th ed. 2012). On remand, the district court should consider all of the factors, and the court should explain how those factors relate to the court's decision.

Whether to grant Brighton's motion to decertify the class is a discretionary call, and it's the district court, not this court, that must exercise that discretion. We therefore reverse and remand the case to the district court to reconsider the matter, based upon the guidance of this opinion.

The district court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.