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PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

TESTIMONY ON H.B. 2376

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TESTIMONY OF JUDAH I. LABOVITZ ON BEHALF OF
THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

Good morning, ladies and gentlemen of the House Judiciary Committee. My name is Judah Labovitz and I am testifying on behalf of the Pennsylvania Chamber of Business and Industry. We appreciate the opportunity to testify before the Committee on House Bill 2376 sponsored by Representative John Broujos.

At the outset, I want to emphasize that the Chamber does not believe that anti-trust legislation is necessary or appropriate in Pennsylvania. In my twenty-seven years of experience representing both plaintiffs and defendants all over the country, I cannot think of any case I have been in in which the availability of a state anti-trust law would have enhanced the claim being made or in which the absence of a state anti-trust law impeded the enforcement of a claim. In 1990, there is virtually no realm of economic activity that the interstate commerce power of the federal government, which is the predicate for federal anti-trust law jurisdiction, does not reach. Let me give you just a few illustrations. It is hard to imagine an activity that is more local in nature than residential and commercial trash collection and hauling. Nonetheless, at the present time, there are literally dozens of federal court criminal and civil anti-trust cases pending against trash collectors and haulers alleging that they have engaged in collusive conduct to divide markets and fix prices.

Also, earlier this month, a criminal prosecution was started in federal court in Philadelphia by the Antitrust Division of the United States Department of Justice alleging that there has been bid rigging by jewelers who engage in consignment auctions, again, a very local type of activity.

The Chamber is quite aware that much of the current interest in legislation such as House Bill 2376 has been intensified by what appears to be a sharp and largely unexplained price rise for home heating oil during the harshest part of this past winter. I think it is important, however, for this Committee to understand that even that was not a local phenomenon limited to this Commonwealth or certain parts of this Commonwealth. Quite to the contrary, the sharp price rise in home heating oil manifested itself up and down the east coast of the United States and was the topic of discussion, not only here in Pennsylvania, but also by the governors of Massachusetts, Connecticut and other states. I think it is significant, in terms of our reasons for being here today, to note that at the time, the National Association of Attorneys General issued a statement to the press in which they stated "the federal government is best equipped to handle the many distribution and pricing problems that cut across state and regional lines and to address the complex network of federal laws and regulations governing the industry." Equally

important, the federal government, both in the Department of Energy and in the Antitrust Division of the Department of Justice, has not ignored the problem. Assistant Attorney General James Rill, who heads the Antitrust Division of the United States Department of Justice, announced that that department has in fact initiated an investigation of the home heating oil price increase this past winter.

Against this background, I think it is interesting to note that House Bill 2376 does not contain any statement of purpose or make any legislative findings as to why such an enactment is necessary. The fact of the matter is that the offenses defined in House Bill 2376 are not new and are not differently defined than the offenses which are presently covered by the Federal Anti-trust Laws. House Bill 2376, and comparable bills, simply do not fill in any perceived gaps in federal law, but rather, essentially, do no more than restate what is already existing federal law. Meanwhile, from the point-of-view of the business community, such an effort is counterproductive. At the federal level, anti-trust government enforcement is largely entrusted to specialized agencies of the government who bring to that task a high level of expertise and sophistication to what generally are subtle, and often complex, economic issues. A separate division exists in the anti-trust division of the Department of Justice to handle anti-trust

litigation staffed not only by attorneys with expertise in the area, but also economists, accountants, and with access to the Federal Bureau of Investigation for investigatory purposes. By contrast, I would be surprised if the average district attorney in Pennsylvania, skilled as he or she may be, or indeed the judges of our Commonwealth Court, have much if any familiarity with such concepts as the free rider problem, the Areeda/Turner concept of predatory pricing below variable cost, or are well read in the writings of the Chicago School of Economics, which today so much influences federal anti-trust law.

It also seems to me, based on my experience, that the federal authorities have not been prone to misuse and abuse anti-trust litigation for its political capital. Unfortunately, the same cannot be said for prosecutors in such states as New York State and California, both of which have state anti-trust laws. In those jurisdictions, there have been well orchestrated news conferences to announce state anti-trust proceedings, often involving what can only be characterized as business bashing in matters that are often never heard of again.

On behalf of the Chamber, I also submit to you that the enactment of a state anti-trust law here in Pennsylvania would run counter to the economic philosophy of making Pennsylvania an attractive climate for business. I don't, by any means, intend to suggest that attractive is synonymous with the right

to fix prices or monopolize. But we do market in a global market in which American business is already inhibited in its ability to compete by lack of comparable economic regulation abroad. Adding another level of supervision through state anti-trust legislation, which on the other hand, adds nothing substantive, will just further burden the competitiveness of local industry abroad.

I do recognize that there is one area where House Bill 2376 differs from existing federal law. The so-called Illinois Brick Rule, whereby only a direct purchaser from a conspiratorial price fixer has standing to sue for damages, is the rule followed in the federal courts. Section 9(a) of House Bill 2376 would, as to the Commonwealth and various governmental entities, permit recovery, even though they might be indirect purchasers, something which the Supreme Court stated that state law can permit, federal law notwithstanding. That the Supreme Court has not required states to follow the Illinois Brick Rule under their own legislation, however, does not mean that that is good or equitable policy. It seems to me that the reasons behind the Illinois Brick Rule, as stated by the Supreme Court in that case, remain persuasive. To permit indirect purchasers, even as limited a group as the state and its political subdivisions, to receive anti-trust recoveries

will introduce a level of complexity into anti-trust trials that can only further lengthen those trials, produce more appeals, and generally clog the judicial system. Moreover, to allow indirect purchasers to recover really does not pay attention to the economic reality of how goods and services are priced. On the other hand, indirect purchaser recovery does create a serious risk of confiscatory double liability which is exacerbated by the lack of ability to coordinate competing claims at the state level, as between direct and indirect purchasers. It is quite possible to imagine a situation in which the Commonwealth or one of its subdivisions, as an indirect purchaser, would bring an action in Pennsylvania, while at the same time, the same defendants are being sued by direct purchasers in state or federal court in some other jurisdiction. Unlike in the single federal system, in which such competing claims can be coordinated and therefore the risk of confiscatory double liability avoided, no such mechanism exists between the states.

The mischief that state anti-trust legislation can do is also illustrated by some of the provisions of Bill 2376, as well as some things that are missing from that Bill. For example, the Bill provides that anti-trust civil penalty and injunction actions are not restricted to the Attorney General,

but with the permission of the Attorney General, may be brought by local district attorneys. I respectfully submit to you that the district attorneys throughout this Commonwealth are simply not equipped to handle that kind of litigation. They do not have adequately trained staffs of lawyers who participate regularly in such litigation and are familiar with the conceptual bases for anti-trust litigation. They do not have on their staffs the economists and investigators who are comfortable with the concepts that have to be explored in anti-trust litigation. Probably of greater importance, they simply do not have the financial resources to undertake such litigation. For example, I am sure many of you read in news reports just last week that the district attorney in my own City of Philadelphia, has suggested moving a significant number of drug cases from the state court to federal court because he does not have the resources in his own office to prosecute those cases.

Section 7 of House Bill 2376 ("Official Investigation") also not only permits, but encourages, fishing expeditions and general harassment. That section does not contain adequate protection for trade secrets and the minimal protection granted for "confidential information" would expire at the time an action is brought. There is also no geographic limitation on where someone might be required to respond to the

investigation, so that business people in Pittsburgh might be required to produce their documents or witnesses in Philadelphia, or vice versa, at considerable expense and disruption to the daily operation of business.

House Bill 2376 also perpetuates one of the most unfair and punitive aspects of Federal Anti-trust Law under which defendants have joint and several liability with no right of contribution. An illustration may help to explain the harsh way in which this aspect of federal law operates. Imagine an industry of six companies, all six members of which are charged with fixing prices. Two of the six each have a market share of thirty percent. The third company has a twenty-five percent market share, the fourth, a seven and one-half percent market share, the fifth a five percent market share and the sixth a two and one-half percent market share. Under existing federal law and apparently under Bill 2376, the company with the two and one-half percent market share could be individually chargeable with one hundred percent of the damages assessed against all six members of the industry, and if so assessed, would have no right to obtain contribution from the other members of the industry, including the two members with a thirty percent

market share each. The net result of this rule is that it forces companies accused of anti-trust violation to reach a settlement without regard to the merits of the case or their assessment of their own liability, because the rules of liability simply make the risk of litigation too great. The defendant that sincerely believes that it has done no wrong and would like to have the merits of the claim tested in a court of law, simply cannot withstand the risk of a liability disproportionate in the extreme to its size and market share.

There are two other aspects of Bill 2376 to which I would like to invite your attention. Section 6 of the Bill states "that any action for violation" is to be brought in the Commonwealth Court. On the face of the Bill, this provision would seem to vest jurisdiction in the Commonwealth Court over criminal cases brought pursuant to Section 10 of the Bill. However, to the best of my knowledge, the Commonwealth Court does not have jurisdiction to hear criminal cases, nor is it equipped to do so.

Finally, Section 8 of the Bill provides a $100,000 penalty "for each violation of this act." Nowhere in the act, however, is there any definition of the term "violation." Would each and every sale of an allegedly price fixed product be a violation? If so, the penalties could become astronomical and likely to bankrupt most companies. Likewise, Section 4

makes it a violation to "use" a monopoly. Presumably, every sale of a product by a monopolist could therefore be a violation, again permitting punitive and indeed catastrophic penalties.

We are all familiar with the old saw that if something isn't broken we ought not to fix it. On behalf of the Chamber, I respectfully submit to this Committee that federal law is capable of reaching, and does reach, at least ninety-nine percent of the concerns which this Bill addresses. Moreover, we already have in this Commonwealth an anti-bid rigging act. Therefore, as far as I can determine, there is nothing about federal law as it applies to activities within this state that is so broken that it requires the fix of anti-trust legislation such as Bill 2376.

Thank you very much for your time and attention.