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COMMONWEALTH OF PENNSYLVANIA  
HOUSE OF REPRESENTATIVES  
COMMITTEE ON JUDICIARY

In re: HB 2376 - Antitrust Law

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Stenographic report of hearing held  
in Room 140, Majority Caucus Room,  
Main Capitol Building, Harrisburg, PA

Monday,  
April 30, 1990  
10:00 a.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN  
Hon. Gerald Kosinski, Subcommittee Chairman on  
Courts

MEMBERS OF COMMITTEE ON JUDICIARY

Hon. Michael Bortner	Hon. John Pressmann
Hon. Lois S. Hagarty	Hon. Robert Reber
Hon. Richard Hayden	Hon. Karen A. Ritter
Hon. Paul McHale	Hon. Michael Veon
Hon. Nicholas B. Moehlmann	

Also Present:

Hon. John Broujos, Prime Sponsor  
David Krantz, Executive Director  
William Andring, Chief Counsel  
Ken Suter, Republican Counsel  
Katherine Manucci, Staff

Reported by:  
Ann-Marie P. Sweeney, Reporter

ANN-MARIE P. SWEENEY  
536 Orrs Bridge Road  
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1                   CHAIRMAN CALTAGIRONE: I'd like to open  
2 up today's hearing on House Bill 2363. Prime sponsor  
3 John Broujos is with us.

4                   And before we do that, the panel of  
5 members that are present, if they'd like to introduce  
6 themselves. Starting to my left, Jack.

7                   REPRESENTATIVE PRESSMANN: Representative  
8 John Pressmann, Allentown.

9                   REPRESENTATIVE BROUJOS: John Broujos,  
10 not a member of the committee here, sponsor of the  
11 bill.

12                   CHIEF COUNSEL ANDRING: Bill Andring,  
13 Democratic Counsel to the committee.

14                   CHAIRMAN CALTAGIRONE: Tom Caltagirone.

15                   REPRESENTATIVE MOEHLMANN: Nick  
16 Moehlmann, Lebanon County, Minority Chairman of the  
17 committee.

18                   MR. SUTER: Ken Suter, Republican  
19 Counsel.

20                   REPRESENTATIVE HAYDEN: Representative  
21 Dick Hayden, Philadelphia.

22                   CHAIRMAN CALTAGIRONE: John, if you'd  
23 like to open up with some remarks about the bill and  
24 then we'll start with our first witness.

25                   REPRESENTATIVE BROUJOS: Thank you, Mr.

1 Chairman.

2 Antitrust legislation has been on the  
3 Federal books since about 1890. There was a Sherman  
4 Antitrust Act, subsequently followed by a Clayton  
5 Antitrust Act. Prior to that there were common law  
6 decisions which generally set the tone for policy of  
7 opposing restraints of trade and monopolistic  
8 practices. This comes out of a very basic American  
9 drive, and that is to be fair, to compete, and to have  
10 price and other economic factors determined by the  
11 marketplace. Consequently, any restraints of that  
12 trade and that market determination and of the fair  
13 exchange of products and prices in the market is really  
14 anathema to the American system, and I would think  
15 would be supported, conceptually at least, by the  
16 business community and all Americans.

17 The fact that we're the only State that  
18 does not have a bill I think first puts on us the  
19 burden not to show the need for it but to show why we  
20 don't have one. The second thing is that there's an  
21 old expression about closing the barn door after the  
22 horse is gone. With respect to need, there's really a  
23 consideration of what problems would come down the road  
24 that we wouldn't be prepared for because we do not have  
25 a State act.

1                   This act generally is patterned after the  
2 other States, the Uniform Act. The matter has been  
3 studied by my office for about 2 1/2 years. We have  
4 documentation from other States as to the need for  
5 State action. At the same time, an antitrust act is  
6 both simple and complex - simple in its concept,  
7 complex in the number of areas in which there may be  
8 problems encountered and in which it is implemented.  
9 And I think the committee should proceed with, shall we  
10 say, all due caution in the evaluation of the bill and  
11 receive as much input as possible.

12                   Thank you for the opportunity to open.

13                   CHAIRMAN CALTAGIRONE: Thank you,  
14 Representative Broujos.

15                   For the record, I'd like to submit the  
16 official copy from the Attorney General, Ernie Preate,  
17 to the committee about this piece of legislation and  
18 I'd like to read it into the record. Each of the  
19 members have a copy of it, I think, in their packet.

20                   "Dear Chairman Caltagirone:

21                   "By reason of earlier commitments not  
22 permitting me to be in Harrisburg, I am unable to  
23 testify at the House Judiciary Committee hearing April  
24 30, 1990, on House Bill 2376 which would be known as  
25 the Pennsylvania Antitrust Act.

1                   "However, I wish to let you know of my  
2 strong support for a Pennsylvania antitrust statute. I  
3 commend you and other members of the House Judiciary  
4 Committee for your efforts to examine into the need for  
5 a Pennsylvania antitrust statute.

6                   "Pennsylvania does not have the subpoena  
7 power needed to investigate price-fixing and other  
8 trade restraints. Although the Commonwealth, through  
9 the Office of the Attorney General, may now act in  
10 limited circumstances against price-fixing, unlawful  
11 mergers, and other restraints of trade, the legislature  
12 has not thus far provided the Office of Attorney  
13 General with the necessary investigative subpoena  
14 powers to secure the facts relevant to these trade  
15 restraints. Information which we have obtained for the  
16 cases we have brought was either voluntarily provided  
17 or publicly available. There have been many other  
18 matters in which the investigations strongly indicated  
19 price-fixing or other restraints of trade, but we could  
20 not get the needed facts. Thus, the ability to  
21 investigate is a major reason to enact a Pennsylvania  
22 antitrust statute.

23                   "Competition, which encourages efficiency  
24 and low prices, is recognized by everyone as the  
25 keystone of this nation's economic strength -- and

1 competition is the essence of what the antitrust laws  
2 require. It is in my judgment that a State as large  
3 and as important as Pennsylvania should have the  
4 capacity to protect itself against unlawful efforts to  
5 subvert competition -- which only its own antitrust  
6 statute can provide.

7 "I hope my comments will assist in your  
8 deliberations. I support your efforts to enact a  
9 Pennsylvania Antitrust Act. Please let me know if in  
10 any way my office can supply you with further  
11 information you believe will be helpful."

12 Signed, Ernie Preate, Attorney General of  
13 Pennsylvania. And I submit that for the record.

14 (See Appendix for a copy of letter from  
15 Attorney General Preate.)

16 CHAIRMAN CALTAGIRONE: I'd like to start  
17 off with the first testifier, Mr. Judah Labovitz,  
18 Pennsylvania Chamber of Business and Industry.

19 MR. LABOVITZ: Good morning, gentlemen.  
20 My name is Judah Labovitz. I'm an attorney in  
21 Philadelphia, and I am testifying this morning on  
22 behalf of the Pennsylvania Chamber of Business and  
23 Industry. We appreciate very much the opportunity to  
24 testify with respect to House Bill 2376.

25 I will be making some comments that go to

1 specific provisions of the bill, but before I do so, I  
2 do want to state reasons why the Chamber believes that  
3 this legislation really is unnecessary and probably  
4 even unwise in the context of antitrust regulation.

5 In 1990, it is hard for me to imagine  
6 virtually any area of economic activity that does not  
7 touch upon the interstate commerce powers of the  
8 Federal government and therefore would not be subject  
9 to the Federal antitrust laws. And frankly, when I was  
10 asked to testify I went back through my mind over the  
11 cases in which I've participated both as a plaintiff's  
12 counsel and a defense counsel over 27 years. It was  
13 hard for me to come up with a single case where the  
14 presence of a State antitrust law would have changed  
15 the result in any meaningful way or the absence of such  
16 a law would have impacted that case. The fact of the  
17 matter is that almost everything we see and do today is  
18 within the realm of Federal regulation.

19 A couple of examples, I can think of  
20 nothing that's really in a sense more local than the  
21 collection and disposition of trash, and yet there are  
22 literally dozens of antitrust cases pending across the  
23 United States in the Federal courts having to do with  
24 alleged collusive behavior in the collection and  
25 disposition of trash.



1                   Just a couple of weeks ago in  
2 Philadelphia a criminal case was brought in the Federal  
3 court alleging price-fixing among retail jewelers in  
4 their bidding for consignment auction merchandise.  
5 Again, a very local type of activity, and I could go on  
6 with other examples.

7                   I am aware, and it doesn't take much  
8 reading of the press not to be aware, of the grave  
9 concern that arose this past winter here in  
10 Pennsylvania having to do with the rather sharp price  
11 increase in home heating oil during the very cold  
12 period that we had back in December and January. But I  
13 think it's very important to note that that was not,  
14 and I underscore the word "not," a local phenomenon  
15 limited to this Commonwealth, or even to certain parts  
16 of this Commonwealth. In fact, the increase in home  
17 heating oil prices was felt up and down the east coast.  
18 Public statements were made by Governor Dukakis in  
19 Massachusetts about the problem, the Governor of  
20 Connecticut spoke out about the problem. There was  
21 also a subject of discussion and concern among the  
22 members of the National Association of Attorneys  
23 General, of which our own Attorney General is a member,  
24 and after discussing it they issued a press statement,  
25 and that press statement included this following

1 comment, which I'm quoting, "the federal government is  
2 best equipped to handle the many distribution and  
3 pricing problems that cut across state and regional  
4 lines and to address the complex network of federal  
5 laws and regulations governing the industry," close of  
6 quote.

7 In the same news report in which that  
8 quote was contained there was also a report that the  
9 Antitrust Division of the Department of Justice of the  
10 United States under the leadership of Assistant  
11 Attorney General James Rill has initiated an  
12 investigation under the antitrust laws into the home  
13 heating oil crisis that occurred this past winter, so  
14 that that issue is by no means being ignored at the  
15 Federal level, and more importantly, by having it  
16 addressed at the Federal level, problems that have to  
17 cross State lines on the one hand and problems that run  
18 into Federal regulatory policy in terms of energy  
19 policy on the other will all be accommodated.

20 Although it is not contained in my  
21 statement, when I heard the letter from Attorney  
22 General Preate I was reminded also of two other cases  
23 that might be of interest to the committee. Many  
24 members of the committee may be aware of the litigation  
25 that is pending in the northern district of California

1 in the Federal court involving the insurance industry  
2 and claims about the way in which policies were written  
3 in the insurance industry, particularly in terms of  
4 environmental coverage. I don't want to comment on the  
5 merits of the case because I am not familiar with the  
6 merits of it, but suffice it to say that those cases  
7 were brought, in the first instance, by Attorneys  
8 General from across the United States and that the  
9 Commonwealth of Pennsylvania is one of the named  
10 plaintiffs in that litigation, regardless of the fact  
11 that we don't have our own antitrust law.

12           Likewise, several years ago a very good  
13 friend of mine, Gene Waye, who is in the Attorney  
14 General's Office and is responsible for much of their  
15 antitrust effort, someone who I practiced with when he  
16 was in Philadelphia for many years, was very involved  
17 in that piece of legislation, again in the absence of  
18 any legislation, involving the dental community in  
19 Pennsylvania on the claim that the dental community was  
20 not very receptive to certain types of third party  
21 payment procedures and were organized to resist it, and  
22 that litigation was brought and eventually a settlement  
23 was entered into by the Commonwealth. So the  
24 Commonwealth has had occasion where it's been able to  
25 do what it needs to do even in the absence of any

1 legislation.

2                   It was interesting to me, in looking at  
3 Bill 2376, that unlike much legislation that I'm  
4 familiar with it does not contain a statement of  
5 purpose or a statement of legislative findings. And I  
6 believe that when you look at the bill, there really is  
7 nothing in the bill that is new or different in terms  
8 of the definition of the offenses which it would create  
9 that are not already covered by Federal antitrust law.  
10 I just haven't been able to see any perceived gap in  
11 the coverage in terms of price-fixing or monopolization  
12 that is not in Federal law, and much of the language of  
13 the bill is essentially a restatement of the language  
14 taken from the Sherman Act and the Clayton Act.

15                   Meanwhile, I think that from the point of  
16 view of the business community there is a great fear  
17 that this will be simply a double-whammy, if you will.  
18 Keep in mind that at the Federal level there are very  
19 specialized agencies of government to deal with  
20 antitrust problems and they have quite a deal of  
21 sophistication to deal with those problems which  
22 involve essentially rather complex economic issues.  
23 You have a separate division in the Antitrust Division  
24 of the Department of Justice which has not only  
25 attorneys on its staff but also economists,

1 accountants, and access to the Federal Bureau of  
2 Investigation in order to undertake investigations.  
3 You also have an entire agency of the Federal  
4 government that is devoted exclusively to antitrust in  
5 the Federal Trade Commission. Again, staffed with  
6 economists as well as lawyers, accountants, and other  
7 people knowledgeable about the issues that will come  
8 up.

9 I must tell you, in all candor, although  
10 I have great respect for those members of the Bar who  
11 have become public servants and serve as district  
12 attorneys in this Commonwealth, I don't believe that  
13 they have in their offices the capacity or the  
14 familiarity to deal with the kind of issues that will  
15 come up in the antitrust field, and with all due  
16 respect to the bench as well, I have grave doubts that  
17 the Commonwealth Court is capable, as presently  
18 constituted, to deal with such issues as predatory  
19 pricing below variable cost, the free rider problem,  
20 and many of the other issues that are the hot topics of  
21 the Chicago School of Economics which are influencing  
22 Federal antitrust policy. It is difficult enough for  
23 Federal judges, who get a fairly steady diet of this  
24 kind of stuff, to keep up with the movement of the law.  
25 It would seem to me extremely difficult for a local

1 district attorney and the Commonwealth, which is given  
2 jurisdiction by this bill, to do the same.

3 I should also point out that I have  
4 never, to my recollection, been involved in any  
5 situation where I felt that there was any political  
6 misuse or abuse for publicity purposes of the Federal  
7 antitrust laws. However, I am quite aware of instances  
8 in New York and California in particular, both of which  
9 have antitrust laws, in which there have been  
10 well-orchestrated news conferences announcing State  
11 initiatives in the antitrust area, quite a bit of  
12 brouhaha involved and even some business bashing and  
13 then the matters were never heard of again, and I have  
14 had that personal experience.

15 Also, I think that at this day and age  
16 antitrust legislation at the State level, particularly  
17 to the extent that it duplicates in large part what  
18 already exists at the Federal level, is not consistent  
19 with the philosophy of making this Commonwealth an  
20 attractive place for business. That's not to suggest,  
21 and I would never suggest, that price-fixing or  
22 monopolization are the kinds of things we have to allow  
23 to be conducive to business. Certainly not. But the  
24 fact of the matter is that conduct is already regulated  
25 once, and even twice in some instances, at the Federal

1 level given the overlapping jurisdiction between the  
2 Justice Department and the Federal Trade Commission.  
3 For example, both of which have the ability to bring  
4 prosecutions and action on the area of monopolization,  
5 price-fixing, mergers and acquisitions, and the like.  
6 It would seem to me to add still another level of  
7 supervision through State antitrust legislation which  
8 adds nothing really substantive to it, simply would  
9 further burden the competitiveness of local industry  
10 abroad which faces industries in other countries which  
11 do not even have one level of antitrust supervision,  
12 and we have two and three already.

13 I am aware that there is one area in this  
14 bill which is a variation from Federal law and does  
15 need to be addressed, and that is Section 9(a) of the  
16 bill. Section 9(a) of the bill is the State's answer,  
17 I assume, to what is known in antitrust parlance as the  
18 Illinois Brick Rule. Illinois Brick was a decision by  
19 the Supreme Court of the United States a number of  
20 years ago in which it held that indirect purchasers,  
21 that is people who did not deal directly with the  
22 antitrust violator, did not have standing in the  
23 Federal court to bring an action for damages. This  
24 bill, in Section 9(a), would overturn that as a matter  
25 of State antitrust law with respect to actions brought

1 by the Commonwealth and certain of its political  
2 subdivisions, and I must tell the committee in all  
3 candor that the United States Supreme Court very  
4 recently has determined that State antitrust  
5 legislation does not have to comply with the Illinois  
6 Brick Rule, so that this provision would not violate  
7 any Federal policy. That does not mean, however, that  
8 it is a wise policy to undo Illinois Brick, even in a  
9 limited situation involving the Commonwealth and its  
10 political subdivisions.

11           The reasoning behind the Illinois Brick  
12 decision in the first instance I think is quite  
13 compelling. The court there was concerned with adding  
14 undue complexity to antitrust trials, lengthening those  
15 trials, making more appeals out of them, and generally  
16 clogging the court system. The court recognized what I  
17 think this committee would be willing to recognize,  
18 that allowing an indirect purchaser to recover really  
19 does not deal -- oversimplifies the issue of how  
20 businesses price their goods. And to know whether in a  
21 given situation and to have to try in a court of law  
22 whether certain price increases were passed on or were  
23 absorbed or were partially passed on and partially  
24 absorbed, and to understand all of the variables that  
25 go into a pricing decision in order to isolate, if you



1 could, that portion of the decision that reflects the  
2 passing on of an overcharge is a virtual impossibility.  
3 I have sat through trials where economists have gone  
4 through what they call, and I'm not an economist and I  
5 am not a statistician so I only know the words,  
6 regression analyses. I don't know how any jury can  
7 ever understand one of these things. They are very  
8 complicated statistical formulas which supposedly are  
9 able to isolate out of a whole number of different  
10 variables what the impact of one variable was and what  
11 the impact was of another variable. But to see that  
12 going on in a courtroom in order to try and demonstrate  
13 indirect damage I think is going to make trials simply  
14 so complex that they will be virtually incomprehensible  
15 to the average juror.

16           Furthermore, you risk very substantially  
17 the probability of imposing a double punitive liability  
18 on the defendant in the case, and the reason for that  
19 is simply that we don't have the ability at the State  
20 level to coordinate claims as between direct purchasers  
21 and indirect purchasers. For example, I can conceive  
22 very easily of a situation in which the Attorney  
23 General of Pennsylvania, under this bill, would  
24 initiate an action in the Commonwealth Court claiming  
25 that the Commonwealth was an indirect purchaser.

1           An example would be that the Commonwealth  
2 granted a construction contract for some purpose and  
3 one of the elements that went into the construction  
4 which was purchased by a subcontractor who then made a  
5 contract with the general contractor who made a  
6 contract with the Commonwealth had engaged in collusive  
7 conduct, and so the Attorney General brings an action  
8 in the Commonwealth Court as an indirect purchaser, and  
9 at the same time the person who bought directly from  
10 that supplier is bringing an action in Federal court in  
11 Ohio, let us say, for the same antitrust violation.  
12 There is no way in our system of State and Federal  
13 government to coordinate those two actions to make sure  
14 that the defendant only pays once for what was one  
15 wrong. The Federal courts, on the other hand, do have  
16 the ability to coordinate because they have the ability  
17 to move cases through the system, under a provision of  
18 the Federal Code, so that cases pending in different  
19 parts of the country can be brought to a single court  
20 and coordinated. This bill only means that when we  
21 have that kind of a situation, the defendant faces the  
22 risk of not being punished once but being punished  
23 twice, and indeed being punished six times, in effect,  
24 because we have treble damaging in the Federal law and  
25 the potential for treble damaging in this bill.

1 I also think that some of the problems of  
2 State antitrust legislation are illustrated by some of  
3 the things that are in the bill and some of the things  
4 that are not. I have already referred briefly to the  
5 fact that this bill would authorize local district  
6 attorneys, with the permission of the Attorney General,  
7 to initiate antitrust litigation. And just as I have  
8 said that even at the State level in the Attorney  
9 General's Office I don't believe there is the staff and  
10 the sophistication and without some significant fiscal  
11 impact the ability to gain that staff and that  
12 sophistication to handle these cases, and all I can say  
13 is how much more so at the local level with local  
14 district attorneys who do not have this kind of  
15 ability.

16 Also, I don't think they have the  
17 financial resources to do it and I think this would be  
18 a terrible diversion or potential for diversion from  
19 much more serious problems. Just last week in  
20 Philadelphia there were news reports for several days  
21 that our District Attorney, Mr. Castille, is seeking to  
22 move drug cases from the State court system to the  
23 Federal court system because he simply doesn't have the  
24 wherewithal and the capacity to handle the volume of  
25 cases that are crossing through his office. To divert

1 him from that kind of an effort, which I think we all  
2 believe is one of the most pressing problems we have,  
3 and to give an Attorney General the additional ability  
4 and responsibility for antitrust enforcement I think is  
5 simply going to be a dissipation of resources.

6           The letter that you received from  
7 Attorney General Preate refers to the ability to  
8 investigate, and this bill does have a Section 7 which  
9 would purport to give him that ability. The trouble is  
10 I think it gives him much too much ability. It allows  
11 for fishing expeditions without very much required in  
12 order to demonstrate that he has some basis for  
13 proceeding. I don't believe there is adequate  
14 protection in the bill for trade secrets. There is  
15 some reference to confidentiality, but it would appear  
16 from my reading of the language of the bill that the  
17 moment the Attorney General proceeded with an action in  
18 court, whatever had been produced in confidence would  
19 lose its confidentiality.

20           There does not appear to be any  
21 geographic limitation in terms of the investigation, so  
22 that for example if the district attorney of Pittsburgh  
23 in Allegheny County were authorized by the Attorney  
24 General to conduct an investigation, he could issue one  
25 of these civil demands and require someone from

1 Harrisburg or Philadelphia to show up in Pittsburgh  
2 with documents. I've been through these  
3 investigations. When we talk about documents, we're  
4 not talking about the little pile of paper I have on my  
5 desk. We're talking about file cabinets and  
6 truckloads, literally, of documents. If you've ever  
7 seen the response to a Federal CID you'd know that you  
8 really have to be in the hauling business almost and in  
9 the paper reproduction business to comply with what is  
10 the typical demand. So that I think this provision is  
11 going to end up being extremely oppressive and subject  
12 to potential abuse.

13                   One thing that's missing from the bill  
14 and therefore would, I guess, be a matter of court  
15 interpretation is the issue of joint and several  
16 liability and the right of contribution. Unless the  
17 bill will make some specific provision to allow for the  
18 right of contribution or to modify the traditional  
19 notions of joint and several liability, you will have  
20 in this bill what has turned out to be one of the most  
21 oppressive and potentially unfair provisions of Federal  
22 antitrust law, and here I have to give an illustration  
23 that might help to explain what's on my mind.

24                   Take a hypothetical situation in which  
25 six companies are charged with price-fixing of a

1 product. Two of them have 30-percent of the market  
2 share in that particular product, a third has, say, a  
3 25-percent market share, a fourth has 7 1/2-percent  
4 market share, a fifth has a 5-percent market share, and  
5 the last one, the small guy in the industry, has a 2  
6 1/2-percent market share. And all six of them are sued  
7 by a plaintiff who says you fixed prices, and the  
8 plaintiff gets back a multimillion dollar verdict,  
9 looks around and decides that the easiest one to chase  
10 after is the one with the 2 1/2 percent market share.  
11 It's a local company, he doesn't have to go looking at  
12 other States to enforce his judgment, they're right  
13 here, they've got a deep enough pocket to pay the  
14 judgment, and so he executes against that company and  
15 that company ends up paying 100 percent of whatever the  
16 court awarded, including to the extent that that award  
17 has been trebled. Under existing Federal law, and  
18 presumably under this bill, that company with its 2 1/2  
19 percent market share that paid the full treble damages  
20 would have no right to seek any contribution, any  
21 participation, any recompense from the other five who  
22 are equally responsible for that violation, and several  
23 of whom, indeed all of whom, have much larger market  
24 shares than that particular company.

25 What this does is that it really compels

1 people not to litigate antitrust cases. It compels  
2 people to come in and buy what one plaintiff's lawyer  
3 whom I know calls an insurance policy, because you  
4 can't afford to try your case. Because if you do and  
5 everybody else settles out and the verdict is big and  
6 it gets trebled, you will end up paying the whole  
7 freight, and that's too big a risk for most businessmen  
8 to roll the dice knowing that if they're the one who  
9 really believes in their cause and wants to hold out  
10 and everybody else settles, they could end up holding  
11 the whole bag times three. So that's a very punitive  
12 provision and one which, we would submit, is really  
13 unfair and doesn't deal with the realities of the  
14 marketplace.

15                   There are two other aspects of the bill  
16 that I would like to talk about. The first is Section  
17 6 of the bill that talks about the fact that any action  
18 for a violation will be brought in the Commonwealth  
19 Court. I looked through the bill and I did not see any  
20 definition of the word "violation," but it would  
21 appear from the context of the bill that a criminal  
22 action as well as a civil action would be deemed a  
23 violation. It is possible that my research is  
24 incomplete, but on my research that I was able to do,  
25 to the best of my knowledge the Commonwealth Court does

1 not have criminal jurisdiction, and I believe that the  
2 bill is probably technically deficient in that respect,  
3 but it opens up a broader problem, which is if that is  
4 correct, then the place that these actions will have to  
5 be brought is in the various Common Pleas Courts and  
6 their criminal parts, and again that raises all of the  
7 issues we talked about before about the fact that we  
8 would have the courts having these all over the  
9 Commonwealth, lack of coordination in the cases at  
10 least at the criminal level and the need for judges and  
11 juries in local jurisdictions to have to deal with  
12 these very complex kinds of issues.

13                   Finally, again turning on the word  
14 "violation," I invite your attention to Section 8 of  
15 the bill that provides for a \$100,000 penalty, quote,  
16 "for each violation of this act," closed quote. Again,  
17 I was unable to find any definition of the word  
18 "violation" in the bill. Query, therefore, whether  
19 each sale, for example, of an allegedly price-fixed  
20 product would be a separate violation. If so, as you  
21 can imagine, the penalties would not just be  
22 astronomical, they would be absolutely bankrupting.

23                   Also, Section 4 of the bill which deals  
24 with monopolization specifically makes it a violation  
25 to, quote, "use," closed quote, a monopoly. I submit



1 to you that there I don't even have to be hypothetical.  
2 Every act, every transaction by a monopolist  
3 theoretically and practically is a use of monopoly, so  
4 that again every product sold, every transaction  
5 entered into by a punitive monopolist would be a,  
6 quote, "violation" subject to a \$100,000 penalty, which  
7 I submit is very large and could mount into  
8 astronomical numbers.

9 I was always taught, and we've all heard  
10 the expression that if something isn't broken, why  
11 bother to fix it? I don't believe Federal antitrust  
12 law is broken. I believe that it covers about 99.9  
13 percent of the concerns that the Commonwealth should  
14 and could have in the antitrust area. That is  
15 complemented by the fact that we have an anti-bid  
16 rigging act in the State and we also have a fairly good  
17 consumer protection law in terms of misrepresentations  
18 and the like, and that therefore I believe that there  
19 is really no need for Bill 2376. I appreciate that we  
20 are the only State in the country that does not have  
21 one. Maybe that makes us more right than the other 49  
22 rather than more wrong.

23 Thank you very much.

24 CHAIRMAN CALTAGIRONE: Questions from the  
25 committee?

1 Jack.

2 BY REPRESENTATIVE PRESSMANN: (Of Mr. Labovitz)

3 Q. Are you aware if the Federal government  
4 has been less vigorous pursuing antitrust actions in  
5 the last 10 years than it had been previously?

6 Q. The answer to that in the broadest sense  
7 is yes, but in a narrower sense no, and let me explain  
8 why I make that distinction.

9 Q. I'm sure.

10 A. The Federal government has been very  
11 reticent to deal with things like mergers,  
12 acquisitions, and the old Section 7 Clayton Act type of  
13 activity in the belief that those kinds of activities  
14 have put a major burden on United States industry and  
15 its competition abroad, particularly with the Japanese,  
16 and less so to some degree in Europe. When you come  
17 down to the nitty-gritty sort of old fashioned type of  
18 trust violations, however, I have not found the same to  
19 be true. Things that would be, particularly, for  
20 example, of concern to a governmental entity have not  
21 lost attention. I don't know of a road paving job  
22 anywhere in the United States almost that hasn't been  
23 subject to a criminal antitrust investigation by the  
24 Federal government because of expansive price-fixing in  
25 the road paving industry and the asphalt industry all

1 over the United States. And they have been extremely  
2 active at that level.

3 I mentioned, for example, the fact that  
4 in the trash hauling area there has been a tremendous  
5 amount of activity not only at the private level but at  
6 the Federal governmental level. So that I think you  
7 have to make a distinction between the type of  
8 antitrust regulation that was at the outer bounds of  
9 types of things like mergers, joint ventures, and those  
10 type of activities as opposed to the kinds of things  
11 that really impact the pocketbook of the Commonwealth  
12 on a day-to-day basis, which is primarily bid rigging,  
13 price-fixing, and that type of activity.

14 Q. Aren't a lot of the antitrust actions  
15 that you mentioned that are taking place result more in  
16 criminal investigations because of activities by  
17 organized crime than activities by your traditional  
18 business corporations?

19 A. With the possible exception, and I have  
20 read some of this, in the trash hauling industry I am  
21 not aware that that is the case. I certainly don't  
22 believe that has been the case, for example, in the  
23 jewelry situation, the auction -- I'm familiar with  
24 some industrial auction situations where the government  
25 stepped in. I have heard none of that in the road

1 paving, as a matter of fact.

2 Q. In the paper the other day we saw an  
3 article where former Governor Thornburgh, General  
4 Thornburgh, has now agreed that we should stop putting  
5 heavier penalties on white collar criminals. He  
6 thought that there should be a reduction, sentences  
7 should not be as strong, that the fine shouldn't be as  
8 strong as they've been in the past, and they shouldn't  
9 be as vigorous. When I see that and plus the fact that  
10 ever since the Reagan administration we've been dealing  
11 with something called New Federalism where the States  
12 are supposed to take more responsibility for their  
13 actions and more responsibilities for what goes on  
14 within their borders, part of the aggression of the  
15 States to take over responsibility like antitrust is a  
16 recognition at times that the Federal government is not  
17 going to do it.

18 A. Well, let me answer that in two respects.  
19 As far as the white collar crime and penalties are  
20 concerned, we do have, at the Federal level, sentencing  
21 guidelines and they leave very little discretion to  
22 judges nowadays. Indeed, one of the reasons you are  
23 seeing an increase in people actually going to trial in  
24 Federal court in criminal cases as opposed to plea  
25 bargaining is there is very little room left for plea

1 bargaining in the Federal system. There is almost a  
2 mathematical formula that judges are now required to  
3 apply in order to do sentencing in the Federal court.  
4 I don't know, I guess to me \$600 million, to talk about  
5 one recent Federal situation, is not a small penalty,  
6 especially if it's followed by five years in jail,  
7 which I understand it is likely to be.

8                 So I'm not convinced from what I've seen  
9 at least, and I must tell you, by the way, that most  
10 Federal judges today believe that executives who engage  
11 in antitrust conduct of a criminal nature ought to go  
12 to jail, and they have. They don't go for, you know,  
13 six years, but they have gone for months and a year or  
14 two years, and that has not been an uncommon thing.  
15 Certainly not in the eastern district of Pennsylvania,  
16 and I can cite you cases where that has happened.

17                 As to the second part of what you said,  
18 there is no doubt that the Federal government at the  
19 levels I mentioned has taken a more backed-off  
20 position, I think for economic reasons having to do  
21 with international trade. Keep in mind that even under  
22 the Federal legislation there is something called a  
23 "parens patriae" provision, which was enacted about  
24 seven, eight years ago, as I recall, which says that  
25 where you're dealing with consumer products, for

1 example specifically, the Attorney General of every  
2 State has the authority to bring an action in the name  
3 of the consumers of the State for treble damages  
4 against price-fixers and if there is a recovery, it is  
5 up to the court and the Attorney General to agree upon  
6 a plan, with court approval, which either allows those  
7 funds to go into the State revenues as part of an  
8 effort to beef up antitrust enforcement or to be  
9 distributed to the people who were actually injured.

10 One example of that is there was an  
11 action brought by the Attorney General of California in  
12 Federal court for Federal violation for price-fixing of  
13 dungarees, denim jeans, and it was brought as a *parens*  
14 *patriae* act, and the same thing happened with -- I also  
15 want to smile when I say this, with potato chips where  
16 there was price-fixing of snack foods, in effect, and  
17 again the Attorneys General of several States brought  
18 *parens patriae* actions and were able to recover, in  
19 Federal court, the money that they believe was the  
20 legitimate overcharge and then apply that either to  
21 funding additional educational and enforcement  
22 activities in the State of that nature or to make  
23 distribution to the people who made claims, and that  
24 has been done and done effectively.

25 Q. Who do you think should bring antitrust

1 actions in, say, Lehigh County, Pennsylvania, where I'm  
2 from when you've got three or four wholesalers of a  
3 good who engage in monopolistic practices who get  
4 together at the local Holiday Inn one night and cut a  
5 deal and agree that prices are going to be at such a  
6 level? The Attorney General is not going to go after  
7 those guys.

8 A. He has. He has. That's my point. I  
9 mean, in my district, I can't speak for that area, in  
10 my district in Philadelphia they have. And I just told  
11 you just in the last month the retail jewelers who are  
12 purely local business people were brought in as an  
13 antitrust case. We have trash cases in our district.  
14 We had a situation brought where an auction where you  
15 and I would just bring stuff because someone died in  
16 our family and we wanted to auction off part of the  
17 estate, auctioneers were indicted in the eastern  
18 district of Pennsylvania by the U.S. Attorney's Office  
19 for price-fixing.

20 They have been doing it. I think that's  
21 precisely the point. It is at that level that Federal  
22 policy continues to function fairly effectively and  
23 forcefully. It's at these bigger, broader, almost  
24 international type of issues that it hasn't functioned  
25 the way it had in the past.

1           Q.    You mentioned we're in a global market  
2 now and competition.  What advantage does this give the  
3 corporations operating in Pennsylvania to not be under  
4 a State antitrust act?

5           A.    It just means that since they already are  
6 subject to the same rules of conduct, that is that they  
7 are still not allowed to fix prices, they are still not  
8 allowed to monopolize because the Federal law says  
9 they're not, it simply means that they are not going to  
10 be put to the economic burden of having to deal with  
11 another level of government that's going to some day  
12 decide to issue an investigative demand and put them  
13 through the same, in effect, processes that they would  
14 have to go through with the Federal government with the  
15 knowledge that that's going to be a cost of doing  
16 business now that they're going to have to worry and  
17 respond to not only the Federal level in terms of  
18 anything they do, any filings they have to make, but  
19 now wonder whether and deal with the fact that at some  
20 given point in time a district attorney in one of the  
21 counties or the Attorney General will also ask them to  
22 produce truckloads of documents and make them respond  
23 and produce people and disrupt business.  That's just  
24 going to be an added layer of activity that isn't going  
25 to produce any different result, as far as I can see.



1           Q.    Couldn't it also be true that with more  
2 than one person watching you you would be more likely  
3 to obey the law?

4           A.    I guess, yeah, theoretically you could  
5 have six layers and eight layers or so on and I guess  
6 all of us who are parents figure it's better to have  
7 two parents in the house to spank the kids--

8           Q.    That was the example I was going to use.

9           A.    --to spank the kids than one, but I must  
10 tell you, you know, when my wife's away I do a pretty  
11 good job anyway.

12                   I just think that you're not going to get  
13 any difference, I don't think, because what I said  
14 before is the people who are going to be doing it at  
15 the State level are going to be, first of all,  
16 learners. Secondly, it's not something that they're  
17 going to be doing as a steady diet, particularly at the  
18 local level with the district attorneys. They are not  
19 going to have the facilities to do it right, and that's  
20 a very important fact. They are not going to have the  
21 staff, they are not going to have the financial  
22 resources to do it.

23                   Let me tell you something. These are  
24 tough, tough cases, even the ones that would seem to be  
25 open-and-shut, black-and-white cases. They are tough,

1 tough cases because they are run by economic issues and  
2 business issues. They are often paper trails. You  
3 very rarely today find a conspiracy in which a bunch of  
4 people got more sophisticated in that and they have a  
5 lot more sophisticated ways, and to take somebody with  
6 a fair degree of sophistication to be able to follow  
7 the trail to see where the conduct actually took, and I  
8 just don't think you're going to get it at the local  
9 level.

10 REPRESENTATIVE PRESSMANN: Thank you.

11 CHAIRMAN CALTAGIRONE: We've had several  
12 members join us since we've opened the hearing, and if  
13 you'd like to introduce yourself for the record.

14 Jerry.

15 REPRESENTATIVE KOSINSKI: Excuse me?

16 CHAIRMAN CALTAGIRONE: If you want to  
17 introduce yourself the for the record.

18 REPRESENTATIVE KOSINSKI: Hi. I'm Jerry  
19 Kosinski from Philadelphia.

20 CHAIRMAN CALTAGIRONE: It wouldn't be the  
21 same without you.

22 REPRESENTATIVE RITTER: Karen Ritter from  
23 Allentown, Lehigh County.

24 REPRESENTATIVE REBER: Representative Bob  
25 Reber, Montgomery County.

1                   REPRESENTATIVE BORTNER: Representative  
2 Mike Bortner from York.

3                   CHAIRMAN CALTAGIRONE: If I could just  
4 pick up on that line of questioning that Representative  
5 Pressmann started with you.

6 BY CHAIRMAN CALTAGIRONE: (Of Mr. Labovitz)

7                   Q. I'm just curious, is there any area that  
8 hasn't been touched with some type of restraint of  
9 trade that you can think of, because you evidently have  
10 pretty good knowledge of the practices that have gone  
11 on at the Federal level and possibly some of the major  
12 States where they've rigged prices or opted to  
13 participate in some sort of monopolies. You're  
14 indicating that you have complete faith and confidence  
15 in the Federal government's ability to control the  
16 situation, and yet in Philadelphia, and I'm sitting  
17 here wondering how many other cases and how many other  
18 areas in this Commonwealth is this going on? You  
19 talked about fuel oil earlier, and how many other areas  
20 do you think there might be for the potential for that  
21 type of abuse?

22                   A. Well, again, I mean, anytime you have --  
23 business is like everybody else - there are good apples  
24 and there are bad apples in business, and when times  
25 get tough or conditions permit, there are always going

1 to be some people who think they can take advantage of  
2 the situation. I mean, there's no area of economic  
3 activity that I can tell you where there's not at least  
4 a risk that somebody is going to do something they  
5 shouldn't do. But when I look at this bill and I see  
6 that it really, you know, in terms of Sections 3 and 4,  
7 they're lifted almost verbatim, I won't say verbatim,  
8 but almost verbatim from the Federal antitrust laws.

9 What I'm saying is that there is no type  
10 of conduct that I can imagine businessmen or business  
11 people participating in that would violate this bill  
12 that wouldn't violate the Sherman Act or the Clayton  
13 Act. That's my problem. I don't see anything in here  
14 that's not already covered by Federal law.

15 Now, someone might say, yeah, but what  
16 about a very local activity? My only point is, again,  
17 everything I've seen at the local level, even down to  
18 hospital admissions policies of doctors who haven't had  
19 staff privileges, have been dealt with at the Federal  
20 level. One of the leading cases on the issue of the  
21 way in which the antitrust laws impact health care  
22 delivery is a case from York County, Pennsylvania,  
23 involving a hospital in York County in which a group of  
24 doctors brought an action claiming that they were -- I  
25 don't remember whether they were osteopaths or

1 chiropractors -- were excluded from staff privileges--

2 REPRESENTATIVE BORTNER: They were  
3 osteopaths.

4 MR. LABOVITZ: They were excluded from  
5 staff privileges, and that was dealt with as a Federal  
6 antitrust. There was no problem finding that there was  
7 interstate commerce there, and the case was dealt with.  
8 Now, again, I'm not speaking to the merits of the  
9 result of that case, but what I'm saying is here is  
10 again something that we all think of, you know, our  
11 doctor being in a local hospital and it's a community  
12 type thing. It was dealt with within the impetus of  
13 the Federal antitrust laws.

14 CHAIRMAN CALTAGIRONE: Representative  
15 Hayden.

16 BY REPRESENTATIVE HAYDEN: (Of Mr. Labovitz)

17 Q. Mr. Labovitz, I'd like to ask you some  
18 jurisdictional questions, if I may.

19 Does a Federal indictment for antitrust  
20 activities bar any related State enforcement based on  
21 the same activity?

22 A. No. Again, I guess I have to answer that  
23 in two different ways. You could run into some double  
24 jeopardy problems in the criminal lawyer, but in terms  
25 of civil enforcement, as far as I can tell, no.

1       Essentially, though, what you're going to end up with  
2       is a coordination problem because once you get into --  
3       either the Federal authorities in the State are going  
4       to have to negotiate who gets the case or you're going  
5       to end up with injunctions, for example, where a  
6       business is going to say, Judge A told me to do this,  
7       Judge B told me I can only do Y, and you're going to  
8       run into serious problems.

9                       In fact, I think we're beginning to see a  
10       little of that in another area having nothing to do  
11       with antitrust, which is in the environmental area. We  
12       now have a very powerful environmental law in  
13       Pennsylvania, what we call HSCA, Hazardous Sites  
14       Clean-Up Act, and it's very new so we don't know quite  
15       what's going to happen yet, but there are already going  
16       to be some jurisdictional tensions that I have seen  
17       between that and EPA, for example, where that's in  
18       State court and there is an EPA action in the Federal  
19       court, who is the lead agency, and so on and so forth,  
20       and therefore what is your obligation? Somebody is  
21       going to tell you what to do. Who is it and if they  
22       tell you different things, what do you do? And I can  
23       see that happening here.

24                      Q.     But hasn't the general trend been in  
25       enforcement of antitrust activity that if the Justice

1 Department gets involved in whatever the particular  
2 case is that the Justice Department then is the major  
3 player in terms of sanctions, in terms of how to  
4 prosecute the case and in many cases the States  
5 Attorney Generals take a back seat, they take a  
6 secondary role, although they are obviously consulted  
7 as to what the outcome will be in a case? Isn't it  
8 rare to have the opposite occur, to have a State  
9 initiate the activity and then have the Attorney  
10 General's Office and the U.S.--

11 A. Well, I'll take the heating oil situation  
12 as an example. Clearly, the pressure was brought to  
13 the bear by the States, there's no question about that,  
14 but it was the Feds, for a lot of good reasons, who  
15 were going to take the lead on that. And again, it has  
16 to do with jurisdictional issues and coordination  
17 issues because there, using that as a very specific  
18 example, you have a lot of Federal policy having  
19 nothing to do with antitrust necessarily that gets  
20 implicated. A whole lot of stuff in terms of the  
21 regulatory policy of the Energy Department, and  
22 therefore it was felt that even though the States were  
23 clearly the moving force there and they had done their  
24 homework and made a pretty good fuss about it, that  
25 that was one where it was much more sensible to have

1 the Federal government step in and take it over rather  
2 than have it at the State level.

3 Q. One more question for you. I know that  
4 there is a substantial amount of disagreement as to  
5 whether it is wise for local or State Attorney Generals  
6 to get involved in national merger cases. Some of the  
7 activity that I've seen on behalf of the New York  
8 Attorney General's Office, who has a very aggressive  
9 antitrust enforcement division, they point in their  
10 report, I guess it's the report on their 1988 antitrust  
11 activities, they talked about in 1987 their antitrust  
12 bureau got involved in the investigation of the  
13 anti-competitive effects of the acquisition of Piedmont  
14 Airlines by US Air, and at the time Piedmont was a  
15 major carrier for several upstate cities in New York,  
16 including Syracuse and Buffalo. The bottom line is  
17 they got together with other States who were affected  
18 - West Virginia and Massachusetts - and then they got  
19 involved with Federal officials where it was a  
20 negotiated settlement which included continuation to  
21 carry those routes and also to prohibit excessive fare  
22 raises.

23 I was thinking of an example here in the  
24 State of Pennsylvania involving US Air which has, as  
25 far as I know, based upon my experience anyway, a near



1 monopoly over the Philadelphia and Pittsburgh market.  
2 I know that our Attorney General raised some concerns,  
3 but it would seem to me that our Attorney General,  
4 without State statute, do you think he has any standing  
5 to raise the concerns that are particular only to a  
6 Pennsylvania market potentially to Pennsylvania  
7 consumers in a major merger like that?

8 A. I answered your question a little bit the  
9 other way around, which is in the situation you state I  
10 don't think has any standing under this bill either.  
11 This is not a merger, it's an acquisitions bill. The  
12 closest it comes is its monopolization provision, which  
13 is a pretty high level before it would kick in.

14 But secondly, that gives me the perfect  
15 reason for saying you can't have it at the State level,  
16 and indeed what you said about what happened with  
17 Piedmont, because you can't isolate the problem. You  
18 can't take it and break it down and say there's this  
19 Pennsylvania segment of it and I can ignore the rest of  
20 the problems so that even if you had a State statute,  
21 the Pennsylvania Attorney General isn't going to be  
22 able to take that and isolate out the Philadelphia  
23 segment and say, I don't have to worry about Federal  
24 aviation policy, I don't have to worry about Federal  
25 route regulation, I don't have to worry about all of

1 the other things that may even preempt me at the  
2 Federal level, as for example in the energy situation,  
3 and sooner or later he's going to have to go and do the  
4 coordination anyway and he's going to have to work with  
5 the Federal level because the problem doesn't end at  
6 the State border. It just won't work that way.

7 As a practical matter, in the type of the  
8 hypo that you gave me with US Air, it won't end at the  
9 State border and indeed the laws that will impact that  
10 situation don't end at the State border. So that even  
11 with any bill I don't see how the Attorney General of  
12 Pennsylvania could take independent action in a  
13 situation like that that's going to be meaningful  
14 because he's going to run into all kinds of other  
15 problems that are going to have to be dealt with and  
16 can't be avoided.

17 Q. Thank you.

18 REPRESENTATIVE HAYDEN: Thank you, Mr.  
19 Chairman.

20 CHAIRMAN CALTAGIRONE: Are there any  
21 other questions from the committee?

22 Representative Bortner.

23 REPRESENTATIVE BORTNER: Just one or two  
24 to follow up on something you said.

25 BY REPRESENTATIVE BORTNER: (Of Mr. Labovitz)

1           Q.    You indicated that you felt that this  
2           sends a bad message to business in Pennsylvania and it  
3           makes our State less attractive for business.  I mean,  
4           I guess my question would be where are they going to  
5           go, since we're the only State that -- I mean, we're  
6           sort of an island as it is in this area, aren't we?

7           A.    I didn't mean to suggest that they are  
8           going to go somewhere else.  All I'm saying is they're  
9           not going to go somewhere else, but what it does mean  
10          is that those who are here are simply going to find  
11          themselves adding on a certain other layer of concern,  
12          cost, administrative expense, and so on and so forth,  
13          and all I'm saying is that at this time and place in  
14          our country, I don't see that that's a good thing to  
15          do.  I'm not saying they're going to run somewhere  
16          else.  You're right, every other State has it.  Since  
17          it doesn't accomplish, in my view, anything  
18          substantive, I just don't think it's worth it to make  
19          them still have another onus on them that's not  
20          necessary.

21          Q.    And I would disagree with you.  I don't  
22          think the fact that we're the only State that does not  
23          have an antitrust act is any reason for us to do it.  
24          It does raise some questions to me as to why other  
25          States have found this beneficial and, you know, why

1 Pennsylvania hasn't, and that's, I think, why it has  
2 sort of caused me to take a good look at what we are  
3 doing or what we could be doing more than just trying  
4 to pass a law so that we can kind of be similar to  
5 every other State or sort of jump on the bandwagon.

6 A. I think you'll find that most of those  
7 laws, and particularly those that are the more well  
8 known like the Donnelly Act in New York and the  
9 Cartwright Act in California, are not recent  
10 legislation, number one, so I don't know that any State  
11 has really addressed it the way we are in today's  
12 climate.

13 Number two, I guess, you know, I'm not a  
14 politician and I don't say that glibly because I  
15 respect politicians, but I'm just a lawyer. I suspect,  
16 however, that there are political implications to it,  
17 as I mentioned. Attorney General Abrams is a very able  
18 man. He has also made very good use of the fact from  
19 his only personal vantage point that he has a State  
20 antitrust statute. The same was true a number of years  
21 ago, I haven't seen it more recently, of the Attorney  
22 General of California because the issues that they have  
23 picked out, by and large, have been what I will call  
24 consumer populace type of issues, like the jeans. And  
25 they have big headlines in those kinds of things.

1 There's no question about it that if somebody says that  
2 Levi Strauss fixed prices on all the jeans that we all  
3 wear, and Lord knows, I haven't seen a teenager in the  
4 last 15 years that doesn't wear jeans, we're doing  
5 something bad. That's a very popular kind of thing to  
6 make a fuss about.

7                   So I have a feeling that it's less  
8 because of the result it produces, which is produced  
9 anyway elsewhere, than it is the fact that it gives  
10 someone at the local level an opportunity to say I'm  
11 doing it that makes a big difference.

12                   Q. The only other comment I make is that in  
13 response to your suggestion, and most of this is  
14 covered by Federal law, I would venture to say that  
15 just about every provision that we have in  
16 Pennsylvania, for example, dealing with drugs is  
17 probably covered by some aspect of Federal law and that  
18 hasn't, however, prevented us from passing a whole  
19 series of drug legislation, and in fact a very  
20 comprehensive package, because I felt or because I  
21 believe people felt that we had a role in enforcement  
22 and we had a responsibility to the people that we  
23 represent. I guess I think that's what I see is the  
24 question here, is there a proper role for Pennsylvania?  
25 Do we have a responsibility to the consumers that we

1 represent not so much whether it's something that the  
2 Federal government already has the right to become  
3 involved with?

4 A. I could give you really two answers to  
5 that question. Number one, I think that you can be  
6 involved without necessarily having legislation.  
7 That's number one. And again, I point out the fact  
8 that when it came to the problem with the Dental  
9 Association, the Attorney General of this Commonwealth  
10 didn't need a State statute to address that issue and  
11 to be involved. He didn't need a State statute when he  
12 felt that the various municipalities and the State  
13 itself were not getting a fair shake from the insurance  
14 industry. Again, I don't comment on the merits of  
15 those cases, but he didn't need Federal legislation to  
16 jump into those. That's one thing I think is an  
17 answer.

18 The other thing is I think there's a big  
19 difference between drug enforcement and antitrust  
20 enforcement in the sense that you don't need the same  
21 equipment. You need a different kind of equipment.  
22 You need the traditional things that district attorneys  
23 are very comfortable with and are used to doing. This  
24 is a whole different ball game. This is a whole  
25 different field of activity in which the concepts and

1 the commitments that have to be made to it are highly  
2 specialized. And in that respect, I think it's very  
3 different from local drug enforcement where indeed some  
4 sense of the local scene and some feel for the local  
5 community adds something to the picture. I think the  
6 need for and the level of sophistication that's needed  
7 to deal with these problems means that to put it at the  
8 local level detracts from the proper handling of it.

9 Q. Well, thank you. It's certainly -- I  
10 think you're right, it is a very complicated area of  
11 the law. It's been a long time since I took antitrust  
12 law and read some of the sort of classic cases in  
13 antitrust law, but it does appear to me, at least it  
14 appeared to me at the outset, that this is an area that  
15 Pennsylvania, unlike most States, has not had  
16 legislation, and I suppose that's the whole purpose of  
17 this hearing, to try and get some more information on  
18 it.

19 Thank you.

20 (Whereupon, Representative Moehlmann  
21 assumed the Chair.)

22 ACTING CHAIRMAN MOEHLMANN: Are there any  
23 other questions?

24 REPRESENTATIVE BROUJOS: After the  
25 committee members.

1                   ACTING CHAIRMAN MOEHLMANN: May I  
2 introduce, I think it's Mike, yeah, Representative Veon  
3 has joined us.

4                   Representative Broujos.

5 BY REPRESENTATIVE BROUJOS: (Of Mr. Labovitz)

6                   Q. Sir, what is your relationship to the  
7 Chamber here today?

8                   A. I am here, my firm, one of my partners is  
9 very active with the Chamber and I was asked if I would  
10 do this and I said I would.

11                  Q. You're testifying on behalf of the  
12 Chamber of Business and Industry?

13                  A. Yes, sir. Yes.

14                  Q. What is the nature of your private  
15 practice?

16                  A. I am a litigator with a law firm of about  
17 105 lawyers in Philadelphia handling all types of  
18 commercial litigation, including antitrust.

19                  Q. Have you been involved in antitrust?

20                  A. For 27 years.

21                  Q. And have you represented defendants in  
22 antitrust cases?

23                  A. I have represented both plaintiffs and  
24 defendants.

25                  Q. What percentage, generally, of plaintiffs



1 versus defendants?

2 A. I would say probably slightly more on the  
3 plaintiff's side than on the defendant's side.

4 Q. Now, in your experiences, have you  
5 encountered no situations where a State antitrust  
6 prosecution would be essential because of the issue of  
7 interstate commerce?

8 A. I can honestly say that that is the case.

9 Q. From your knowledge of the law and your  
10 knowledge of business activity in general, are there  
11 some cases where a Federal prosecution could not be had  
12 because it's not interstate commerce?

13 A. The closest I have seen to that, and  
14 again, it is not resolved, the courts are still  
15 struggling with it, is in the health care area, and  
16 even there the majority view is leading towards there  
17 being interstate commerce, even in terms, as I said,  
18 the doctor who is denied staff privileges at the local  
19 hospital.

20 Q. Would you say there are no cases in which  
21 a State prosecution would be essential because of the  
22 absence of Federal jurisdiction?

23 A. I have not seen any in the last number of  
24 years.

25 Q. I know you haven't seen any, but--

1           A.    So that I'm trying to imagine a situation  
2 of a business which does not have some connection to  
3 interstate commerce, and I find it very difficult to  
4 imagine in today's economy such a business.  Almost  
5 every business that we deal with buys or sells products  
6 that move in some way through interstate commerce, who  
7 have insurance that moves through interstate commerce,  
8 that have employees who come and go from different  
9 locations, and it's very hard to imagine that they  
10 don't have an impact.

11           Q.    Would you agree that there can exist some  
12 cases?

13           A.    I guess hypothetically there could be,  
14 but as I say, I'm hard pressed to come up with a  
15 factual situation.

16           Q.    Now, in the situations where the Federal  
17 government prosecutes, does the Federal government  
18 prosecute in all cases in which they observe some  
19 interstate commerce which may involve a restraint of  
20 trade?

21           A.    The Federal government, I think, is like  
22 every other prosecutor - it uses prosecutorial  
23 discretion to pick out those cases which it believes  
24 are winnable and have merit and it does not necessarily  
25 bring every case that could be brought any more than we

1 do in the drug area or we do in any other area of  
2 criminal law.

3 Q. From your experience, could you indicate  
4 what you think are the tests that they apply? For  
5 instance, do they apply a test that, well, there are so  
6 many cases we're prosecuting that we don't have time  
7 for those cases, or this is a relatively minimal  
8 interstate commerce?

9 A. I don't think the latter is so much the  
10 case as illustrated by the cases I gave you of the  
11 trash, the auctions. As a matter of fact, they seem to  
12 have been more interested in those lately than they do  
13 in the bigger national cases. I think what attracts  
14 them is the quality of the evidence, primarily, and the  
15 ability they believe they have to win the case.

16 Q. Well, aren't there some instances where  
17 you think they would say that case is too small in  
18 terms of the damage, in terms of the degree of  
19 interstate commerce, in terms of the activity?

20 A. Certainly they may say that. They don't  
21 tell me whether they do or they don't.

22 Q. I'm asking in your experience.

23 A. No, I understand. All I'm saying to you  
24 is, again, I judge by what I can see outside in terms  
25 of cases that have been brought. That's the only

1 standard I have to go by. When the Federal government  
2 is bringing cases for somebody who paved 10 miles of  
3 roads in a rural county in Indiana or is bringing cases  
4 because a group of auctioneers who are dealing with  
5 people who have a chiffonier that their grandmother  
6 left them that's an antique are fixing prices, it looks  
7 to me like they're not worrying that they're too small  
8 or that they're too local.

9 Q. We have a letter from Ronald Goldstock,  
10 Organized Crime Task Force, State of New York, 1987, in  
11 which he indicates that prosecutions under the Donnelly  
12 Act, and he points out an area of concern in their  
13 prosecutions, one of course was the case that you  
14 alluded to, and that's the Cartwright case, and they  
15 were prosecuted, you understand, under the State law?

16 A. Well, I understand they were prosecuted  
17 under Federal law and I would be happy to submit to  
18 you, I don't have them with me, a list of at least a  
19 dozen such cases that are pending in Federal courts  
20 under Federal antitrust law all over the country,  
21 including one which alleges that all of these local  
22 cases are really part of one big national conspiracy.

23 Q. Are you saying they haven't prosecuted  
24 them under the Donnelly Act?

25 A. I don't say they haven't, what I'm saying

1 is I don't think it was necessary to prosecute under  
2 the Donnelly Act because they're equally being dealt  
3 with at the Federal level.

4 Q. Now, with respect to the second point,  
5 you said we are witness to a time when organized crime  
6 enterprises and syndicates have infiltrated and are  
7 continuing to infiltrate legitimate businesses. Can  
8 you conceive, hypothetically, the situation where  
9 organized crime uses legitimate businesses and uses  
10 them locally and uses them in a situation where all the  
11 indicia of commerce are local?

12 A. No question about that, but we have a  
13 separate set of laws to deal with that. We have the  
14 RICO statute. And they are specifically geared to that  
15 problem and have very greater powers to penetrate that  
16 problem, I believe, than the antitrust laws. I think  
17 the antitrust laws are not the best weapon to use to  
18 attack that problem, based on what I've been able to  
19 observe.

20 And in fact--

21 Q. Excuse me for interrupting.

22 A. Sure.

23 Q. Isn't the RICO case pretty much under  
24 attack also by certain elements that feel it's gone too  
25 far?

1           A.    Only -- well, there is only at the civil  
2 level, not at the criminal level. There is no move  
3 afoot to change criminal RICO that I'm aware of. There  
4 is an effort afoot to change some of the provisions of  
5 civil RICO, not to do away with it but to change some  
6 of the features, particularly the treble damage  
7 provision of it.

8           Q.    Now, with respect to the prosecutions,  
9 are you aware of the general nature of prosecution in  
10 other States that do have this act? Are they  
11 increasing, decreasing, are they dormant?

12          A.    My impression, and it is no more than an  
13 impression, sir, is that they have not changed  
14 substantially over the years, with the one exception,  
15 and that is the Illinois Brick problem issue. That has  
16 been a matter of considerable discussion and so on  
17 within the States. That I will have to acknowledge.

18          Q.    Now, the question of dual jurisdiction,  
19 don't we have that in many areas, as already has been  
20 alluded to in questioning in environmental matters, in  
21 drug matters, and in crime?

22          A.    My familiarity is more in the  
23 environmental area, and again, I'm dealing more with  
24 the civil side in terms of the exposure that someone  
25 has for damages and for costs. And I agree with you,

1 we have it, and as I say, in Pennsylvania it's  
2 relatively new. HSCA was only adopted at the end of  
3 1989. The first case brought under HSCA is still  
4 pending in Federal court, interestingly enough, not in  
5 State court, in the middle district of Pennsylvania. I  
6 am litigating a similar case in Bucks County, and there  
7 is going to be, I predict, there is going to be a  
8 serious problem that no one has yet addressed, and we  
9 don't know what the answer is going to be, of a clash  
10 between those two laws, and already we're finding  
11 situations where people are playing one off against the  
12 other. Let's go negotiate with DER because maybe we  
13 can get a better deal with DER than we can get with  
14 EPA, or let's go get EPA moving real fast because we  
15 don't want to have to deal with DER, and sooner or  
16 later there's going to be a clash because one or the  
17 other of them is going to not want to put up with the  
18 fact that the other has taken over jurisdiction of  
19 them.

20 Q. But isn't that the nature of a lot of the  
21 prosecutions of cases, environmental and criminal and  
22 drug?

23 A. I think criminal and drugs are a  
24 different nature of beast because by and large you're  
25 dealing with a whole different level of activity.

1 You're dealing primarily with strictly like a criminal  
2 level whereas in antitrust we're dealing with penalties  
3 under this bill that are civil penalties, we're dealing  
4 with up to potential treble damaging, and at the level  
5 of the drugs and so on there is a fair amount of  
6 coordination going on. And as I said, just the other  
7 day the district attorney of Philadelphia is trying to  
8 move his drug cases, a lot of his drug cases, out of  
9 his court, out of his office because he can't handle,  
10 he can't literally deal with them.

11 But I think it's a very different thing  
12 when you're talking about coordinating in terms of  
13 conduct that is not of that nature where we're not  
14 talking about strictest criminal penalty, where we're  
15 not talking about the fact that you have certain double  
16 jeopardy protections and so on and where we're dealing  
17 with two systems that have civil liabilities that very  
18 well may clash, including injunctive provisions that  
19 may clash. I may get an order from the Court of Common  
20 Pleas of Philadelphia County that says I'm a monopolist  
21 and therefore I've got to spin off a certain division  
22 that I own, and I may get an order from a Federal court  
23 from the Federal Trade Commission that says something  
24 totally different.

25 Q. Isn't there also another development, and



1 that is the Federalism concept? Federalism has been  
2 moving for over 10 years to move functions of  
3 government down from the Federal level to the State  
4 level, and hasn't that occurred with prosecution of  
5 laws specifically in the environmental area?

6 A. I have certainly not seen it in the  
7 environmental area.

8 Q. Well, the Federal Safe Drinking Water Act  
9 in fact provides the States enactment.

10 A. No, I understand that level of it, but in  
11 terms of there are two different levels and I'm only  
12 very slightly in the environmental area. I do a little  
13 litigation in the area but I don't profess to be a  
14 technical person, but there's a difference between the  
15 area of regulation and the area of enforcement, and  
16 when it comes time to enforcement, by and large most of  
17 the activity is coming from the Federal level for a  
18 very simple reason - most of the money is coming from  
19 the Federal level - and where we have litigation what  
20 we find is that the EPA brings an action, the  
21 Commonwealth joins in because it has put up 10 percent  
22 of the cost usually to clean up a site, but the  
23 litigation is being run at the Federal level.  
24 Particularly, again, in this area of the country. Some  
25 areas of the country there have been some different

1 patterns, but that's certainly been the pattern here.

2 Q. Well, I just suggest to you that the  
3 Federal government is attempting to reduce  
4 significantly its prosecution in a number of areas and  
5 wants to send it down to the State.

6 How about the antitrust, are you familiar  
7 with whether the Antitrust Department at the Federal  
8 level, Department of Justice, has received the same  
9 budget?

10 A. I haven't watched the figures exactly,  
11 sir, but what I can tell you is this as an illustration  
12 of the point: A number of years ago there was a lot of  
13 talk about closing a number of the regional offices of  
14 the Antitrust Division of the Department of Justice.  
15 The fact of the matter is we still have a regional  
16 office in Philadelphia, we still have a very active  
17 regional office in Philadelphia, and they have not cut  
18 back their activities.

19 Q. Addressing another objection you had,  
20 with respect to the joint and several amount of  
21 damages, you're talking about a concern for joint and  
22 severable contribution. Isn't the nature of antitrust  
23 different in that it's not a question of the  
24 contributory negligence but a question of the act being  
25 an unlawful restraint of trade? That's the offense.

1           A.    Well, I understand the analogy you're  
2 making and it is an old common law type of analogy that  
3 so-called intentional tortfeasors aren't entitled to a  
4 right of contribution.  But we're dealing, again, with  
5 economic activity where I don't think that things are  
6 nearly as black and white in terms of what can or  
7 cannot be a violation.  I mean, there are situations  
8 where people believe that they were engaged in  
9 perfectly proper conduct that turns out to have been  
10 found not to be, but the fact remains, we're talking  
11 about an area where we can measure in fairly easy terms  
12 what the fair allocation is.  And that's because you  
13 have market share.  And what happens is I think you  
14 have to weigh on the other side of the equation is that  
15 the numbers you are often talking about--

16           Q.    Excuse me for interrupting, but you're  
17 talking about numbers.  I'm talking about the offense.

18           A.    No, no, I'm coming around -- I guess what  
19 I'm trying to say, I think you have to balance that  
20 notion of that somehow you're punishing people because  
21 they've engaged in an offense against another very  
22 important concept which is fair right to a trial,  
23 because what the lack of contribution does is it says  
24 you're guilty until you prove yourself innocent, in  
25 effect, because you can't afford to prove yourself

1 innocent. You can't afford to take the risk, if you're  
2 a small market share participant but with a deep  
3 pocket, or even not a deep pocket, that you are going  
4 to end up with the total liability and therefore even  
5 though you may not in fact be guilty, in effect you are  
6 forced to settle up because you can't take the risk  
7 that if you're wrong, but if you roll the dice and a  
8 jury decides you're wrong in a good faith trial, you're  
9 going to get hammered.

10 Q. How about on the question of abuses?

11 Now, have you experienced, have any knowledge of abuses  
12 in other States by State prosecuting attorneys or State  
13 Attorney Generals of their use of power of a State  
14 antitrust law?

15 A. All I can say on that score is that I  
16 cannot say abuse. All I can say is that I have seen  
17 and I have been witness to major press conferences in  
18 other States announcing major, major activities which  
19 ended up petering out and going nowhere.

20 Q. Has that ever occurred with a Federal  
21 prosecutor in a big city such as Philadelphia or  
22 Pittsburgh?

23 A. Not that I'm aware of in the antitrust  
24 field.

25 Q. Not in the history of Pennsylvania? How

1 long have you been living in Pennsylvania?

2 A. Again, I was very careful to say not in  
3 the antitrust field. I have been living in  
4 Pennsylvania for, let's see now, I'm 50 so I've been  
5 living here for 44 years.

6 Q. Now, you complained about the generality  
7 and the language being lifted. Don't you think it's a  
8 virtue to lift language from an act such as--

9 A. Well--

10 Q. Let me finish.

11 A. I'm sorry.

12 Q. The Federal antitrust act that has case  
13 law to support it, that permits you to move into an  
14 area of activity without really striking new ground,  
15 new decisions, and new light, and isn't it true that  
16 the general statement of that language is considered to  
17 be a virtue and that each separate case must be decided  
18 on its merits under that general language?

19 A. I think it's always helpful to have  
20 language that's defined, but on the other hand, if the  
21 language only duplicates that which already exists and  
22 doesn't do anything new, then I'm not sure I see any  
23 virtue.

24 For example--

25 Q. Well, let me interrupt you there to say

1 that we admit that it doesn't try to do anything new  
2 except jurisdiction. The only issue we have is a  
3 jurisdictional issue. It's not a question of what the  
4 offenses are.

5 A. Well, I think that's very true and that's  
6 where my fundamental problem comes in with it is that  
7 because I don't see a pressing jurisdictional need. I  
8 mean, I just don't see that as a very important issue  
9 not because I don't think the topic of antitrust is  
10 important. I make my career out of being involved in  
11 antitrust. I've taught it, I've written on the  
12 subject, so it's not that I don't think the field is  
13 important, but I don't see the jurisdictional issue as  
14 a particularly compelling one in the environment that  
15 I've practiced in for the last 27 years.

16 Q. And in Pennsylvania since we haven't had  
17 the act there really hasn't been occasion to attempt to  
18 implement an act that we don't have.

19 A. Except that I'm admitted in New York and  
20 I have practiced all over the country, sir. Literally,  
21 I have been in courts in almost every jurisdiction in  
22 this country.

23 REPRESENTATIVE BROUJOS: No further  
24 questions.

25 Thank you very much.

1 MR. LABOVITZ: Thank you very much.

2 (Whereupon, Chairman Caltagirone resumed  
3 the Chair.)

4 CHAIRMAN CALTAGIRONE: We've had  
5 additional members join us. If they would like to  
6 introduce themselves for the record.

7 REPRESENTATIVE MCHALE: Thank you, Mr.  
8 Chairman.

9 Representative Paul McHale, Lehigh  
10 County.

11 CHAIRMAN CALTAGIRONE: Mike was  
12 introduced. Okay.

13 We'll go to the next testifier, David L.  
14 Cohen. If you would introduce yourself and who you  
15 represent for the record, sir.

16 MR. COHEN: Thank you, Mr. Chairman.

17 Good morning. My name is David L.  
18 Cohen, and I am a partner specializing in antitrust law  
19 in the Philadelphia-based law firm of Ballard, Spahr,  
20 Andrews & Ingersoll. We represent the ARCO Chemical  
21 Company, and we appreciate the opportunity to present  
22 ARCO Chemical's views to this committee about  
23 Pennsylvania antitrust law, and in particular House  
24 Bill 2376.

25 I will attempt in some areas where I was

1 going to speak about some of the same things Mr.  
2 Labovitz has spoken about I will attempt to eliminate  
3 those and just address new areas, in the interest of  
4 saving some time here.

5 ARCO Chemical produces and markets  
6 industrial chemicals throughout the Commonwealth of  
7 Pennsylvania, the United States, and indeed really the  
8 entire world. The company is headquartered in Newtown  
9 Square, Delaware County, here in Pennsylvania. ARCO  
10 Chemical is subject to the Federal antitrust laws in  
11 all of its business activities. The company devotes a  
12 substantial amount of time and effort trying to comply  
13 with those laws, which, as you know, are broad and  
14 general in scope and are often very difficult to apply  
15 to particular complex factual situations.

16 There are several reasons why ARCO  
17 Chemical is interested in House Bill 2376. If a  
18 Pennsylvania antitrust act will impose different  
19 regulatory requirements on the company than are already  
20 contained in Federal law, the company's antitrust  
21 compliance efforts will be rendered a great deal more  
22 complicated and costly, and perhaps of more  
23 significance in some instances might prevent the  
24 company from taking advantage of profitable business  
25 opportunities which Federal law would allow it to take.



1 Even if the Commonwealth's antitrust requirements would  
2 be no different substantively from those of the Federal  
3 government already in place, there is the additional  
4 compliance concern mentioned by Mr. Labovitz, and in  
5 addition, ARCO Chemical, as a citizen of the  
6 Commonwealth of Pennsylvania, believes that it still  
7 has an important stake in the well-being of the  
8 Pennsylvania economy and the efficient working of its  
9 legal system.

10 In short, ARCO Chemical thinks that  
11 antitrust laws are important and the company has  
12 opinions that it hopes you will find to be worthy of  
13 your consideration. These views really fall into two  
14 categories. First, whether there's any real need for  
15 State antitrust legislation in Pennsylvania; and  
16 second, assuming that such legislation is appropriate,  
17 some specific comments about certain of the provisions  
18 contained in House Bill 2376.

19 Now, the threshold question in  
20 considering State antitrust legislation is whether we  
21 need it. Mr. Labovitz really discussed that topic  
22 exhaustively and I do not propose to repeat what he  
23 said, although I agree with most of it. Antitrust  
24 litigation makes profligate use of the courts' time.  
25 The Federal courts in Pennsylvania are experienced and

1 competent in handling antitrust cases. Pennsylvania  
2 State courts are not. Moreover, the State court system  
3 is already overloaded, and that includes the  
4 Commonwealth Court as well as the Courts of Common  
5 Pleas in a number of counties.

6 In addition, the overwhelming majority of  
7 companies transacting business in Pennsylvania are  
8 engaged in interstate commerce and are therefore  
9 already subject to the Federal antitrust laws. In  
10 these circumstances there is at least a legitimate  
11 public policy concern whether the benefits of a  
12 Pennsylvania antitrust law would outweigh the costs of  
13 decreased efficiency in the Commonwealth's judicial  
14 system, and I think that's really the question that's  
15 being posed to the committee.

16 On the one hand, I think this committee  
17 has to find something in the exercise of this  
18 additional jurisdiction that is going to merit what is  
19 clearly a burdensome and an expensive proposition for  
20 the Pennsylvania judicial system. I know  
21 Representative Pressmann was talking about Lehigh  
22 County as an example and I think Mr. Labovitz addressed  
23 most of those concerns very well. I would note that  
24 Lehigh County happens to be a county in which I have  
25 some familiarity. There happens to be a pending FTC

1 investigation of a major manufacturing company doing  
2 business in Lehigh County, and I guess probably three  
3 or four years ago when they were talking about the  
4 combination of the hospitals in Allentown the FTC was  
5 also involved in studying that situation extremely  
6 carefully.

7                   So I think that underscores what Mr.  
8 Labovitz says, that there is an interest by the Federal  
9 government and there are resources and even in a time  
10 in which there has been decreased attention in the  
11 merger activity there has been sufficient attention at  
12 the Federal level to go into a quasi-rural Pennsylvania  
13 county and look quite carefully at merger and  
14 acquisition activity that is taking place there.

15                   Furthermore, one thing which Mr. Labovitz  
16 did not mention which I think is important is that from  
17 the consumer perspective, from this committee's  
18 perspective, the Commonwealth of Pennsylvania is  
19 arguably blessed with the most active plaintiff's bar  
20 in the country, and one thing which has not been  
21 mentioned is the ability of individual consumers to  
22 enforce the antitrust laws, and that is a right that is  
23 exercised frequently in, and it doesn't matter what  
24 county is involved in that situation, so that I guess  
25 our view and ARCO Chemical's view in this situation is

1 that the incremental benefits that you will receive  
2 from a State antitrust law at this point in time when  
3 the jurisdictional requirements are so broad, and I  
4 might add that the third circuit is right at the edge  
5 in terms of the breadth of the interstate commerce  
6 jurisdiction. It has gone as far as any circuit in the  
7 country, and as a result, in Pennsylvania the reach of  
8 the interstate commerce laws is so broad that I agree  
9 with Mr. Labovitz, it is hard to imagine a company that  
10 would not be subject to the Federal antitrust laws.  
11 And given the lack of substantial benefit on that side  
12 and the obvious difficulties in administrative burdens  
13 on the costs side, ARCO Chemical has a serious concern  
14 as to whether State antitrust legislation is justified  
15 or appropriate in Pennsylvania at this time.

16 Assuming this committee determines that  
17 it makes sense though for Pennsylvania to have some  
18 sort of a State antitrust act, ARCO Chemical submits  
19 that there are several problems with House Bill 2376.  
20 We've really got four different categories of concerns  
21 here basically beyond what Mr. Labovitz talked about.

22 The first is with the definition of the  
23 offense. The conduct prohibited by the bill is defined  
24 in Sections 3 and 4, and although the language of those  
25 sections is almost the same as Section 1 of the Sherman

1 Act, it is not identical. And I make my living  
2 studying the Federal antitrust laws and advising  
3 clients as to their meaning and interpretation, and  
4 frankly, I'm a little puzzled as to what Section 3 and  
5 Section 4 are supposed to mean. It is unclear whether  
6 the draftsman is intending to expand the prohibitions  
7 of the Sherman Act or to change those prohibitions in  
8 some unspecified way. I'm not sure what Section 4 adds  
9 beyond what Section 3 says. And it's also unclear, for  
10 example, whether there's any intention to cover mergers  
11 or merger-related conduct in this legislation.

12 ARCO Chemical believes that if you are  
13 going to have a State antitrust act, the State  
14 antitrust law should conform with Federal law. In the  
15 absence of such national uniformity, we could end up  
16 with a national economy that is shackled by 51 sets of  
17 overlapping and conflicting rules. Interestingly,  
18 after a thousand years of such conflict, the European  
19 economic community is finally moving toward a situation  
20 where they are trying to unite and eliminate the  
21 situation that balkanized antitrust legislation would  
22 create.

23 Consequently, ARCO Chemical's strong  
24 recommendation to this committee is that this committee  
25 should follow the lead of the majority of other

1 jurisdictions that have adopted State antitrust laws  
2 and use statutory language that is identical to Section  
3 1 of the Sherman Act and include a provision that the  
4 State law shall be construed in accordance with Federal  
5 law and precedence, and that is a provision that is  
6 found in some of the other legislation that is pending  
7 in this legislature on that subject but is not found in  
8 HB 2376.

9 I'd also note that in our view a  
10 State-level analog to Section 2 of the Sherman Act  
11 which deals with monopolization should be avoided  
12 because such a prohibition on the State level raises  
13 special problems, and that is the status of so-called  
14 local monopolies. Many of Pennsylvania's counties have  
15 small populations, and the local economy may be large  
16 enough to support only one lumberyard, food store, or  
17 drug store. This type of enterprise is usually  
18 considered small business and is not the normal object  
19 of antitrust regulation but it becomes a prime target  
20 if you seek to regulate monopolies in relevant State  
21 markets within the Commonwealth, as House Bill 2376  
22 would appear to do.

23 Second category of concerns that ARCO  
24 Chemical has are with the exclusions set forth in the  
25 bill. Section 5 of House Bill 2376 contains a number

1 of exclusions. Given ARCO Chemical's opposition to  
2 expansive State antitrust laws, the company urges you  
3 to consider the broadest list of exclusions possible,  
4 consistent with your own balance of the public policy  
5 considerations involved.

6 Consider the following problems that we  
7 think are presented by the current draft of House Bill  
8 2376. First, and these are really phrased by way of  
9 questions because I'm not sure I know the answers to  
10 them either. But first, would the human labor  
11 exemption contained in Section 5(a) apply in the case  
12 of an administrator of the only hospital in a small  
13 county being faced with a demand from its medical staff  
14 to upgrade professional standards coupled with a  
15 complaint from non-staff physicians in town that they  
16 were being discriminated against?

17 Second, do you want to provide exemptions  
18 for banks or capital markets which have to work well if  
19 the economy is to flourish?

20 Third, a lot of Pennsylvanians live or  
21 die with their professional sports teams. Do you  
22 intend to regulate this particular area in  
23 Pennsylvania?

24 Fourth, Pittsburgh, as an example, has  
25 been going through a painful process of reorienting its

1 economy from heavy industry to high technology. There  
2 is a special Federal statute passed in 1986 which  
3 provides a partial but very significant antitrust  
4 exemption for research and development joint ventures.  
5 Do you want to at least exclude R&D joint ventures that  
6 have been registered under the Federal law? I have  
7 heard today that there is an intention here to follow  
8 Federal law and to track the Federal law as much as  
9 possible. Unfortunately, the list of exclusions that  
10 appear in the current draft of House Bill 2376 do not  
11 meet that objective. I'll note and I will leave to the  
12 next witness a discussion of the insurance exemption  
13 which is also absent from this statute and which is, of  
14 course, a very significant part of existing Federal law  
15 and the other bills pending on this subject before this  
16 legislature.

17 Third category of concerns we have are  
18 with the official investigation powers under the draft  
19 bill. Section 7 of House Bill 2376 vest the Attorney  
20 General with broad investigative powers into the  
21 affairs of citizens before commencing litigation.  
22 Although ARCO Chemical believes that investigative  
23 power can be justified under a State antitrust statute,  
24 House Bill 2376 contains two basic defects that are not  
25 found in the Federal practice. Mr. Labovitz has



1 discussed these and I will not repeat them again except  
2 to note that ARCO Chemical agrees that the authority to  
3 refer investigations and prosecutions to the district  
4 attorneys of individual counties does not make a lot of  
5 sense for the reasons Mr. Labovitz discussed.

6 And second, there is clearly insufficient  
7 protection given to confidentiality of information  
8 generated through that process in this bill, and again  
9 we believe that the protections of Federal law would be  
10 more appropriate in this context.

11 Finally, let me talk about that, the  
12 provisions dealing with damages and criminal penalties.  
13 House Bill 2376 provides for treble damages in flagrant  
14 cases with criminal penalties of up to a million  
15 dollars in fines for corporations or up to \$100,000 in  
16 fines and three years imprisonment for individuals.  
17 Although these sanctions are commensurate with those  
18 provided under Federal law, ARCO Chemical believes that  
19 they are too harsh for any valid purpose that a  
20 Pennsylvania antitrust law might serve. In this  
21 context, it is important to note again the proper focus  
22 and purpose of State antitrust statutes. The Federal  
23 antitrust laws remain alive and well and individual  
24 citizens and the Attorney General remain empowered to  
25 enforce their provisions in the Federal courts.

1           The only legitimate purpose of State  
2 antitrust legislation, I suggest, is to fill the gaps  
3 that exist in the Federal system - essentially to  
4 provide legal redress against any localized trade  
5 restraints which might have a low enforcement priority  
6 with Federal agencies or which might not be reachable  
7 under the jurisdiction of the Sherman Act. Thus, the  
8 natural target of State antitrust laws is not John D.  
9 Rockefeller and the big trusts that stimulated passage  
10 of the Sherman Act but the small local businessman who,  
11 through ignorance or greed, imposes unreasonable  
12 restraints on his local or regional economy.

13           When New Jersey passed its new antitrust  
14 law a few years ago, the first individual sued by the  
15 Attorney General included a small nurseryman who tried  
16 to impose maximum resale prices on his customers, and a  
17 club of practical nurses who agreed over teacups which  
18 sections of their hometown each of them would service.

19           For targets of this kind, ARCO Chemical  
20 respectfully suggests that the penalties provided by  
21 House Bill 2376 are too severe. If International Salt  
22 Company refuses to sell its patented salt dispensers  
23 unless its customer agrees to buy the company's  
24 unpatented salt tablets, there may be a major harm to  
25 competition and someone should arguably go to jail.

1 This result can be accomplished though under the  
2 Federal antitrust laws and we don't need State  
3 legislation to do that. The same is not true, however,  
4 if the only drug store in a small town tries to level  
5 its inventories by selling toothpaste in a package with  
6 toothbrushes.

7 Thank you for your patience and your  
8 attention. I will be glad to address any questions  
9 that the committee might have.

10 CHAIRMAN CALTAGIRONE: Thank you.

11 Questions from the committee?

12 BY REPRESENTATIVE BROUJOS: (Of Mr. Cohen)

13 Q. Sir, I appreciate your observations and  
14 your criticisms, comments with respect to some of the  
15 language, and it certainly will be considered by myself  
16 as a sponsor.

17 On the question of the prosecuting  
18 attorney, you and the prior speaker both referred to  
19 that but you haven't really also added the condition  
20 that it has to be at the request of or under the  
21 direction of the Attorney General.

22 A. (Indicating in the affirmative.)

23 Q. So I think that you should -- I'm sure  
24 you understand that, you make clear that it is not an  
25 independent initiative that the prosecuting district

1 attorney of the county can take, it has to be at the  
2 direction or under the control of the Attorney General.

3 A. Obviously, I think that's a good  
4 provision to the extent you're going to have that at  
5 all, but I guess the concern really is that whether  
6 that makes sense. If you're going to have an antitrust  
7 act, does it make sense to allow the district  
8 attorneys, even under the direction or at the request  
9 of the Attorney General, to go off on their own fishing  
10 expeditions or to stimulate their own fishing  
11 expeditions in terms of both what you're trying to  
12 accomplish under the act and the resources question  
13 that Mr. Labovitz talked about, whether they even have  
14 the capability or the capacity to be doing that.

15 Q. Well, see, what both you and the prior  
16 speaker are doing is taking a given situation and  
17 looking at the worst part of everything. You're  
18 assuming that the intent and the motivation of district  
19 attorneys is going to be questionable, it's a question  
20 of whether they are going to expand the powers, they  
21 are going to go on fishing expeditions, at the same  
22 time you know very well that if you're a plaintiff's  
23 attorney you're going to want all kinds of latitude to  
24 get discovery and to reach different wrongs and  
25 different activities within the scope of an agreement.

1 So here when you discuss the scope of the investigative  
2 activities and whether or not the district attorneys  
3 are equipped, you have another side of the coin, and  
4 the other side of the coin is that if the Attorney  
5 General wants extra help, if he has somebody with some  
6 expertise, if he's in a big city, he's going to want to  
7 tap those people and can do it under this act. It  
8 doesn't mean that he's going to go to McKean County or  
9 some small county, Potter County, and say, hey,  
10 prosecute this case, where that Potter County guy is  
11 not likely going to want to get involved in a  
12 prosecution. So I want to make that clear.

13 A. Mr. Labovitz may disagree with me here.  
14 I guess my view is that if you're going to have a State  
15 antitrust law, it makes the most sense to run it in a  
16 very closely parallel system to the way the Federal law  
17 is administered, and that is to let the Attorney  
18 General be assigned the responsibility for enforcing  
19 the law, give him the resources necessary to be able to  
20 do that so he can take advantage of a centralized pool  
21 of expertise within the Commonwealth of Pennsylvania  
22 and that it does not make sense in the type of a  
23 complicated area to have a diffused responsibility for  
24 administering the statute. But I--

25 Q. Excuse me now, a question. How is it

1 diffused if the Attorney General controls the  
2 activities of the local district attorney?

3 A. Well, as a practical matter, I don't  
4 believe that it controls it, as I read the statute. I  
5 can see a district attorney coming and saying, I have  
6 -- the district attorney of Lehigh County, we have  
7 three wholesalers that met in the Holiday Inn the other  
8 night and they made their decision, I want to go after  
9 them, and the Attorney General, under this statute, has  
10 the right to say, okay, go ahead and go after them.  
11 There's no provision for further control beyond that  
12 other than the fact that he's authorized him to  
13 investigate -- the Lehigh district attorney to  
14 investigate them and to prosecuted them. And I think  
15 if the Lehigh County district attorney has that  
16 problem, he should come to the Attorney General and the  
17 Attorney General should investigate it and if necessary  
18 prosecute it.

19 Q. At that point, does the Attorney General  
20 now have authority to designate a district attorney to  
21 prosecute a case absent this provision in an antitrust  
22 situation, if this act were enacted without that  
23 provision?

24 A. I honestly don't know the answer to that  
25 question. I assume the answer is no.

1 Q. Well, don't you think it would be very  
2 convenient to have that in his hip pocket?

3 A. I actually disagree with that approach.  
4 I think that if it's going to be prosecuted, it should  
5 be prosecuted with an attorney within the antitrust  
6 division of a State Attorney General's Office. I think  
7 that's the appropriate way to do it.

8 Q. Are there any restrictions that you would  
9 place on Federal antitrust legislation?

10 A. Any restrictions on Federal antitrust  
11 legislation?

12 Q. Do you think it's too broad?

13 A. I actually, at this point, I'm not aware  
14 of anything that I would -- I'm not aware of anything  
15 that the company believes should be changed in Federal  
16 antitrust legislation, and personally, I haven't  
17 thought about that question in a while but I can't  
18 think of anything off the top of my head.

19 Q. Well, it achieves a good result, don't  
20 you think?

21 A. I think that overall the Federal  
22 antitrust laws have done their job and continue to do  
23 their job.

24 Q. Now, if we were to find that they are not  
25 being prosecuting with diligence in the State area

1 because of either direction from a Federal Attorney  
2 General or lack of personnel or lack of inclination on  
3 the part of a U.S. Attorney would you see a need?

4 A. Well, let me answer that question by  
5 saying yes with a caveat, which is I think you have to  
6 look at more than what any particular political  
7 administration is doing in any particular moment in  
8 time. The Federal antitrust laws were designed to be  
9 enforced through a combination of governmental effort  
10 and private litigation, and I think that if this  
11 committee and this legislature were to determine that  
12 in ways that are important to the Commonwealth of  
13 Pennsylvania that private litigants and the  
14 governmental mechanisms were not fulfilling their  
15 responsibilities, then I think that's something you  
16 have to put into that balance that I talked about in  
17 terms of the benefits that you would accomplish by  
18 having State antitrust legislation. I don't see that  
19 present in the current environment, but that's my view  
20 of this and you may have a different view and there may  
21 be other people who would present to you a different  
22 view, and that might change my mind.

23 Q. Now, would you agree that actions such as  
24 monopolies and price-fixing, restraint of trade,  
25 inclusive bidding, boycotts, amalgamations, cartels,



1 and other activities in restraint of trade are wrong  
2 and incur legitimate businesses and may hurt ARCO?

3 A. Yes. ARCO would agree with that. ARCO  
4 would agree with that. There is no doubt about that  
5 and ARCO is viewed, I think, in the world as a very  
6 good corporate antitrust citizen. In the antitrust  
7 enforcement, ARCO Chemical is viewed as a very good  
8 corporate antitrust citizen in the world and as I said,  
9 we take -- the company takes very seriously its  
10 responsibilities to comply with the antitrust laws and  
11 would agree with each of those statements that you  
12 made.

13 REPRESENTATIVE BROUJOS: Thank you.

14 CHAIRMAN CALTAGIRONE: Are there other  
15 questions?

16 REPRESENTATIVE McHALE: Mr. Chairman.

17 CHAIRMAN CALTAGIRONE: Paul.

18 REPRESENTATIVE McHALE: Thank you, Mr.  
19 Chairman.

20 BY REPRESENTATIVE McHALE: (Of Mr. Cohen)

21 Q. Mr. Blenko, I noted that my--

22 A. I'm David Cohen. Mr. Blenko could not be  
23 here today.

24 Q. I apologize. I came in a bit late. I  
25 caught all of your testimony but your name.

1 I noted that my home county played a  
2 fairly prominent role in your testimony. I'm from  
3 Lehigh County and I found it astonishing that you  
4 referred to Lehigh County as quasi-rural.

5 A. I've gotten myself in trouble already.

6 Q. While there's a very humorous side to  
7 that, there's a more serious, substantive side as well.

8 Lehigh County is at the center of the  
9 third largest metropolitan area of the State and it may  
10 be quasi-rural when viewed from Rittenhouse Square, but  
11 from any other perspective it's very much an urban  
12 area.

13 You made reference to two FTC  
14 investigations in recent years. Over what span of time  
15 did they occur?

16 A. Well, one of them was -- let me say one  
17 thing. I was really reacting to Representative  
18 Pressmann's comments earlier when he was talking about  
19 his non-industrialized Lehigh County and comparing it  
20 to Philadelphia and his concern being, when Mr.  
21 Labovitz was testifying, whether the same attention  
22 would be paid in a county like Lehigh County by the  
23 Federal government as it is being paid in Philadelphia  
24 County.

25 Q. Well, that's precisely why I'm -- that

1 was my questioning.

2 A. That's the context that I was doing it.

3 Q. I understand that.

4 A. But the hospital, Health East merger  
5 situation, I believe, took place three or four years  
6 ago. The acquisition that stimulated some FTC scrutiny  
7 was recent acquisition that was consummated, I believe,  
8 last fall involving the Fuller Company. So those are  
9 both within the past four years. They are simply two  
10 matters with which I have personal involvement. I  
11 don't mean to suggest that they are the only two  
12 matters that are at stake, but I thought it was  
13 interesting with Lehigh County being mentioned that in  
14 fact there was specific attention paid in this context  
15 by the Federal regulators in these two examples.

16 Q. Well, I think what you did mean to  
17 suggest was that Federal regulation was adequate  
18 because these two investigations were taking place in  
19 quasi-rural Lehigh County and that the Federal  
20 government had taken the time and energy to look into  
21 these two matters in quasi-rural Lehigh County that  
22 surely Federal enforcement was adequate, and I couldn't  
23 let that impression stand because just to give you an  
24 example, as a reflection of the degree of commerce that  
25 takes place in Lehigh County, not to mention the Lehigh

1 Valley, there are over 500 members of the Lehigh County  
2 Bar Association. Between Lehigh and Northampton  
3 Counties, which are adjacent and which form the  
4 Allentown-Bethlehem-Easton metropolitan area, there are  
5 over a thousand members of the Bar. That is a highly  
6 urbanized area. It is the third largest metropolitan  
7 area of the State, and you've indicated that for the  
8 last four years you're aware of two FTC investigations.  
9 What I'd like you to do is if you have any other  
10 awareness of FTC investigations or enforcement, let's  
11 say in the last decade in the third largest  
12 metropolitan area of the State, I would like to hear it  
13 because I think that is relevant to the question of  
14 whether or not Federal enforcement is adequate.

15 A. Okay, the answer is I am not specifically  
16 aware, but I would suggest to you that I believe that  
17 Federal enforcement is adequate. I was only giving two  
18 examples, as I said, in response to Representative  
19 Pressmann's concern that the Federal government wasn't  
20 paying any attention in Lehigh County, and again, I  
21 need to say again that I think it is important to  
22 couple Federal regulatory enforcement with the private  
23 Bar. And as you just pointed out, there are over a  
24 thousand members of the private Bar practicing in that  
25 third largest metropolitan area in the Commonwealth of

1 Pennsylvania. Federal antitrust statutes and the  
2 Federal antitrust scheme is specifically set up in such  
3 a way as to enable the private Bar to enforce the  
4 Federal antitrust laws.

5 Q. Does that happen in the real world?

6 A. Absolutely

7 Q. Mr. Cohen, it does not happen in the  
8 third largest metropolitan area of the State.

9 Do you know how many Federal judges there  
10 are in the Lehigh Valley?

11 A. I believe there are -- are there two  
12 sitting in Allentown, is that correct?

13 Q. One sitting in Allentown. That's Judge  
14 Cahn.

15 A. Okay.

16 Q. And one part-time or he's in transition  
17 now in Easton, that's Judge Van Antwerpen.

18 A. Okay.

19 Q. The courthouse in Allentown is about to  
20 be closed. Now, I've been a member of the Bar for 13  
21 years and I've never seen an antitrust action that was  
22 brought in the Lehigh Valley. Now, undoubtedly they  
23 have been brought, but they are rarely brought and the  
24 private Bar is hardly an adequate enforcement  
25 mechanism.

1                   The point that I am trying to get to and  
2                   to give you a full opportunity to rebut is that the  
3                   Lehigh Valley is a very large and active area for  
4                   commerce. You're aware of two investigations in the  
5                   last four years. I have a great concern, contrary to  
6                   the implication of your testimony, that Federal  
7                   enforcement is virtually nonexistent in the Lehigh  
8                   Valley. And I don't mean to be argumentative. You  
9                   have presented your conclusion, which is that Federal  
10                  enforcement is adequate. In the third largest  
11                  metropolitan area of the State, I would like to hear  
12                  the facts that are used as premises in leading to that  
13                  conclusion.

14                 A. I need to flip this back to you and to  
15                 say I need you to tell me about something that has gone  
16                 on in the Lehigh Valley area in that economy that  
17                 merited investigation or attention and was not  
18                 investigated or attended to by the Federal regulators  
19                 or the private Bar.

20                 Q. That is an unfair reversal. What I am  
21                 saying is that we require not simply Federal  
22                 enforcement but I think is called for in Representative  
23                 Broujos' legislation diligent investigation by State  
24                 authorities as well. I don't know, but I can tell you  
25                 when you have an area of 525,000 people reflecting

1 substantial commerce in that community, two  
2 investigations in the last four years strikes me, on  
3 the surface, to be woefully inadequate. Now, I don't  
4 mean to imply those are the only investigations. I  
5 understand that. But I don't think we should glibly  
6 assume that quasi-rural Lehigh County is well-served by  
7 the FTC, because I don't think that it is.

8 REPRESENTATIVE McHALE: Thank you, Mr.  
9 Chairman.

10 CHAIRMAN CALTAGIRONE: Thank you.

11 REPRESENTATIVE BROUJOS: I have a  
12 question.

13 CHAIRMAN CALTAGIRONE: Sure.

14 BY REPRESENTATIVE BROUJOS: (Of Mr. Cohen)

15 Q. Sir, you referred to a nursery  
16 prosecution and perhaps one other prosecution that was  
17 of a relatively small nature or risk?

18 A. Um-hum.

19 Q. Are they any less important to the small  
20 businessman in competition with price-fixing,  
21 market-fixing, bid-fixing of small business?

22 A. I'm not -- let's understand the point I  
23 was making there. First of all, arguably, both of  
24 those matters could have been prosecuted under the  
25 Federal antitrust laws and could have been pursued

1 under the Federal antitrust laws. The point I was  
2 making was that if you have a State antitrust statute,  
3 recognize that those are the kind of arguable loophole  
4 kinds of cases that are going to be escaping and is it  
5 appropriate to have stiff criminal penalties, potential  
6 million dollar fines, for those types of violations?

7 Q. Now, excuse me for interrupting. I know  
8 you were talking about the penalty.

9 A. That's the only point I was making.

10 Q. Well, you made that point. I'm on  
11 another point.

12 A. Okay.

13 Q. And I'm asking you, is it not true, on  
14 the question of violation alone, is it not true that  
15 the persons that would be in competition with a small  
16 nursery or any small business would be just as  
17 concerned with the damaged price-fixing to the economic  
18 community as a whole as some major ARCO producer?

19 A. The answer is yes, they would be, and  
20 they have the right, under the antitrust laws, if they  
21 are injured by it, to bring a private right of action  
22 and enforce their rights under those laws. And that  
23 really, that is the way the Federal antitrust laws have  
24 worked for a hundred years. And I submit to you that  
25 they've worked very well in that way.



1           Q.    Isn't it true that we really don't know,  
2 you and I, how many cases there may be out there of  
3 antitrust activity or monopolistic activity on a State  
4 level under State jurisdiction and not Federal  
5 jurisdiction because the power isn't there to  
6 investigate?

7           A.    My answer to that is this committee  
8 doesn't know and I don't know. I do not believe,  
9 however, that that is a reason for legislation. And  
10 the reason for that is that the small nurserymen who  
11 were in competition with that nurseryman who was  
12 investigated did know, and notwithstanding the  
13 availability of a private right of action, they didn't  
14 think that the balance of how much they were being hurt  
15 was sufficient to pursue a private right of action.  
16 And I suggest to the committee that almost any  
17 antitrust violation that I can think of that has an  
18 ability to be recognized under the antitrust laws can  
19 be picked up either through existing enforcement  
20 priorities or by private plaintiffs.

21                   And as I said, it is the number of  
22 antitrust actions that have been brought by the  
23 plaintiff Bar, and I wish I had brought the statistics  
24 with me, in the eastern district of Pennsylvania it is  
25 dramatically higher today than it was five years ago.

1 We are in one district in the country where the number  
2 of antitrust cases continues to be extensive. And I  
3 believe that although this committee might not know and  
4 I might not know all the examples, the best source of  
5 information and the best source of antitrust  
6 enforcement are competitors, that is people who are  
7 actually being injured by the arguably illegal act.  
8 And I will tell you that if this committee passes, if  
9 this legislature passes an antitrust act, the Attorney  
10 General of Pennsylvania will find out that an  
11 overwhelming proportion of its leads are given to it by  
12 competitors.

13 Q. Are you a member also of the plaintiff's  
14 Bar?

15 A. I have not had as extensive an experience  
16 as Mr. Labovitz, but I have also represented plaintiffs  
17 in antitrust cases.

18 Q. Well, as an attorney--

19 A. Probably about 80 percent of my antitrust  
20 practice is on the defense side and about 20 percent is  
21 on the plaintiff side.

22 Q. And as an attorney you know that for a  
23 private person to bring an action, it takes a lot of  
24 money.

25 A. Actually, that is not necessarily true

1 because a tremendous number of plaintiff's antitrust  
2 cases that are brought are brought on a contingent  
3 basis and particularly because of the availability of  
4 the recovery of attorney's fees under the Federal  
5 antitrust laws, there are a large number of attorneys  
6 who take those cases without extensive payments at all  
7 from the private plaintiffs, and that includes our firm  
8 and I'm sure Mr. Labovitz's firm.

9 REPRESENTATIVE BROUJOS: Thank you.

10 CHAIRMAN CALTAGIRONE: Thank you very  
11 much for your testimony.

12 We will next hear from Samuel Marshall.

13 MR. MARSHALL: Good morning. My name is  
14 Sam Marshall. I'm Secretary and Counsel for the  
15 Insurance Federation of Pennsylvania. The Insurance  
16 Federation is a State trade association located in  
17 Philadelphia. We represent commercial carriers in the  
18 Commonwealth, commercial carriers of all sizes and  
19 shape - domestic, foreign, life, health, property,  
20 casualty.

21 We recommend an amendment to the bill  
22 which establishes a Pennsylvania antitrust act.  
23 Section 5, which sets forth the exclusions, should be  
24 amended to include, to add a subsection (e) that would  
25 state as follows:

1            "This act shall not apply to the business  
2 of insurance to the extent that the business:

3            "(1) is otherwise regulated by State law;  
4 and

5            "(2) does not constitute a boycott,  
6 coercion or intimidation or an agreement to boycott,  
7 coerce or intimidate."

8            This amendment mirrors the Federal  
9 exemption of the business of insurance from its  
10 antitrust laws, which exemption is found in Section  
11 2(b) of the McCarran Ferguson Act, and I attached a  
12 copy of that act to the letter that was submitted to  
13 this committee.

14           The amendment is necessary for the  
15 proposed act to avoid conflict with the existing State  
16 insurance laws and case law and to avoid conflicting  
17 regulatory responsibilities of the Attorney General and  
18 the Insurance Commissioner. The amendment in no way  
19 lessens the regulatory supervision under which the  
20 business of insurance is conducted, nor does it allow  
21 for monopolistic limiting of competition or fixing of  
22 prices in that business. Instead, the amendment  
23 recognizes that the business of insurance is already  
24 subject to the Insurance Commissioner's jurisdiction  
25 under the laws of this Commonwealth.

1                   Those laws control veritably every aspect  
2 of the business of insurance, including ratemaking,  
3 issuance, coverage, market conduct, and claims  
4 handling. They empower the Insurance Commissioner with  
5 extensive authority to regulate the business of  
6 insurance and punish unlawful activity, including any  
7 potential for monopolistic practices for the purpose of  
8 limiting competition or controlling prices, the conduct  
9 this proposed act also proscribes.

10                   Antitrust legislation generally regulates  
11 businesses and business practices that would otherwise  
12 be unregulated. The insurance business, as covered in  
13 the proposed amendment, is already closely regulated by  
14 this Commonwealth. Thus, inclusion of insurers in this  
15 bill creates unnecessary duplication and legal  
16 obstacles without adding consumer protection.

17                   Thank you for the opportunity to bring  
18 this matter to the committee's attention, and obviously  
19 any questions I'd be more than happy to answer.

20                   CHAIRMAN CALTAGIRONE: Thank you.

21                   REPRESENTATIVE HAYDEN: Mr. Chairman?

22                   CHAIRMAN CALTAGIRONE: Representative  
23 Hayden.

24                   REPRESENTATIVE HAYDEN: Mr. Chairman,  
25 thank you.

1 BY REPRESENTATIVE HAYDEN: (Of Mr. Marshall)

2 Q. Mr. Marshall, there is a movement afoot,  
3 I understand, in Congress to repeal or at least  
4 dramatically change the McCarran Ferguson Act. I don't  
5 know if it's even gotten out of committee yet, but I  
6 think there are some bills pending, particularly in the  
7 Senate Judiciary Committee, to accomplish that. The  
8 McCarran Ferguson Act was enacted, I guess in reference  
9 here, in 1948. There seems to be a group of people who  
10 think that the status and the activities of the  
11 insurance market have changed dramatically since 1948,  
12 when that legislation was initially passed, in that the  
13 original motivations and concerns for the passage of  
14 the act in 1948 are no longer relevant in 1990. I  
15 understand why the IFP has a position about adherence  
16 of the McCarran Ferguson Act to include an exemption  
17 from our statute, but I'm just wondering if you could  
18 articulate the case as to why the insurance industry  
19 still needs the protection under the McCarran Ferguson  
20 Act, other than just the simple response that insurance  
21 is already regulated under State statute by the  
22 Insurance Commission.

23 I'm referring specifically to the general  
24 monopolistic or anti-competitive type of practices such  
25 as collection of data and dissemination of data, actual

1 pricing mechanisms such as through the ISO mechanism,  
2 those kinds of activities which have enjoyed protection  
3 but if you didn't have the exemption ordinarily it  
4 wouldn't. Why do you still need that?

5 A. Okay, the McCarran Ferguson Act exemption  
6 is an exemption from Federal regulation to defer to  
7 State regulation.

8 Q. Right.

9 A. In terms of do I think that that  
10 exemption, and that's different than what I'm proposing  
11 in this act.

12 Q. I understand that.

13 A. And it's a fascinating question as to  
14 whether the business of insurance, I mean, I may agree  
15 that the business of insurance should be regulated at  
16 the Federal level rather than at the State level. I  
17 mean, I'm going to say, gee, I think there should be a  
18 Federal Insurance Commissioner rather than 51 States or  
19 State jurisdictions, including Puerto Rico and  
20 Washington, D.C., that there should be all these State  
21 Insurance Commissioners. That's a different matter.  
22 The purpose of that, though, the purpose of McCarran  
23 Ferguson, is to acknowledge the existence of the State  
24 Insurance Commissioners and the State regulatory  
25 system. Until you decide to abolish the State

1 regulatory system, which is a debate that's underway at  
2 the Federal level, you have to have the McCarran  
3 Ferguson Act. If you don't, you've taken away the  
4 authority of the State Insurance Commissioners, which  
5 are empowered under State law, and what you have is  
6 just a conflict between Federal and State standards.

7 Some of the activities--

8 Q. But have you really taken away the power?  
9 I mean, have you simply, if you're talking about, for  
10 instance in the Sherman Antitrust Act or the Clayton  
11 Act, the kinds of activities, isn't that the only area  
12 that we're talking about giving at the Federal level  
13 rather than the whole range of broad-ranging activities  
14 that our Insurance Commissioners at the State levels  
15 are charged with?

16 A. I'm sorry, you wouldn't take away every  
17 power of a State Insurance Commissioner, you would take  
18 away a great number of the powers. For instance, in  
19 Pennsylvania you would probably take away the  
20 Commissioner's power to regulate rates. Certainly one  
21 of her primary responsibilities. You may also take  
22 away, and I'm not exactly sure, whatever I would say  
23 I'm sure the Insurance Commissioner may well disagree,  
24 but you may well take away the Commissioner's power to  
25 supervise the Blue Shield and Blue Cross systems, which



1 are essentially regional State encouraged, if not  
2 monopolies at least dominant market shares in the  
3 health insurance business. If you took that away from  
4 the Commissioner, you may have to replace that with  
5 instead of regional or State-based Blue Crosses and  
6 Blue Shields with some sort of a national Blue Cross or  
7 Blue Shield, and that would be the ramification of  
8 taking away the McCarran Ferguson Act.

9 There are a number of areas, I would  
10 concede, there are a number of areas where at least  
11 arguably Federal regulation of insurance would make  
12 somewhat more sense than State regulation of insurance.  
13 I mean, you could find that on investment law  
14 provisions, you could find that on how data is to be  
15 collected by the regulator. That's a different matter,  
16 one I'm more than happy to discuss at length.

17 Q. Are you aware of any State's statutes  
18 with respect to antitrust that do not include this  
19 exclusion language you suggest here?

20 A. No. I believe all of them do.

21 REPRESENTATIVE HAYDEN: Thank you.

22 CHAIRMAN CALTAGIRONE: Thank you.

23 Representative Broujos.

24 BY REPRESENTATIVE BROUJOS: (Of Mr. Marshall)

25 Q. Sir, my next question was probably

1 answered by that last one, and that is, are you aware  
2 of any prosecutions of insurance companies or any  
3 company for any antitrust violations?

4 A. Aside from the most notorious one where  
5 20-plus State Attorney Generals, Attorneys General, I'm  
6 not sure what the correct language is, joined in on the  
7 antitrust investigation of, I believe, four or five  
8 companies.

9 Q. How long ago was that?

10 A. That was--

11 REPRESENTATIVE HAYDEN: '87.

12 MR. MARSHALL: '87, actually '88, and I  
13 think is still ongoing for the alleged meeting that  
14 took place over in London in a dining room of Lloyds  
15 involving four or five companies, some of whom we  
16 represent and some of whom we don't, and I'm not that  
17 familiar with the details, but that's one example.

18 But your question on what goes on,  
19 antitrust violations, per se, no, there aren't any.  
20 However, the State Insurance Commissioner here in  
21 Pennsylvania, and Insurance Commissioners in all other  
22 jurisdictions, does a variety of activities that I  
23 think would constitute antitrust. Our Insurance  
24 Commissioner routinely, and by that I mean at least  
25 every three years as required by statute and normally

1 more often, conducts market conduct exams of every  
2 company doing business. Every policy that every  
3 company issues in the Commonwealth of Pennsylvania has  
4 to be reviewed by the Insurance Commissioner. With  
5 that comes marketing plans and things of that nature.  
6 Advertisements are filed with the Insurance  
7 Commissioner.

8 Q. Can I interrupt here? You're going on at  
9 length on that.

10 I just want to ask you whether the  
11 present insurance laws by which you are regulated are  
12 broad enough to be construed to prohibit restraints of  
13 trade similar to the proscriptions in this act?

14 A. Oh, yes, sir. And you'll find that in  
15 particular in the Unfair Insurance Practices Act,  
16 Section 4 of that act.

17 Q. Is it a complete duplication?

18 A. I don't know that it is a complete  
19 duplication, but, and I will get back to you on that  
20 with that language.

21 Q. Yeah, I appreciate that. Like does it  
22 cover divisions of markets and other types of  
23 activities other than just having the rate that's the  
24 same?

25 A. Yes.

1 REPRESENTATIVE BROUJOS: Okay, thank you.  
2 That's all I have.

3 CHAIRMAN CALTAGIRONE: Representative  
4 McHale.

5 REPRESENTATIVE McHALE: Thank you, Mr.  
6 Chairman.

7 BY REPRESENTATIVE McHALE: (Of Mr. Marshall)

8 Q. Mr. Marshall, I apologize in advance for  
9 my ignorance. I'm going to be asking questions in an  
10 area where I haven't a clue as to what the correct  
11 answers are, and I guess that's what questioning really  
12 is supposed to be about.

13 Did I understand you correctly in  
14 responding to Representative Broujos when you  
15 indicated, I thought, your opinion that current law  
16 would prevent conspiratorial restraints on trade and  
17 other monopolistic agreements?

18 A. Yes.

19 Q. And was I also correct in my  
20 understanding that you responded to an earlier question  
21 that to the best of your knowledge though such  
22 restraints have been unlawful, there have been no  
23 prosecutions?

24 A. Yes, and one point on that, sir, and I  
25 should have made it clear for the Representative. The

1 amendment that we're suggesting, the amendment that I'm  
2 recommending, does not in any way allow for that. If  
3 you'll notice, the second portion of that talks about  
4 "does not constitute a boycott, coercion or  
5 intimidation or an agreement to boycott, coerce or  
6 intimidate." I'm not suggesting that we in any way  
7 think that monopolistic practices should be allowed

8 Q. If I understand you correctly, you're  
9 saying that current State law is adequate and that your  
10 amendment simply seeks to preserve the status quo?

11 A. Seeks to preserve the status quo while  
12 making clear within that amendment that the conduct  
13 that would constitute a boycott, coercion or  
14 intimidation would be proscribed and would actually  
15 fall under this act.

16 Q. I have no doubt as to the sincerity of  
17 your interpretation of existing State law. If your  
18 argument is current State law is satisfactory and if  
19 your argument further is that current State law would  
20 prohibit such restraints on trade, why is it that we  
21 have not seen any prosecutions?

22 A. I think that's because that doesn't  
23 happen. I think what you find--

24 Q. What doesn't happen, sir?

25 A. Restraints of trade. I mean, the reason

1 you haven't seen any actions against it is because it  
2 doesn't happen.

3 Q. Ever?

4 A. Not to my knowledge, and certainly not in  
5 the Commonwealth of Pennsylvania. If you look at the  
6 business of insurance and how it is regulated, it is  
7 not regulated in the sense of the regulator coming in  
8 after the horse is out of the barn. In the business of  
9 insurance, it's the regulator who allows the horse to  
10 go anywhere. It's the regulator who allows the horse  
11 to be born, if I may. I mean, that's how extensive our  
12 business is regulated. We are regulated from our  
13 inception, we are regulated before we can put out a  
14 product, we are regulated before we can price a  
15 product. All of that is subject to the Commissioner's  
16 stamp of approval before we can go into the  
17 marketplace.

18 Q. And so in your view the extent of the  
19 regulation is so severe and so significant that a  
20 restraint on trade simply would not occur?

21 A. Yes. I wouldn't want to say severe.  
22 Pervasive. I say that somewhat facetiously. I mean,  
23 severe ascribes certain motives to our regulator that I  
24 wouldn't want to suggest.

25 Q. Over what period of time has it been, in

1 your opinion, unlawful for Pennsylvania insurance  
2 companies to enter into these kinds of restraints on  
3 trade?

4 A. I think since the establishment of State  
5 regulation, which would be really the insurance company  
6 law and the Insurance Department Act of 1921, at least.

7 Q. And so you're saying that regulation has  
8 been so pervasive since 1921 that no restraint on trade  
9 has ever occurred?

10 A. You're asking me is it possible that it's  
11 ever occurred?

12 Q. I'm not trying to be unfair.

13 A. I can't say for sure.

14 Q. You're saying that in your view it's been  
15 illegal since 1921?

16 A. It's been illegal at least since 1921,  
17 probably longer.

18 Q. And you're also saying to the best of  
19 your knowledge there's never been a prosecution since  
20 1921?

21 A. That's correct.

22 Q. Because the regulatory process is so  
23 successful?

24 A. That's correct.

25 Q. One final question. Are you familiar

1 with the regulatory procedures in other States beyond  
2 the jurisdiction of Pennsylvania?

3 A. Of their insurance departments?

4 Q. Yes.

5 A. Yes, reasonably familiar.

6 Q. I have read, and I truly don't know if  
7 this is accurate or not, but I have read that the scope  
8 of regulation in Pennsylvania, particularly when viewed  
9 in terms of the size and funding for the Insurance  
10 Department, is substantially less significant than the  
11 devotion of similar resources in other States, most  
12 notably the State of New York. If that has been, I  
13 have read that in the form of criticism of how well we  
14 regulate. You're arguing that regulation is so  
15 pervasive and successful that antitrust actions are  
16 unnecessary. What I have read is that we in  
17 Pennsylvania do not fund our Insurance Department very  
18 well and that the Insurance Department, because of  
19 those kinds of resource limitations in Pennsylvania, is  
20 not nearly as aggressive, thorough, or effective as the  
21 comparable agency in the State of New York. Would you  
22 comment on that?

23 A. Yeah, and I will comment not only as  
24 counsel for the Insurance Federation but as a former  
25 assistant counsel of the Insurance Department.



1           I can say, based on my experience within  
2 the Insurance Department, that no, there was no lack of  
3 resources for the job of regulating. There may have,  
4 on occasion, been a lack of expertise or gumption to go  
5 do it on the part of an individual here or an  
6 individual there, but there was certainly no lack of  
7 resources. I would say that the Pennsylvania Insurance  
8 Department has, I mean, I would say enjoyed, and I take  
9 pride in what I did for the department, I would say  
10 that it has enjoyed a representation as certainly one  
11 of the most vigorous departments in terms of ferreting  
12 out fraudulent activity, in terms of ferreting out  
13 insolvencies, in terms of ferreting out corrupt  
14 marketing plans, whatever. I think that our department  
15 is an extremely aggressive department.

16           I would also note, unfortunately all  
17 since I left, that the amount of moneys authorized for  
18 the department have increased dramatically every year.  
19 Increased salaries, which is part that I regret, but  
20 also increased personnel, and I think that that's a  
21 trend that is continuing. It is continuing with the  
22 industry's support. I believe we are very interested  
23 in good, quality, strong regulation. And a good  
24 insurance company obviously wants the bad actors out of  
25 the business.

1           Q.    Mr. Marshall, I would be interested in  
 2    seeing a factual comparison between the State of  
 3    Pennsylvania and the State of New York in terms of the  
 4    size, the scope of regulation, number of investigators,  
 5    adequacy of funding.

6                   I'll simply close with this: I sincerely  
 7    hope that you're correct. I'm pleased to hear that  
 8    it's your interpretation of the law that these kinds of  
 9    restraints on trade are illegal under existing  
 10   statutes. I'm pleased to hear that conclusion, but you  
 11   can't help, and I hope you'll forgive me for being a  
 12   bit skeptical when I hear that that illegality, in your  
 13   opinion, has existed since 1921 and that no  
 14   prosecutions have been brought in the last 70 years  
 15   because our regulatory process is so pervasive and  
 16   effective. I have to view that conclusion with some  
 17   degree of doubt. I'll mix that doubt with hope that  
 18   you're correct, but when I see 70 years of potential  
 19   illegality and no prosecutions, I've got to wonder how  
 20   any administrative regulatory process could possibly be  
 21   so effective.

22                   REPRESENTATIVE McHALE: Thank you, Mr.  
 23    Chairman.

24                   CHAIRMAN CALTAGIRONE: Thank you.  
 25                   Another question from Representative

1 Broujos.

2 BY REPRESENTATIVE BROUJOS: (Of Mr. Marshall)

3 Q. Mr. Marshall, isn't it true that it's  
4 really not a question of whether there's been  
5 prosecutions or whether there are cases in the woods  
6 out there that should be prosecuted or that there are  
7 combinations out there but whether we have the tools to  
8 determine if they are there, and in that regard I'd ask  
9 the question with respect to the procedure as well the  
10 substantive nature of the existing insurance laws. Are  
11 there sufficient tools to investigate comparable to  
12 2376?

13 A. Yes, sir, and you actually formed an  
14 answer that I should have formed to the other  
15 Representative. The tools are there within the  
16 Insurance Department. In fact, the tools that the  
17 Insurance Commissioner and the department enjoy under  
18 existing insurance laws are, in truth, considerably  
19 more extensive than what's proposed in House Bill 2376.

20 Q. Now, apropos of the questions of our  
21 prior speakers, have you found any abuses of those by  
22 the State?

23 A. I'm not going to touch that. I'm not  
24 going to touch it. Seeing Representative Hayden over  
25 here, we could have an interesting discussion about

1 data collection, about rate review filings. However,  
2 apropos of the other speakers and appreciating their  
3 concerns about investigative powers on the part of  
4 district attorneys or Attorneys General, the insurance  
5 industry, I've looked at those investigative powers and  
6 thought, gee, that's just another day at the office for  
7 an examiner of the Insurance Department. I mean, the  
8 fact is everything that we do is subject to, at  
9 moment's notice, I mean, on the whim of the Insurance  
10 Commissioner, no need for probable cause, no need for  
11 anything like that, to the Commissioner's supervision  
12 and regulation. In fact, we fund that supervision and  
13 regulation.

14 And so certainly under existing insurance  
15 laws the tools are there in plentiful supply.

16 Q. As a citizen of this Commonwealth, as  
17 well as counsel, when you look back, were there times  
18 when you felt that there should have been prosecutions  
19 that there weren't prosecutions? Generally speaking.

20 A. No. The only thing I would say is that--

21 Q. Well, can I change that? That wasn't  
22 really as a good question.

23 A. Yeah, I certainly wasn't going to say,  
24 yes, I wasn't doing my job as counsel to the Insurance  
25 Department.

1 Q. Well, that's why I'm going to change it.  
2 That there perhaps were opportunities to investigate  
3 but you didn't investigate because you didn't have the  
4 means to investigate in terms of manpower and budget?

5 A. No, that certainly has never been the  
6 case, in my experience with the Insurance Department,  
7 and I followed the Insurance Department both as an  
8 employee and somebody who has dealt with it from the  
9 other side for the last 10 years. Certainly not the  
10 case.

11 Q. Now, you're saying that you had  
12 sufficient tools in terms of investigative powers,  
13 manpower, and budget to investigate all complaints that  
14 you felt were investigatable?

15 A. Yes. I'd say we probably investigated a  
16 few that really weren't investigatable, too.

17 REPRESENTATIVE BROUJOS: Okay. Thank  
18 you.

19 CHAIRMAN CALTAGIRONE: Thank you, and  
20 this will conclude the hearing for today. Thank you  
21 very much.

22 (Whereupon, the proceedings were  
23 concluded at 12:15 p.m.)  
24  
25

1 I hereby certify that the proceedings and  
2 evidence are contained fully and accurately in the  
3 notes taken by me during the hearing of the within  
4 cause, and that this is a true and correct transcript  
5 of the same.

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