ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: Senate Bill 307, Antitrust Legislation

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Stenographic record of hearing held in Room 140, Main Capitol, Harrisburg, Pennsylvania

Wednesday, August 4, 1993, 10:00 a.m.

HON. THOMAS R. CALTAGIRONE, Chairman
HON. JEFFREY E. PICCOLA, Minority Chairman

MEMBERS OF THE COMMITTEE

Hon. Albert H. Masland, Jr.
Hon. Robert D. Reber, Jr.
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Hon. David W. Heckler
Hon. Dennis O'Brien

Also Present:

William H. Andring, Chief Counsel to the Committee

Kenneth J. Suter, Counsel to the Committee

Galina Milohov, Research Analyst

Margaret Tricarico, Secretary

Reported by:
Emily R. Clark, RPR

I N D E X

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CHAIRMAN CALTAGIRONE: I would like to get the hearing started, the House Judiciary public hearing on Senate Bill 307, Antitrust Legislation, and our first witness for today would be former Representative John Broujos, a member of the Pennsylvania House.

MR. BROUJOS: Thank you, sir.

Mr. Chairman and members of the Judiciary Committee, I appreciate the opportunity to present to the committee some views on the current Senate Bill 307, providing for a state antitrust act. The thrust of this law is to prevent the suppression or limitation of competition required to make the price determination in the market enterprise economy work.

There are legitimate exchanges of information among companies and business associations; there are always collusive agreements. The challenge to this legislature is to enact a law that does not interfere with the first and proper goal, but does control the second and anti-competitive activity.

There are pros and cons to the enactment of this legislation. But the net effect is to encourage competition by prosecuting flagrant violators and discouraging collusion by the prospect of prosecution and ensuring that potential actors are not discouraged from entering the competitive arena.

Is there a need? There certainly is a need. A major opposition has centered on whether the federal antitrust act is sufficient. No more appropriate statement could describe the position of federal law than a conservative United States Supreme Court statement in California v. ARC America Corporation case, quoting: "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. In fact, 21 states adopted antitrust laws prior to the Sherman Act. Common law had preceded the enactment by the states, and the enactment by the federal government." So the states are very much at home with antitrust legislation. The courts have recognized that the Supreme Court has recognized it.

There is a need for a state act because there are a number of advantages. They're listed on page 2. The first, certain damages may be recovered only under a state act. When there was a $32 million damage suit for the price of cement, the amount was paid out in settlement under both federal and state laws. In the California case, state laws provided for the indirect purchaser getting recovery in an antitrust case.

That indirect purchaser cite I'll address in more detail later, but it resulted from the fact that there were state laws in existence at the time. Pennsylvania did

not benefit from that because they simply did not have a state law.

Secondly, a state act will provide jurisdiction that the federal act does not provide. That's because any acts that occur within Pennsylvania that are strictly within the confines of Pennsylvania are not subject to federal jurisdiction.

Some people say, well, really, what today is not interstate? Well, not everything is interstate, and if there are any intrastate violations, then this law would take care of it.

C, page 3: Only a state act will provide investigative authority to obtain information necessary to protect consumers and businesses. The state cannot use the federal prosecutorial investigative powers. And in many cases, there's a history of the failure of the federal government to prosecute cases, leaving the state without a remedy, and without the ability to proceed because they do not have the investigative powers.

Next, the state act needs the precedent and stability of the Sherman Antitrust Act language. This state act, this bill, does follow in many respects federal language.

On page 3, I list the summary of arguments of some of the critics. It's a repetition of some of the major

points so I'll go over them briefly.

A. The federal antitrust act is sufficient. Well, it's not sufficient because it doesn't cover consumer complaints, the indirect purchaser. The state may not bring federal criminal sanction in certain cases. It does provide the state with investigative powers, and any act performed within the state that does not involve intrastate commerce cannot be prosecuted under the federal act.

B. Any act which constitutes a restraint of trade can be prosecuted under a federal antitrust law. This argument is not correct. As recently as 1989, the Supreme Court held that prosecution under a state antitrust law is permissible for recovery of damages by indirect purchasers. The courts held that the federal act does not preclude recovery under a state law.

There are some actions for damages from restraint of trade that can only be brought under state law, and I related some of those cases in my prior remarks.

C. State law. The argument's made that a state law would clutter the courts with complicated proceedings. I haven't seen anything in factual testimony that supports that. In fact, most of the time in the past, in the '89 and '91 proceedings, most of these arguments were presented and there was no significant rebuttal in terms of actual cases, in terms of actual types of situations that would support

the complicated proceedings.

In fact, I haven't heard anybody complain, as an indirect purchaser, about the complication of proceedings or the duplicity or any other problems that arise because the consumer is entitled to recovery when he gets that recovery. It's because action has been taken under indirect purchaser laws.

Businesses would face multiple actions in two courts. Again, the California case had the answer. It said: It would not permit federal action to have the effect of preemption of any state law claimed against antitrust defendants simply because multiple litigation could threaten the defendants with bankruptcy. There is no federal policy against states imposing liability in addition to that imposed by federal law.

We see that in environmental matters, in the safe water act on the federal level. The federal government said, we will take jurisdiction unless the states take jurisdiction, and in many cases, the states have and the federal government got out of it.

There are some situations where there is dual jurisdiction, and properly so. There are some cases in which the federal government says, states, proceed if you want to, and the states have taken up the cause. In those cases, the federal government has left them alone.

There is no inconsistency in state and federal antitrust laws. And I related the argument for that previously.

The next argument used is only the federal government has specialized agencies with expertise and sophistication to prosecute antitrust cases. Well, we cannot rely exclusively upon the federal government for prosecution of all antitrust activities. As a matter of policy, the federal government may choose not to prosecute it. The federal government chose not to regulate the savings and loan institutions, while increasing deposit insurance, coincidentally. And after losses exceeding $130 billion, Congress then reacted. It's ironic that business organizations that decry the overbearing regulation of the federal government and preach the return to states of power to regulate, suddenly want prosecution only on the federal level.

There are many areas of dual jurisdiction to which I've related. Another argument is made that Attorney Generals will misuse and abuse the state law. Well, then we should scrap all criminal laws. Refusal to enact a state antitrust law because the Attorney General with bad motives may invoke it is the most cynical reason for opposing the bill. The interesting thing about state prosecution is that the states go about it very methodically and very carefully

and very professionally. The National Association of Attorneys General has guidelines that they published which state the standards of concentration, the standards of abuse by the industry. They approach it in a very professional manner, in a very scientific manner. It's not a matter of an Attorney General waking up some morning and saying, geez, I think we ought to go after these guys. The study by the Attorney General's office, this Attorney General, has been careful, it's been calculated, and it's been done conservatively and with good taste and it's been done as a situation requires it. The initial efforts made for heating oil prosecution alerted the Attorney General to the failure of the state to have an act which would permit that prosecution.

Later on, you will see a number of areas of beer price fixes, sale of band instruments, merger of Horne's and Kaufmann's, sale of of airline gates in Philadelphia, waste haulers, jewelers, home heating oil, all of which justify action on a state level and a basis for action by an Attorney General that acts responsibly.

The next argument made is the state antitrust law will create an unfavorable business climate in the state. Where else is the company going to go that there is not a state antitrust law? The chamber in effect has testified to this classic non sequitur that a state law

enacted to ensure a competitive market will just further burden the competitiveness of local industry abroad. We know that there are certain areas of exceptions or certain areas of inquiry that should be made by the federal government with respect to exports. This current administration is re-examining the impact of antitrust laws on international trade. That's the legitimate function. That addresses the application of antitrust laws, not the existence of antitrust laws.

The final argument is that indirect purchasers should not be permitted to sue for damages, since this would introduce complexity into antitrust trials, produce appeals and clog the judicial system. This is directly contrary to the California case.

The interesting thing about price-fixing is that price-fixing occurs at the top by anti-competitor, anti-business forces, selfish forces that don't want to play by the rules of competition, and who pays the price? The price is usually paid by the ultimate consumer, because the distributor and the retailer get the higher price passed on to them, and what do they do? They have to pass it on to the consumer. But does the consumer have a right to sue? Not in Pennsylvania under this act.

The ironic thing is that only the Commonwealth of Pennsylvania is defined as an indirect purchaser. Isn't

that ironic? That this state through this General Assembly, through your House, if you pass this bill as it's presently constituted, will say that the Commonwealth stands higher than the small businesses and the retailers or the small businesses and the consumers that pay the price. That's something you want to seriously think about. I tried to keep the indirect purchaser, in 1989 and 1991, business would come and say, well, the price for our support is getting rid of the indirect purchaser provision. So a few sponsors would say, okay, let's amend it and they get enough support and it would be amended. And then business would not support the bill as business may come in today and say, we don't support the bill. This House should re-insert the indirect purchaser to protect the ultimate consumer, who is the person that really pays the price for the price-fixing and the market-fixing that occurs at the top.

I went to buy a Toyota about at least 15 years ago, and when I decided what I would like, I was told, well, now you've got $150 for undercoat, $150 for interior coat, $150 for outside coat. Three separate coatings had to be applied. I said, I don't want them. They said, oh, our distributor in New Jersey says you have to do it. The Attorney General here, either independently or with other New Jersey perhaps, or with federal agencies, managed to get an action against the Toyota firm to eliminate that. Did

the buyer get the $150 back? Or $400 back, in Pennsylvania? He did not, because the indirect purchaser was not protected. I never heard persons victimized in the multi-million dollar Minolta case and the Pennsylvania Toyota case complain about complexity and clogging in the courts.

I deeply regret the attitude of major businesses in opposing this bill, and for opposing the indirect purchaser, because you should ask the businesses when they come before you, what are your answers to these questions that have been raised in this presentation? You should ask them, do you represent all the businesses of this state? Do you represent the petroleum dealers, auto dealers, cemetery people? Do you represent all of the small businesses that don't have the assets that the major industries have, that may not come before you with these arguments, but are still there and are still there like the innocent victims that do not have a voice but still need protection.

The antitrust act protects good businesses from actions of bad businesses that abuse the legitimate business practices. They deserve this act, and the Attorney General's Office will tell you that many of the complaints coming to their office are from businesses.

I list on page 7 the types of prosecutions within the state for state acts that have occurred and which

can occur. The investigative powers are there, I list that very briefly. And then I list on page 7, state statutes allowing indirect purchasers to sue for damages.

I have one comment that I would like to pass on for your consideration, and that is the question of the insurance exemption. The insurance exemption comes in every time this bill is debated, but it's so broad that certain anti-competitive acts against individuals, even businesses, and even the Commonwealth as indirect purchaser cannot be prosecuted.

Now, this next is a long sentence but this sentence raises and points out that issue: Since the bill does not apply to the business of insurance that is regulated by the insurance commissioner, the traditional language of exemption, and since the Unfair Insurance Practices Act does regulate the business of insurance, which is the key word, and since the consumer and a business entity have no cause of action under the Unfair Insurance Practices Act, therefore, your consumers and businesses have no claim for relief from conspiracy and restraint of trade or from monopolistic practices by the insurance industry.

I congratulate the Senate on including Section 10(f)(2) which permits actions against companies for boycott, coercion and intimidation. This follows the McCarran Ferguson Act.

Next, I've raised an issue here that I may be incorrect in but counsel can review that. The risk that an individual cannot be prosecuted for a criminal penalty may exist, and it may have been intended.

Section 3 defines a person. Section 7 defines only partnership, corporation and association being eligible, or subject to violation, charge of a felony for a violation of Section 4 or 5.

Finally, the traditional language is that two or more persons in restraint of trade is unlawful. Your language, your bill does not have that language. It's traditional language in the dichotomy of the Sherman Antitrust Act. Briefly, Section 1 of the Sherman Antitrust Act is against two or more people may agree in restraint of trade. That's the conspiracy type.

The second category is monopoly. Monopoly may occur from one person. So the second category, which is not in some prior acts but is essential to this act and is in this act is the monopoly act.

So I think that a strict reading may possibly exclude an individual from a criminal penalty. If that's what you want, so be it. I think that's subject to review.

I have provided to you a secondhand audit hand-out which very eloquently states that antitrust laws and the Sherman Act are the Magna Carta of free enterprise.

You're on the side of the angels. There's a second letter there from Connecticut which supports indirect purchasers from a gentleman that's been involved in antitrust litigation and can state it more eloquently than I.

Thank you for the opportunity to appear before you.

CHAIRMAN CALTAGIRONE: Thank you, Representative Broujos.

Questions from the committee? Chairman Piccola?

CHAIRMAN PICCOLA: Thank you, Mr. Chairman.

John, you've covered an awful lot of territory here, and I think you and I have probably debated a lot of it over the last couple of sessions, but there was one question that I did have, and my recollection is that the bill that you introduced in the last, I guess, couple of sessions does not have a section similar to Section 6 of this bill, the acquisition and merger section. Is my recollection correct?

REPRESENTATIVE BROUJOS: Yes, I don't recall that.

CHAIRMAN PICCOLA: So that's something new from what you had introduced in prior sessions?

MR. BROUJOS: That is.

CHAIRMAN PICCOLA: My reading of that section,

Section 6, seems awfully broad and awfully nebulous. Could you comment on that?

MR. BROUJOS: No, I'm not prepared to comment on that. I'll review it and I'll try and get some comment back on that.

CHAIRMAN PICCOLA: You don't have any recollection as to why you did not include that kind of a section in your bill?

MR. BROUJOS: I think the most important thing is why it went in the Senate. The traditional approach is to outline these two sections I referred to briefly before, the Section 1 and 2 of the Sherman Antitrust that are copied by all the little Sherman Antitrust which is Section 4 and 5. This appears to be an attempt to more carefully define what type specifically of an acquisition or merger may constitute a monopoly, and there's a reason that the Senate had, I'm sure, and I'll try and find that.

CHAIRMAN PICCOLA: In other words, I don't want to put words in your mouth, but perhaps they are the kinds of things that are being attacked under 6 are already covered under 5 and perhaps 4?

MR. BROUJOS: Well, what's happened over the years is that there has been an attempt to spell out more specifically the nature of monopolistic and restraints of trade. For instance, the Antitrust Civil Process Act

amendments, that Hart-Scott-Rodino and other amendments have sought to define more carefully to make perhaps prosecution easier or more difficult. The specific areas of restraint of trade and monopoly, and this may be an attempt to define more precisely an area that may have escaped prosecution before, or may be sought to be defined in more detail.

CHAIRMAN PICCOLA: I would appreciate any comments you might have on that. I don't look at this as defining it more precisely. In fact, it appears to be defining it less precisely. But I appreciate your comments after you've had the opportunity to review it.

MR. BROUJOS: Yes, sir.

CHAIRMAN PICCOLA: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Counsel Suter?

MR. SUTER: I just have one question on page 10, Section 11, regarding investigatory power of the Attorney General. It says: If the Attorney General has reason to believe that a violation of this act has occurred. Is the intent of that to mean reasonable cause to believe, or not?

MR. BROUJOS: I believe that would be equal to reasonable cause. The problem has always arisen, and we dealt with this a few years ago, as to what degree of proof or what degree of factual conditions can justify an investigation. The way that we took it down the path a few years ago was to eventually get to the question of the

subpoena. Most of this deals with the right to challenge the subpoena, and that's for substantial reasonable cause. That is defined in here pretty well and I think that's taken care of.

The problem with saying if the Attorney General has reason to believe the violation has occurred is perhaps the burden to the Attorney General. I think that you should have a right to take action even when -- to investigate even when it's speculative. So the Attorney General may have some comment on that, whether that imposes any type of duty on him higher than a normal investigative procedure that's based on information that may not be reasonable cause.

I don't know that that language should be interpreted as reasonable cause, because reasonable cause is a very high degree, and I think the Attorney General should have some latitude in investigating prior to his issuance of a subpoena and prior to his action of bringing a suit.

MR. SUTER: Okay.

CHAIRMAN CALTAGIRONE: Representative Reber?

REPRESENTATIVE REBER: Thank you, Mr. Chairman.

Good to see you, John.

MR. BROUJOS: Yes, sir, thank you.

REPRESENTATIVE REBER: On the criticism of the insurance exemption, the Section 10 language, can we zero in on that a little bit? I think you'll certainly recall the

enactment in or about 1978 of the Political Subdivision Tort Claims Act which virtually narrowed the potential liability issues relative to actions against municipalities. And you may recall that in the mid '80s, there was a crisis for many of our authorities and our municipalities getting liability insurance for the members of their boards and what have you, even to the point where it had been written from '78 up until '83, '84, '85, and then all of a sudden there was a crisis, if you will. I know many, many members of authorities resigned because of the unavailability of particular liability policies to be purchased.

My question is this: Do you think that there should be a subsection 3 in 10(f) that would allow for the Act's investigative aspects to be used where before a particular date, there was the availability of a type of insurance? And I use the municipality situation as an example, and then all of a sudden there is a total drying up of market, if you will, and the unavailability of it virtually at any price in the state. Do you think that might be an additional area that we should consider for purposes of limiting, if you will, the insurance exemption under Section 10?

MR. BROUJOS: What language or what real language would you have that would implement that? I follow the concept, but as far as the manner in which it would be

phrased, do you have any --

REPRESENTATIVE REBER: Just off the top of my head I don't, but some -- I don't have anything.

MR. BROUJOS: Generally.

REPRESENTATIVE REBER: Just generally, if there was an established line of policy being written and then all of a sudden, there's a declaration for that announced, and in many cases, unannounced specific reasons it's not available anymore. Would or should the act trigger investigative authorities to make a determination whether there is some attempt to monopolize, to manipulate, you know, the market?

Because I always found it to be very paradoxical that we had a very, very tight liability situation on the municipal side, notwithstanding that limited amount of liability exposure, the market virtually dried up for a number of months and/or years in the mid '80s and then all of a sudden, miraculously reappeared and people were writing, you know, these policies. I just have some concern about a blanket exemption in the area of insurance. I can only think back to some of the debate that we had on the no-fault auto and what have you, and just have some concern.

And I detected in your language that to use your words, criticism of the insurance exemption. I'm just

wondering how far that exemption should go to be limited, if at all, and what your thoughts are by way of the example I gave or any others that might come to your mind.

MR. BROUJOS: Okay. I think that your situation addresses the defect of permitting what I would call almost a blanket exemption of the insurance industry. And you have to go back to the concept of where this started. The exemption starts when you say that the federal Sherman Antitrust Act and the Clayton Act shall not have jurisdiction where a state has regulated the insurance industry or business.

The state then may have the most modest or smallest modicum of regulation, and consequently, automatically because it does regulate business in the weakest way or insurance in the weakest way, there is an exemption from the federal antitrust acts. If we address that, we would address the problem you've posed.

REPRESENTATIVE REBER: Can I interrupt you there? Was it implicit in that language in the federal legislation and the federal acts that the states would then be doing in the course of their regulation, the necessary investigation that would be implicit in this particular type of concept? I mean, does legislative history back there point that out? That that was what was behind that exemption, that they didn't want to get involved in

investigating and regulating each and every state, but they had the assumption that each state would take that upon themselves to do that, to prohibit those kind of practices under the state regulatory process vis-a-vis state law?

MR. BROUJOS: Representative Reber, at the time that that federal exemption was put in, there were certainly highly intelligent legislators, congressmen, senators, staff, that knew that any exemption they had would be broad, and that it would have the same effect on the substantive prosecution as much as the investigative phase. So my answer is that, yes, they would have known. I don't know what the legislative history is that's to be divined by pulling it out. But I think that we can conclude that they knew very well that once they put in a blanket exemption of insurance, that it was going to just take insurance right out of the antitrust.

You see, I think it's a relatively simple proposition that you can grasp in this situation, that is, that there may be antitrust activities, monopolistic, restraint of trade, price setting, market failure to provide policies, cutting off policies for all kinds of reasons. There may be all of these things going on in the insurance industry that cannot be reached by a state, and they should be. Texas in 1989 or '90 brought a massive action against companies that carved up territories that said, we're not

going to write policies in certain areas and in certain amounts. All of the actions which are anti-competitive hurt the consumer, and cry out for state antitrust legislation.

REPRESENTATIVE REBER: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Thank you. Are there any other questions? John, it's good having you back with us. Appreciate your testimony.

MR. BROUJOS: Thanks for the opportunity.

CHAIRMAN CALTAGIRONE: We'll next hear from John Dankowsky, Pennsylvania Business Roundtable.

MR. DANKOWSKY: Good morning, Mr. Chairman. I'm John Dankowsky, executive director of the Pennsylvania Business Roundtable. With me is Mr. Jay Tolson, who will be delivering the statement of the Roundtable. Dave?

MR. TOLSON: Mr. Chairman, members of the Judiciary Committee, good morning. As John said, I'm Jay Tolson and I'm chairman and chief executive officer of Fisher and Porter Company, which is a manufacturer of processed control instrumentation located in Warminister, Pennsylvania. We're a Pennsylvania corporation and our main operations are manufacturing and in Pennsylvania.

Process control instrumentation, computers and little black boxes that run the process industry, such as, well, anything where raw material comes in one end and comes out a finished product on the other end, such things as

petroleum refining, chemicals, pharmaceuticals, and my favorite, breweries, are controlled by our instruments and also power plants. You may have seen some years ago the control room at Three Mile Island. That's the type of product that we make. That was not our instrumentation; unfortunately, we lost the bid.

About 65 percent of our business is outside the United States. We have subsidiaries in 15 different countries, representatives officially in another 36 countries. Actually, there's no place in the world that we're not doing business. And probably no place in the world where we're doing enough business.

I'm also chairman of the Roundtable's Legal Affairs Subcommittee, and you probably know the Roundtable is an association of senior executives from 40 major corporations in Pennsylvania. So I do not represent all the businesses in Pennsylvania. 40 is enough.

The Roundtable was organized in 1979 to bring together the senior officers of the member companies to promote economic growth and development, private sector employment, and fiscal responsibility in the Commonwealth. The Roundtable is comprised of companies which do business internationally and have been subject to the federal antitrust laws since their inception.

Our comments are geared toward emphasizing the

fact that we operate in a world economy and that a state antitrust law is unnecessary.

Antitrust is usually interpreted by the general public to mean a monopoly. The question in a world economy is, what constitutes an alleged monopoly? The definition of what constitutes a monopoly in 1993 is far different than that of 1953 or 1923, or 1890, the date of the California case. Even dominance in the U.S. market does not necessarily mean that a company has a monopoly position in the world economy. If the relevant market area is drawn small enough, monopolies will always occur. Many small towns cannot support more than one jewelry store, lumber yard, et cetera. This does not mean that there has been an attempt to monopolize, but rather, that the particular area lacks sufficient demand to support more than one provider of a particular good or service.

Before I further discuss the need for this legislation, let me suggest changes that should be made if the General Assembly feels that a bill must be enacted.

Section 3, the definitions, Attorney General includes a, quote, designated deputy. We would hope that this means only a deputy attorney general, and not that the Attorney General could retain a private law firm to bring antitrust claims on a contingency fee basis.

We draw your attention to Sections 4, 5 and 6,

dealing with unreasonable restraints of trade, monopolies and acquisition and mergers. Under Section 4, it states that: Unreasonable restraints of trade will not be allowed in this Commonwealth. Under Section 5, Monopolies, the phrase "in this Commonwealth" is repeated.

We feel that if unreasonable restraints of trade and monopolies are occurring, prosecution under the federal law is available.

Under Section 6, Acquisitions and Mergers, the language "in this Commonwealth" was stricken from the bill. We believe that the removal of this language was in recognition that acquisitions and mergers are needed to ensure competitiveness in a global marketplace, and once they pass the muster of the U.S. Justice Department, there should be no more regulatory or legal barriers prior to effecting the acquisition or merger.

If it makes sense to delete the phrase "in this Commonwealth" in Section 6, it seems to make sense to delete it from Sections 4 and 5. It should be noted that the Hart-Scott-Rodino Antitrust Improvements Act deals with mergers, and any state action should be subject to a strict time limit for mergers reported under this statute.

Under Section 7, Criminal Penalty, a state law should limit criminal liability to per se unlawful antitrust offenses as defined in the law.

There's also concern regarding double jeopardy. The legislation includes language in Section 7(g) which would supposedly prohibit an action under the Act if a similar suit had already been initiated in a federal court or other state court. There are, however, several concerns to be raised. One is that the legislation does not indicate who a person in these two suits, or who is a person in these two suits. Therefore, it is possible to have a class action under one case with one or two plaintiffs filing a case under the Pennsylvania law, thereby subjecting a company to double jeopardy. Also, the legislation does not specifically exclude cases currently being litigated under the federal antitrust laws. Any of these cases permitted to proceed should be so only on the claims already at issue.

Section 9(a)(2), Cause of Action, should clearly state that only the Commonwealth would be permitted to bring a case as an indirect purchaser.

Section 9(c), Damages, provides for recovery three times the actual damages sustained, et cetera, as a matter of right to any private plaintiff. We have received information from one of our counsels that this is inconsistent with the Uniform State Antitrust Law recommended by the National Conference of Commissioners on a Uniform State of Laws. That proposal suggests that the court be authorized to award up to treble damages, should

the circumstances warrant. Treble damages should not be mandated. A state law should authorize only actual damages, at least in cases of conduct which has not been characterized as per se violations under the federal antitrust law.

Language in Section 11 regarding the general powers of investigation of the Attorney General states that: If the Attorney General has reason to believe that a violation of this act has occurred, et cetera. If legislation is to be enacted in Pennsylvania, this should be amended to read: Has reasonable cause to believe that a violation has occurred. We believe that the phrase "reasonable cause" is in common usage and more clearly defined in the literature and by the courts.

The widely quoted comment that Pennsylvania is the only state without an antitrust law is in error. Counsel for several Roundtable companies have pointed out that currently four states have no general antitrust law similar to the federal law. These states are Georgia, Vermont, Wyoming and Pennsylvania. Nine states prohibit agreements from restraint of trade but have no general prohibition on monopolization similar to the federal law. These states are California, Delaware, Kansas, New York, Nevada, North Carolina, Ohio, Oklahoma and Tennessee. Arkansas prohibits monopolization but has no general

prohibition on conspiracies and restraints of trade similar to the federal law.

Even without a state antitrust law, there are several protections for Pennsylvanians. First, Pennsylvanians are presently covered under the federal law, which we believe is the rational place for enforcement in a world economy. The second protection is the ability of the state Attorney General to file parens patriae suits under the federal law to protect the citizens of the Commonwealth from alleged antitrust violations.

I will close by restating our basic position and that is, that there has been no need demonstrated for this legislation. The antitrust statutes were passed at the turn of the century. World markets have dramatically changed since that time. We are now in a world economy and, as such, we believe that antitrust actions must be enforced at the national level. We also believe that Pennsylvania is adequately covered under the federal statute and therefore see no reason for the passage of Senate Bill 307.

Thank you very much for giving me the opportunity to appear before you, and I would be happy to try and answer some questions.

CHAIRMAN CALTAGIRONE: Thank you, Mr. Tolson.

Questions? Counsel Suter?

MR. SUTER: I followed your argument regarding

double jeopardy except for one part, and that was when you said that the legislation does not indicate who a person is.

MR. TOLSON: Yes.

MR. SUTER: There's a definition of person in the beginning of the legislation, so I'm a little bit confused by that statement and if you can clear that up for me, I would appreciate it.

MR. DANKOWSKY: We received comments from some of our members that indicated they were concerned about a situation in which you would have a group of people that would bring an antitrust action under the federal law, and then one of them would split off and then file separately under the Pennsylvania law. So that the argument could be made that it's not the same persons that are bringing the case, that this is a different group. That was the comment that was made to us and they said this is something that we were concerned about so that's why we brought it up.

MR. SUTER: Okay. Thank you. I'll have to look at that.

REPRESENTATIVE MASLAND: If I could follow up on that.

CHAIRMAN CALTAGIRONE: Representative Masland.

REPRESENTATIVE MASLAND: I don't see that as a concern under this section, because that section is dealing

with charges being brought against somebody, not a question of who the charge was being brought by. That's not a double jeopardy. So you could have two different groups, one group could proceed federally, one group could proceed on state grounds and there could be different grounds, there could be a reason for proceeding separately. But the fact that they are one group and they split up and do it that way, I don't see that as a concern. Because the real concern is how many times has this entity been sued or been brought under the auspices of either the federal or the state statutes.

MR. TOLSON: I think it's our position that, we think that it's enough to be brought under the federal statute and that that is sufficient protection and that we don't need it, and so that there need not be two different suits, irrespective of the definition of person.

REPRESENTATIVE MASLAND: I understand your concern, but I think it's raised better in other situations, and the fact that you feel "person" isn't clear is not a valid concern to be raised here.

MR. TOLSON: I think the double jeopardy is the valid concern.

REPRESENTATIVE MASLAND: Double jeopardy is the concern, but not the definition of person is all I'm trying to point out, based on your explanation to Counsel Suter. I just thought I would point out that I didn't think it was

valid.

MR. DANKOWSKY: We were simply passing on comments from 134 of our member companies.

CHAIRMAN CALTAGIRONE: Representative Reber?

REPRESENTATIVE REBER: While we're on the topic of double jeopardy, going down a little further under that same paragraph, you note at the outset your concern is regarding double jeopardy, and then the second to the last sentence in that paragraph starting in the bottom part of it on the top of the second page, also the legislation does not specifically exclude cases currently being litigated under federal antitrust law.

When I look at paragraph G, it says a criminal prosecution under this section may not be brought against a person previously charged by information or indictment of a federal antitrust statute.

How does that reconcile with your concern that, quote, also the legislation does not specifically exclude cases currently being litigated? It would seem to me that it very specifically does, and even to the point where the individual does not have to be found guilty, simply the fact that he's charged by information or indictment would trigger the inavailability of this statute being simultaneously brought even for a substantially similar type of alleged conduct.

I just don't understand the big concern about double jeopardy, which, of course, was triggered by the person concern, and then specifically, this statement, the legislation does not specifically exclude. Maybe it's a mistake, I don't know. It seems to me that it very specifically excludes, and that is, frankly, a very, very major concern of mine to begin with, that, you know, somebody here doesn't exactly like how the federal prosecution is going so they start their own witch hunt, if you will, and I tend to agree with you. But I think the language is very specific to that extent. If it's not, I would like to tighten it up, but I want to know where we've got to go to tighten up what is already there, and it seems to me to be pretty primordial to the issue.

MR. DANKOWSKY: I would be very happy to contact the counsel that made that comment and get more information for you on it. But we wanted to be very, very careful of the whole double jeopardy issue was why we stressed it.

MR. TOLSON: While Fisher and Porter has never been involved in an antitrust allegation, even, it's quite well known with other people who I know that when the deputy marshal walks into that door with a subpoena, irrespective of what happens or how the case ends up, it's very, very expensive.

I don't think any of us would want to see

business done in the United States or really, anywhere in the world, where there aren't antitrust protections for the people. On the other hand, we want those protections to be as good, as solid and handled as quickly and efficiently as possible. And while we don't think that the federal court system handles it under those criteria, we really don't want to see another one. And that does not mean that business wants to conspire or violate anything which is within the laws of antitrust, but it just wants it to be prosecuted as efficiently as possible.

And it's absolutely true, that probably businesses such as ours, which are in the mid range category, we do about $250 million of business a year. We can be hurt by the antitrust more than hurting others. We can compete with the major league multi-billion dollar companies throughout the world, so we're interested in the protection, but we're interested in the protection in a manner which is efficient. We think that the best way to handle that is under the present federal law.

CHAIRMAN CALTAGIRONE: Representative Heckler? Senator Heckler.

REPRESENTATIVE HECKLER: Whatever. Somewhere in between, Mr. Chairman. Representative of the day, anyway.

MR. TOLSON: Anyway, you're probably wearing two hats today and get double pay.

REPRESENTATIVE HECKLER: Would that it were. And a welcome to Mr. Tolson, from Bucks County.

I'm going to direct a question to you gentlemen but it may be that someone else, for instance, counsel, can answer this, because I have a suspicion which I will end with, if nobody can answer my question.

You called attention to the deletion of the language "in this Commonwealth" from Section 6, the acquisitions and mergers languages, but not as you point out from the other similar sections dealing with monopolies and restraints of trade.

Does anyone know why or what reasons were articulated for that amendment? I understand that took place in the Senate, and I don't know whether on the floor or in committee. Do we have any insight as to what the stated objective was?

MR. TOLSON: The only guess that I can submit is that we got part of what we wanted.

REPRESENTATIVE HECKLER: That may be.

MR. TOLSON: We're concerned that the definition is too small in today's economy, and that's a very major concern that we have. I think if you get it small enough, there's a monopoly everywhere. And that's what, you know, in today's economy, a monopoly state is not very large for businesses of our nature, that is, the multi-national

businesses.

REPRESENTATIVE HECKLER: Let me share with you a concern that I have broadly, and I know there was a good bit of fuss about the loss of jobs in Philadelphia, I think attributed to the closure of a candy company, candy manufacturer and that -- well, do you know? Obviously this section could have had impact on that situation, and frankly, any time we see a closure which gives rise to a loss of jobs in our area or in some part of Pennsylvania for a time, is going to give rise on the part of an elected attorney general.

And frankly, you know, the longer we have an elected attorney general, the more questions I have about whether that was a good idea. And we're not going to want to go back and amend the Constitution sometime and I could go try it the other way again.

But in any event, assuming absolute good faith on the part, and commitment to making a proper judgment on the part of an elected attorney general, you have, obviously, we're in a state that's struggling to keep jobs that is in an ongoing transition of -- God bless Fisher and Porter, you make things, you know. Pennsylvania was once probably one of the greatest manufacturing centers in the world, and you know, our economy is shifting now away from that.

If every time somebody comes in and buys part of a company and jobs are going to go away, there's going to be an awful lot of political pressure upon the AG to do something, and this is going to be a tool that he's got available to him. It may well be that there's not much of a basis to conclude that the activities of that out-of-state buyer who is defined as evil because he's going to take jobs away, you know, aren't anti-competitive at all. They just happen to have an adverse impact on a particular constituency in Pennsylvania. But there's going to be a considerable amount of political pressure to make them at least jump through all these hoops, as you've pointed out, at considerable expense.

I wondered whether that specific decision was in response to that situation, because I presume that the impact of that removal of that candy company and, I guess, the tuxedo operation, also, we've seen in Philadelphia, that it's been in the news over the last several months, probably didn't have an impact on competition in Philadelphia or in Pennsylvania. Arguably, the only way it could even get to first base in what really could be more essentially an issue or a prosecution or investigation driven by other constituency-driven factors, you would have to get out and look at it nationwide in order to even begin to make a case, I assume.

So that's, you know, I've done more speaking than I have asking, but I think that's a concern we have to have about this legislation, that there's going to be a great deal of pressure upon an elected official to be grandstanding for reasons that have nothing to do with protection of trade.

MR. TOLSON: Senator, I couldn't agree with you more, and I submit that the loss of jobs and the retention and accession of good high quality jobs in the Commonwealth is of primary importance, and that's a negative approach to it that won't work.

However, this legislature has done some excellent things for a positive. I mean, the Ben Franklin partnership and the IRCs and now the combination of them, that's magnificent. And has done a tremendous amount for the retention and the accession of high quality jobs.

I think that the emphasis should be put in that direction, a positive direction, rather than holding up something that's going to happen anyway. Those companies were going to go, no matter what. And it's a shame that we lose jobs. None of us like to lose jobs, and I tell you, as one who reads or read the list when we went through the restructuring of the people on there whom I knew personally and had to say, okay, let her go, that's not fun.

REPRESENTATIVE HECKLER: Thank you, Mr.

Chairman.

CHAIRMAN CALTAGIRONE: Any other questions? Thank you.

MR. TOLSON: Thank you very much.

CHAIRMAN CALTAGIRONE: Let's move to Sam Marshall, vice president and counsel for Pennsylvania Insurance Federation.

And for the record, I would like to submit, I think the members have it in their packet, the Pennsylvania State Association of Township Supervisors, Elam Herr, director of legislation, had submitted for the record a statement of some support by them. And I believe that's in your packets but I wanted to make sure that the court stenographer included that in the official record.

MR. MARSHALL: Thank you, Mr. Chairman.

Mr. Chairman and members of the House Judiciary Committee, I'm Sam Marshall. I'm with the Insurance Federation of Pennsylvania. We're a trade association with about somewhat over 200 member insurers. Membership ranges from the very large to the very small domestic, foreign, multi-line and single-line carriers.

Today, I'm asking this committee to amend Senate Bill 307 to delete the exemption of nonprofit hospitals that was granted in Section 10(j) of the bill. That's on page 10, I believe. As I understand the purpose of the

exemption, it's meant to allow nonprofit hospitals to coordinate amongst themselves to produce greater efficiencies.

In the words of exemption, it's meant to allow agreements or conduct that will reduce health care costs and improve the quality of care. Now, those of us who pay for and receive health care favor reductions of cost and improved quality of care, that's a given. However, an exemption of nonprofit hospitals from this antitrust law isn't going to promote that. In fact, it opens the door to exactly the opposite.

First off, the exemption allows for conduct that's going to raise, not lower health care costs. The major problem with it is that it allows nonprofit hospitals to reach veritably any agreement or engage in any course of conduct with minimal regulatory oversight on the true impact on competition, cost and quality of care.

It allows these hospitals to do anything that's, quote, likely to reduce health care costs or improve the quality of patient care. The only check on this is if the Department of Health determines that the hospitals are acting inconsistent with the state health plan of the Commonwealth.

These are standards that are impossible to define and enforce. First, if we learned anything from the

health care crisis facing not only the Commonwealth but the entire country, it's the impossibility of determining what's likely to happen when it comes to cost and quality of health care.

Second, there's a difference between agreements or conduct that allegedly reduce cost and those that allegedly improve quality of care. The medical community itself highlighted that disparity through its opposition to the fee caps that have been imposed in the auto and worker's compensation laws. Everybody concedes, including the medical community, that those caps have lowered the cost of care. But the medical community has come back and argued that it also hurts the quality of care.

Now, I don't know how this exemption is going to handle something like that, which is the goal, lower costs or improved quality, that's going to take precedence when you try to work through that exemption.

Thirdly, the agreements, any agreement that impacts on cost and quality of care has to be evaluated for both short- and long-term effects, and none of that's covered in this bill. The exemption makes no distinction on that, it's absent from it.

The fourth problem, the exemption doesn't require that those agreements or conduct have to be reviewed by any regulatory body. Instead, it only allows for a

catch-as-catch-can level of oversight from the health department. Even then, the health department standard of abuse is a toothless one. It's without the authority to question whether the hospital's conduct actually reduces or improves, reduces costs or improves quality. Apparently the Department of Health would have to take the hospital's word on that.

Further, it's limited to determining only whether the hospital's conduct is inconsistent with the state health plan. That essentially means that the Department's going to have to prove the negative, which is an almost impossible task.

These aren't merely theoretically or abstract concerns. Let me give you an example. Almost all of the hospitals in my part of suburban Philadelphia, down in Montgomery County, are non-profits. They can easily jointly agree under this exemption to raise their prices to a fixed level. They could offer the rationale that that's going to enable them to attract better physicians or purchase better equipment, and therefore, enable them to improve the quality of care. There would be no requirement that the health department or any other regulatory body would review this price-fixing agreement, and I'm not sure how it could be discovered under this exemption.

Even if it gets discovered, there's really

little that could be done. The state health plan doesn't cover price-fixing so it probably couldn't be considered inconsistent with that plan. And that's the only thing under this exemption that the Department of Health requests. Instead, all that would happen is that we, as payors and consumers, would be left with a price-fixing agreement that probably would remain a secret and would raise the cost of health care on an unfounded quality of care claim.

One of the benefits being the last state, or as Jay Tolson pointed out, maybe one of the last states without an antitrust law, is that we do have the benefit of learning from other states and from the federal law. I think one lesson has to be applied as you evaluate whether this exemption should stay. Namely, that any exemption has to be carefully and clearly constructed with full consideration of the ramifications on all consumers.

The proposed exemption of nonprofit hospitals fails on these counts. Whatever the merits of its goal, it's neither careful nor clear. Because of that, it threatens payors and users of health care with unsupervised price-fixing and agreements to limit competition amongst hospitals. Given the health care crisis facing Pennsylvania and the importance of government in crafting a solution, this is a particularly dangerous time to grant such a poorly

crafted exemption for hospitals from regulatory oversight.

The second problem with the exemption is that the antitrust measures of this bill really don't conflict with the goal that the exemption professes to have, namely, increased efficiency among nonprofit hospitals. If you could remedy that language, you have to address that question. Do they need to be exempt to meet the goal of improved efficiency?

Again, you have some of the benefit of being behind the curve in the area of antitrust law. We're considering the standard that parallels federal law. Today, to my right, I have with me George Addams, with Cigna Corporation. George is an expert on federal antitrust developments. As George will more fully explain, federal regulators, both in the justice department and the Federal Trade Commission, have already studied this issue. They've determined that nothing in the federal antitrust laws prevents nonprofit hospitals, or for that matter, any other group of providers, from joining together to achieve greater efficiency.

In fact, the federal regulators have gone one step further. They note that provider conduct should remain subject to the antitrust laws to make sure that any of these greater efficiency agreements are not only going to produce that efficiency and consumer savings, but they're also going

to pass those savings on to the consumers. It's not going to be a cornering of profits that might be the result from allowing a noncompetitive market.

In essence, the federal regulators point out that the goal of improved efficiency among hospitals, the goal of this exemption, is best met by keeping them subject to the antitrust laws, not by exempting them.

The third point, third reason for deleting the exemption, if you're going to address the goal of improved efficiency, you want to do it through the Health Care Facilities Act. The exception and the lofty language in it obscure the fact that we do have a Health Care Facilities Act with a state health plan and a certificate of need program that's already working to achieve the goal of improved provider efficiencies. Notably, this legislature just amended that bill, just amended that act last session through Act 149 of 1992. The goal here, improved efficiency among hospitals, is best pursued through that act and the certificate of need program. That's where there is a body of expertise and regulatory oversight to make sure that the goal is pursued but with safeguarding of consumers. Instead, under this, the hospitals want to pursue the goal through a blanket exemption that's going to enable them to engage, unchallenged, in monopolistic practices and unreasonable restraints of trade. That makes no sense.

Proponents of the exemption argue that the certificate of need program in the state health plan in the act, health care facilities act, aren't up to the task of meeting the goal of improved efficiency among hospitals. The answer to this is they ought to recommend changes to that act, not seek a back door exemption or an escape hatch from regulatory oversight through this act. In truth, the Health Care Facilities Act illustrates the problem with getting this exemption. Yeah, we all want improved efficiency among hospitals; however, we can't do it by exempting them from any accountability to government, payors or consumers, as that invites problems, the problems I've outlined as well as solutions.

The fourth point that we want you all to consider is, the exemption actually undermines goal of enhanced competition among providers as a means of bringing better, more affordable care to Pennsylvania.

This Commonwealth has already recognized that competition among providers is essential to improving the affordable and availability of health care. That's the purpose of the recent laws that have established HMOs and PPOs, namely, that payors of health care should go out and negotiate with providers. The theory and the record that we have shows that the reality, it's also the reality that competition among providers is going to produce lower costs

and will force providers to better meet the needs of consumers.

To exempt the nonprofit hospitals from this state antitrust law would take a long step in the opposite direction. Insurers and other payors for health care will be hurt in negotiating the best possible rates and the best possible services because the hospitals are going to be able to band together to avoid the marketplace competition that allows these negotiations to work.

In the end, the real victim of that is going to be the consumer. He's the one who ultimately pays the price of a system without competition and without meaningful oversight. The fact is, competition among providers, including nonprofit hospitals, has produced savings for consumers. This exemption threatens to take them away and therefore should be rejected.

This committee should also take note that the admittedly slowly emerging consensus on health reform at the national level features competition among providers and insurers as a key component. George Adams is going to give you more detail on that. I want to point out that this emphasis on competition is also a cornerstone of Governor Casey's health reform billing, hence it's labeled managed competition, and similar reform efforts that have already been enacted in states such as California, Florida and North

Carolina.

There's no guarantee as to what shape health reform is going to take here, nationally or internationally. And I can't hide behind the likely standard the hospitals want in their exemption. However, the one thing you can say based on what's now in the drawing board is the competition among the providers is going to play a key part. It makes no sense to do something in this bill that's going to undercut that direction.

Fifth, and this goes to some of the questions that have been raised before, I think the exemption that's in the bill for the business of insurance demonstrates the difference between a reasoned and a poorly constructed exemption.

I think I recognize, you can all say, gee, why is the insurance industry, who has an exemption, going and citing somebody else? It seems a little bit unfair. The fact is, our exemption is a very limited one. It extends to business that's already regulated by the insurance commissioner and does not constitute a boycott, coercion or intimidation or an agreement to do these, which I think addresses actually the concern that Representative Reber raised.

The reason for the exemption in that sense is that insurance is already subject to the same standards

proposed in this act through the Unfair Insurance Practices Act, specifically, Section 5(a) of that act. In that sense, insurers aren't allowed to engage in any of the conduct that's prohibited by this act. If they do, they actually face penalties there are more draconian than those set forth here, namely, regulatory sanctions that include being put out of business.

Further, they're regulated by a department with specific expertise in the business of insurance, and with investigatory powers that go well beyond those that are given to the Attorney General or private parties under this act.

With the exemption of nonprofit hospitals, you don't have any of those balancing safeguards. It's a pure exemption, a blanket exemption, in the sense that it means that the hospitals are actually allowed to engage in the conduct that's prohibited by the act, namely, unreasonable restraints of trade or monopolistic conspiracies, without any government agency being able to put a stop to it.

Now, I do appreciate the hospital's claim that they're not going to do that, that they are only going to use the exemption to improve efficiencies among themselves. Unfortunately, the exemption goes well beyond that. Unlike the exemption of insurance, it doesn't address the potential harms that it causes. That's why the exemption should be

limited. They really should be labeled here as "not ready for prime time," and should be taken out of Senate Bill 307 by this committee.

I thank you all for the opportunity to share these views with you. I'm happy to answer any questions you have right now. I also have with me George Adams with Cigna, who has a, probably, a more succinct, brief statement to cover on details going on at the federal level both in the areas of antitrust and managed competition. It may be that you want to ask me questions now or hear George first and ask questions then. I defer to your expertise.

CHAIRMAN CALTAGIRONE: We'll hear from George first.

MR. ADAMS: As you know, my name is George Addams and I'm counsel to Cigna Corporation and I'm responsible for antitrust matters, and also a member of the group of lawyers that advise the Alliance For Managed Competition on Antitrust Matters. They are a group of five insurers; Aetna, Cigna, Metropolitan, Prudential and Travelers, which are lobbying for effective managed care legislation at the federal and state level.

I'm testifying only with regard to this particular bill Sam has identified and to join him in telling you that we believe it's inappropriate to grant an exemption for the reasons he stated, and I would just like

to give it a little more detail briefly.

First, as everyone is well aware, the entire relationship between providers and purchasers of health care is at the present time under intense study by the Clinton administration, which in the near future will propose major changes in the manner in which health care is made available to the public. It is expected that the proposals will include provisions for a new relationship between providers and purchasers of health care. That will specifically describe the new structure of that relationship, including any purchasing alliances between providers and the manner in which providers will compete with one another for health care business.

Specifically, health care reform envisions the formation of accountable health care plans known as AHPs that would contract with purchasing alliances to provide health care services to the individuals enrolled in the purchasing alliance. The actual health care services would be delivered by providers who are employed by or contracted with a network formed within the AHP. The AHP would manage the delivery of health care services, including the selection and integration of providers, utilization review, quality assurance, claims processing and network maintenance. Thus, the formation of AHPs as well as their provider networks, necessarily contemplates collaboration

among providers which would include horizontal integration through merger, joint venture or contract among physicians or among hospitals.

As a part of that study, the administration is giving careful attention to antitrust considerations and has asked for and received comment on the extent to which existing antitrust law will impede the ability of providers and others to consolidate into alliances that the new structure will propose.

Whatever this new proposal will be, it is sure to have given very considerable thought to the need for any exemptions from antitrust laws in the context of a comprehensive health care bill that will take all competitors' factors into consideration. These will include not only all aspects of the competitive relationship between providers as a group, but their relationship to buyers of health care as well.

In contrast, the provisions of Section 10(j) are limited to only one class of providers, and are part of a general antitrust bill which has no particular focus on health care. It cannot be predicted what kinds of problems this will create when the new comprehensive health care delivery system is adopted at the federal level, for that matter, at the state level, or what impact it will have on the overall structure of that new system. Significant

provisions dealing with the delicate competitive balance between buyers and sellers of health care should not be added as an afterthought in the general antitrust bill and -- by the way, I understand this was added to the bill the day before it was enacted, that gives consideration to these factors -- but these need to be the subject of comprehensive study and analysis as to the impact they will have on the system of health care delivery to which they relate. This cannot occur really until the structure of that new system is known. So much for that reason.

So the second reason that we believe the provision is inappropriate is that existing antitrust law, as has been said before, which this bill purports to adopt for the State of Pennsylvania, would not prohibit any class of providers from integrating through merger, joint venture or other similar actions that will improve the quality of health care, so long as it does not involve the abusive exercise of monopoly or market power, and involves sufficient integration of provider resources and the sharing of financial risk to ensure its efficiency.

Now, those sound like a lot of big words, but that is the concept which has been great in antitrust laws that I'm familiar with and give advice on an ongoing basis, and it's working.

The key is to assure that after the collaborated

venture is formed, it will not have enough market power to retain the higher profits resulting from its efficiencies but will be forced, as a result of competition, to pass them along to consumers in the form of reduced prices.

Both the Department of Justice and the Federal Trade Commission have for this reason strongly opposed any repeal of the antitrust laws that will prevent those laws from accomplishing their legitimate purpose of ensuring that competition among all participants in any marketplace remains healthy.

For example, in his statement dated October 15th, 1992, Kevin Arquit, the director of the Federal Trade Commission's Bureau of Competition, after reviewing the manner in which the antitrust laws supported development of a competitive health care system, said that although hospitals may assert that the federal government challenge has a chilling effect on procompetitive hospital mergers, modern antitrust analysis does not stand in the way of genuinely pro-consumer mergers or joint ventures and that most hospital mergers fit into that category. He noted in his statement that there was not a single instance of a federal government challenge to a hospital joint venture.

Similarly, in a statement of June 24th, 1992, Charles James, the Acting Assistant Attorney General of the Department of Justice, noted that the antitrust laws were no

impediment to the great majority of mergers among hospitals, and that of 229 such mergers between 1987 and 1991, only 5 were challenged on antitrust grounds. Not a single one of these challenges involved a small hospital.

I have available with me today copies of these statements which clearly demonstrate that the antitrust laws as they exist today fully recognize the need for consolidation and joint ventures among providers of health care where a competitive environment remains healthy.

I request for these reasons and for those that have been suggested by Sam, that Section 10(j) be deleted, and I thank you for your time and I'll be happy to answer any questions.

CHAIRMAN CALTAGIRONE: Thank you, gentlemen. I'm just curious, and I would like both of you to answer yes or no on this question. If that section, in fact, is deleted, will you support the legislation?

MR. ADAMS: I was anticipating that question and I really haven't come prepared to -- I'm not opposing the legislation and I haven't come prepared to answer that on a formal basis. But I listened with care to both statements that were made earlier. I think there's something to be said on both sides. I will tell you that our main concern is this section. But I'm not prepared to say, I just don't have the authority to say because I didn't come prepared to

say that.

CHAIRMAN CALTAGIRONE: Would you take that back and find that out, if the other companies --

MR. MARSHALL: Speaking on behalf of the Federation, obviously, who represents Cigna, we would probably take the position of not opposed, assuming that Section F, the exemption as to the business of insurance, remains as it is, and the exemption in 10(j) is deleted. And I believe that's the position that we had taken on this bill in the Senate.

CHAIRMAN CALTAGIRONE: Questions from the members? Representative Reber?

REPRESENTATIVE REBER: Thank you, Mr. Chairman.

Mr. Marshall, I congratulate you for your testimony. You presented it in such a way that you didn't become absolutely hipocritical with your disclaimer on page 8, subparagraph 5, relative to your recognition of the exception. It is an exemption to which you vehemently oppose in another competitive area, I guess is the way I like to characterize it.

Let me ask you this question, now. I don't understand how you can say on page 9 of your testimony that the reason for the exemption is that insurance is already subject to the same standards proposed in this act through the Unfair Insurance Practices Act, and I'm referring to the

language proposed in this act which we heard earlier testimony presented by Counsel Broujos, former Representative Broujos, that since a consumer and a business entity have no cause of action under the Unfair Insurance Practices Act that a consumer and/or business then would have no claim for relief where, in fact, a conspiracy and restraint of trade or other monopolistic practice could be shown, and I guess specifically, I say that because what good does it do them if the insurance company simply puts the violator out of business and yet the consumer and/or small business consumer could not recover the necessary damages, fees, costs and the like?

MR. MARSHALL: That's really two questions, in the sense of standard, the standard in the act as compared with the insurance laws, and then who can prosecute under it. Addressing the first question, the standards in the act, no, Section 5(a) of the Unfair Insurance Practices Act is verbatim from Sections 4 and 5 of the -- that's what it says.

The new one in this bill as Mr. Broujos pointed out, is Section 6, the acquisitions and mergers. I can tell you, with any acquisition or merger in the insurance company, and actually George Adams here with Cigna would be a classic example because when Connecticut General and INA merged, I guess just about 10 years ago, with a merger of

insurance companies, any accession, it has to go through prior approval by the insurance department, gets held up to public hearings. It's not like in the normal business community. There's a far greater degree of regulatory scrutiny, far greater degree of public input on it. It gets published in the Pennsylvania Bulletin, there are open hearings on it. In the case of Cigna, that large a merger took years. A number of open hearings on it.

And obviously one of the things that is a subject for any acquisition or merger is whether it affects restraints of trade or an unreasonable monopoly.

As to who can bring a cause of action, I was somewhat surprised by Mr. Broujos's comment. No, the Unfair Insurance Practices Act does not have a private right of action in the sense that somebody can go into a court and allege those violations. However, a person can file a complaint with the insurance department under that and proceed to those through that administrative channel.

REPRESENTATIVE REBER: They don't have the right to recover counsel fees or costs.

MR. MARSHALL: No.

REPRESENTATIVE REBER: Okay.

MR. ADAMS: I believe statute in that unfair consumer practices statute does have that.

MR. MARSHALL: You have that there. In

addition, understand that when you file a complaint with the insurance department, the insurance department provides you with counsel. I used to be assistant counsel with the insurance department, and one of the things you spend an awful lot of time doing over there as a lawyer is representing consumers that file complaints against insurance companies. You represent them at the administrative level with the department and obviously, if there's an appeal from that, it goes to Commonwealth Court and, in fact, you represent them there.

REPRESENTATIVE REBER: Is there a special number you have? My constituents haven't seemed over the years to have found that kind of vigorous representation through that individual. I would like to know who that liaison is that I can speak to.

MR. MARSHALL: I speak to the individuals who are lawyers there. I'll be happy to talk to you afterward about exactly how people file complaints.

REPRESENTATIVE REBER: My question also goes to the exemption that is contained in paragraph F in relationship to how it is structured in other states. Is this similar, stricter or less strict than appears in other states?

MR. ADAMS: Very similar, in a lot of other states.

MR. MARSHALL: It's similar. In fact, it's probably in the sense that it has the second clause in it, it's probably a bit more strict. But it's roughly consistent with what you'll find in other states, in the states with antitrust laws.

MR. ADAMS: The same with the federal.

REPRESENTATIVE REBER: Thank you.

Mr. Chairman, could I ask that staff maybe take a look at that aspect so we are 100 percent on point on that I think before this is called for consideration? I would appreciate just a look at that, and I thank you gentlemen for your responses.

MR. MARSHALL: In the interest of making life easy on staff -- because as a staffer I know how it feels -- it is Section 5(a) and I believe it's subsection 4 of the Unfair Insurance Practices Act.

CHAIRMAN CALTAGIRONE: Thank you.

Are there any other questions? Yes, Counsel Andring.

MR. ANDRING: Under the Unfair Insurance Practices Act, can an individual recover damages if they are injured by a monopolistic practice by an insurer?

MR. MARSHALL: Generally, the individual doesn't. What would happen under that is that you have to understand that insurance companies, the rates were

regulated. Take, for example, it's very hard to speak in terms of a hypothetical because -- of course, I hope, I assume any of our clients never violate the law and I don't even want to imagine a case where they do -- but let's imagine that auto insurers were to get together and conspire to price fix and somebody were to complain about that to the insurance department. The insurance department were to have a hearing.

REPRESENTATIVE REBER: We're talking about a hypothetical now, right?

MR. MARSHALL: We're talking strictly about a hypothetical. Thank you, Representative, for clarifying that. And actually, you know, obviously I'm being facetious, but in truth, that couldn't happen given the rate regulation in this Commonwealth. But if somehow or other it were to happen, what would happen under the Unfair Insurance Practices Act is that the commission would order a rate rebate that would go to all consumers and it would be reflected in the rates, in the rates that the commissioner would allow in that example for auto insurers. So that, for instance, if companies went in and fixed prices unlawfully, what the commissioner would do is order that the companies, if that was all found to be true, the commissioner simply would order a rate reduction.

MR. ADAMS: Could I just add to that, the

consumer would, of course, retain his prior right of action independently of this exemption, because you have to understand this exemption is a narrow exemption. In fact, if there were a violation of the Sherman Act that was not, of this act, that was not regulated by a state law, that is, if there was a closet conspiracy somewhere, hypothetical, which no one knew about except the participants, the individual in that case would have the right to bring a private right of action regardless of this exemption, because the exemption does not protect you against conduct which is not regulated by the insurance commissioner. And we give a lot of attention to that.

MR. ANDRING: We delved into this a little more. Suppose hypothetically some insurers got together and decided to divide up the market, and I'll say liability insurance for municipalities, something like that, and each company involved, each took a geographic area, Pennsylvania, and decided they would get in the business in that area.

Now, what would happen and how would this matter proceed under current law with no state antitrust statute and only the current provisions of the Unfair Insurance Practices Act?

MR. MARSHALL: Under the Unfair Insurance Practices Act, that would be illegal and the commissioner could put the companies out of business. It's cut and dry.

And the commissioner has the authority to do that. That's what would happen. And, in fact, one thing you have to understand, the way insurance regulation in toto works, understand the companies are subject on an annual basis to market conduct exams.

So unlike under a state antitrust law where it's somehow or other got to percolate from the bottom up, the consumers have to complain or file a complaint or notify the Attorney General, this is something where simply on a survey basis every year, the department employees go out to the companies and they look at all of that. So there is a regular monitoring. There was debate earlier about, gee, what should it be, probable cause or what is reasonable, you know, cause reason to believe and what's the difference. In the case of how insurers are regulated, they are subject. It's not a matter of reason to believe or anything like that, it's simply that the commissioner, the regulator, goes in every year on an annual ongoing basis and supervises the market conduct of all insurers.

MR. ANDRING: Okay, but how is that individual municipality going to recover its damages? The excess it paid over what it should have paid for the period of time during which this division of the markets occurred.

MR. MARSHALL: First of all, I guess the first question is, is that going to be exempt from, would that

conduct even be exempt from this bill. When you look at, for instance, this bill, what you outlined, and it's exactly what Representative Reber was talking about earlier in his questions for Mr. Broujos, struck me that what you just talked about was a boycott. And therefore, just looking at the exemption, that is subparagraph F(2) is not within the exemption. So a person could proceed.

MR. ANDRING: Assuming we don't have this law, under the Unfair Trade Practices Act which is the law right now.

MR. MARSHALL: If this law were not passed, under the Unfair Insurance Practices Act, the commissioner could order that there be rate rebates.

MR. ADAMS: That would also remedy under the federal law for that conduct.

MR. ANDRING: Would the federal law, it's my understanding federal law wouldn't apply to that situation because we have the business of insurance there.

CHAIRMAN CALTAGIRONE: I would like to jump in just here. I'm just curious, historically has that ever happened in this Commonwealth, that you know of? The rate rebate rollback or whatever?

MR. MARSHALL: I don't believe that there's ever been a case of where somebody said, here, companies got together in Pennsylvania and fixed prices. I mean,

the fact --

CHAIRMAN CALTAGIRONE: I'm talking about the insurance commissioner jumping in and saying, hey, you guys fix the rates here.

MR. MARSHALL: Or the insurance commissioner jumping in and doing it.

CHAIRMAN CALTAGIRONE: Nobody has done it?

MR. MARSHALL: In fact, one of the reasons that you need this is to allow for the rate regulation that you have right now under existing law, you know. The fact is there are rating bureaus, for instance, for auto and worker's comp because most companies are too small, and what happens is the rate, because there's a lot of competition among the industry. But what I saw in the case of ISO, rates of auto or a rating bureau in the case of worker's compensation goes in and files a rate with the commissioner, that the commissioner reviews prior approval. It doesn't go to the marketplace until the commissioner says it can. So any scenario that you envision there actually under our rating laws gets addressed before the fact. If there was to be some sort of a price-fixing, setting the rates excessively high, that's subject to prior approval. That's what the rating laws do. I think that's one of the reasons why it's just never happened in Pennsylvania.

CHAIRMAN CALTAGIRONE: How do you get around,

and I hear about this all the time -- I'm sorry to interrupt, Counsel, but this just intrigues me a little bit. I used to be an underwriter myself for a few years prior to coming to the legislature. How do you get around the fact that they do red lining? In Philadelphia or Pittsburgh or Reading or Lancaster. How do they do that, how do they get away with it?

MR. MARSHALL: If somebody does red lining, I mean, again --

MR. ADAMS: I don't think that's an antitrust issue, if I may say.

CHAIRMAN CALTAGIRONE: I understand, but you're asking for the insurance commissioner to intervene.

MR. MARSHALL: It's not an antitrust issue, but just so you know, if what you're talking about there, this goes outside of this law, but if what you're talking about there is geographic discrimination, that's prohibited under the Unfair Insurance Practices Act. It's another section of that act but it's prohibited under that act.

CHAIRMAN CALTAGIRONE: Is it enforced?

MR. MARSHALL: Yeah.

CHAIRMAN CALTAGIRONE: See, this is the problem that I have with all the laws that we're either dealing with now or we plan to propose. We could write all the laws in the world, as you attorneys know, but if nobody cares to

enforce them, or if people look the other way, you know, what good are they?

MR. MARSHALL: I can tell you, the insurance department sure as hell doesn't look the other way. The relation, and I think in many cases, is a productive one but unfortunately, the relationship between the regulator and the industry is an unduly adversarial one I think in some ways, that's hurt long-term. I think that's hurt Pennsylvanians. But I can tell you, nobody looks the other way as to our industry, whether it be our regulator or all of you as our legislature. We regard you as regulators as well.

CHAIRMAN CALTAGIRONE: Policy makers.

MR. ADAMS: I haven't seen them looking any other way, I don't think.

MR. MARSHALL: If there is a case of red lining, the laws do exist to prevent that.

CHAIRMAN CALTAGIRONE: The point that I was just making, and I'll switch over to Counsel Andring, that, you know, a lot of emphasis is being put on the insurance commissioner to do this, that and the other thing, according to the laws that they can operate under on unlawful restraint of insurance practices, and you're saying that that doesn't go on, or you're saying that the department indicated that the department would react very quickly to

situations like that, correct?

MR. MARSHALL: I think the department has historically always acted aggressively.

CHAIRMAN CALTAGIRONE: That's not what we hear from various areas around the state, when it comes to accessing adequate insurance at a reasonable cost, especially as concerns auto in various sections of the state, depending on where you live and who is in there underwriting. Comment?

MR. MARSHALL: I'm not --

CHAIRMAN CALTAGIRONE: You don't believe that goes on? You don't think that's a problem?

MR. MARSHALL: You're talking about individual company practices.

CHAIRMAN CALTAGIRONE: Any of the companies. Any of the companies. You try to get insurance in some of the inner city areas, okay, from any of the companies as concerns fire insurance, as an example. Auto insurance is another example. Homeowner's. Depends on the section of the city that you're in as to whether or not they'll even underwrite it, number one. Accessability, afordability, and comparability with other sections.

MR. MARSHALL: Actually what, and we're about to embark upon a discussion that goes way outside the antitrust laws, but I really do want to talk with you about that and

maybe we can talk after this or something separate, but understand, what you're talking about now is discrimination, and what is unfair is to discriminate against somebody purely because of where he lives or race, gender, geographic location, religion, whatever. However, as a former underwriter, I'm sure you can appreciate it, what companies do have to do is assess risk. And you do have to evaluate risk. And the fact is that, and there you are talking about auto insurance, you look in the Philadelphia area, if you can't accurately assess that risk and charge a fair premium for that risk, it's irresponsible to your other policyholder, to your employees, to your shareholders to take on that risk. You can't do that.

One of the questions, I know it's a question that always comes up is, should a high-risk area, Philadelphia, auto theft capital of the world, highest P.I. claims per -- bodily injury claims, you know, per number of fender-benders in the country, should an area like that be subsidized by the rest of the Commonwealth? That's a never-ending debate that I know comes before this chamber every session.

Our answer to that is, that's not insurance. Insurance is the grouping of similar risks, it is not the subsidy of one high-risk group by a low-risk group.

And when people talk in terms of red lining, I

look at that in terms of more it's risk evaluation. And obviously there are going to be areas where the risk is higher and therefore they're going to pay a higher premium. And that's like, you know, that's the difference between a smoker and a non-smoker in a life policy.

CHAIRMAN CALTAGIRONE: The point that I was making is that you kept alluding to the department having control over the industry, and I happen to share some of the concerns that Representative Reber raised earlier, that my 17 years here under all kinds of administrations, Democrat, Republican, Democrat, hasn't really mattered who has been in the department over there, trying to get relief for constituents, and I have several ongoing problems right now as a matter of fact with some insurance companies, in situations with my constituents, that have not been resolved. And it just seems to hang there and go on forever and ever and ever and there's been no resolution. And we've gone right to the commissioner, right to the attorneys in the department, trying to get some relief, even to the Attorney General, and it seems like constantly chasing around in circles to get the damn thing resolved. And there has been no resolution in several of the cases that I've been involved with. But let's turn it back to the line of questioning that you were in, Counsel Andring and Representative Reber.

MR. ANDRING: I just have one more question. The insurance exemption in this bill is in Section 10(f) and it's limited to at least some extent, but then in Section 10(i), there's another provision in the bill that exempts any activity exempt from the provisions of the antitrust laws of the United States, which seems to me would provide a blanket exemption for insurance, or for the business of insurance. Is that how you would interpret that?

MR. MARSHALL: No.

MR. ADAMS: I would say they're different.

MR. ANDRING: Section 10(i) provides that any activity exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this act.

Now, that doesn't contain any qualifying language as to whether or not the activity is regulated or constitutes a boycott or coercion or anything else. And I'm interested in the interplay between Section I and Section F.

MR. ADAMS: To be honest, I hadn't thought of that. It's a good question.

MR. MARSHALL: I think the federal exemption is roughly the same, and the point is really when you're talking about consistency of the federal law, what you want to have really just clarifies what is already a doctrine,

namely, federal preemption, and you don't want to have inconsistent regulation at the federal level and at the state level.

MR ADAMS: I think this would incorporate preemption into this law, in addition to this, in answer to your question.

MR. ANDRING: Thank you.

CHAIRMAN CALTAGIRONE: Representative Reber.

REPRESENTATIVE REBER: Just a followup in the questioning. There was some questioning of the term boycott and the determination of that. Did I understand you to say that the situation developed where there was a line of insurance sold in the Commonwealth from 1933 till the present by a number of companies and then all of a sudden a particular insured was told by his company that we are no longer offering that? And he tells his agent/broker to look around and all of a sudden the word gets back that nobody is writing it in the Commonwealth of Pennsylvania? And it could be proven that there was a boycott to write that kind of policy. Would that kind of action fall under the definition of boycott as it's constituted in subparagraph 2 that would allow for the initiation of a cause of action under this particular proposed legislation?

MR. MARSHALL: You just set out a boycott, yeah. You said here, there was a boycott. And if there's a

boycott, there you go. It's 10(f)(2).

REPRESENTATIVE REBER: Excuse my ignorance but I wasn't sure exactly what boycott meant in the terms under antitrust law and I just wanted to make sure. Thank you.

CHAIRMAN CALTAGIRONE: No other questions, gentlemen. Thank you very much for your testimony.

We'll next move to Rebecca Cummings, Pennsylvania Chamber of Business and Industry.

And while she's coming up, I just want to let the members know and we'll put it on the record. Certainly you're going to be notified of it, that the voting session for this bill and several other bills that we'll have on the agenda which you will be receiving in the mail which will be September the 21st at 1:30 p.m. in room 60 E. That will be after the luncheon that we have with the Common Pleas Court judges that will be down meeting with us that day. And I want to make sure that members do get ample notice of the agenda that we're going to be dealing with on legislation. But it's September the 21st, 1:30 p.m., room 60 E after the luncheon that we have with Common Pleas judges.

Beckie?

MS. CUMMINGS: Good morning, Chairman Caltagirone and members of the House Judiciary Committee. My name is Rebecca Cummings and I am director of risk management for the Pennsylvania Chamber of Business and

Industry. With me today is William Gupp, Esquire, of HARSCO Corporation, who has experience as a practicing attorney with a lawfirm and as inhouse counsel on antitrust matters.

We appreciate the opportunity to testify before the committee today about Senate Bill 307, legislation that would provide Pennsylvania with a state antitrust statute. The chamber has been involved in this issue for a number of years and has been an active participant in the ensuing legislative debate on the need for a state antitrust statute.

At the outset, I would like to emphasize that we do not believe that an antitrust statute is necessary or appropriate in Pennsylvania, a position we have steadfastly maintained for many, many years. It is our position that the proponents of Senate Bill 307 have not shown that any anti-competitive activities in Pennsylvania that may occur cannot be remedied effectively through existing federal antitrust laws. On the contrary, the federal statutes provide a well-established base of substantive law and wide-ranging enforcement tools that may be exercised by the U.S. Department of Justice, the Federal Trade Commission, and private parties. In addition, the federal antitrust acts permit the Attorney General of any state to bring a civil action in the name of such state, as parens patriae on behalf of the citizens residing there, to recover treble

damages or to obtain injunctive relief.

Today, there is virtually no realm of economic activity that the interstate commerce power of the federal government, which is the basis of federal antitrust law, does not reach. Further, today's economy dictates that we operate in a global marketplace that extends well beyond the confines of our Commonwealth. Conceptually, the Pennsylvania Chamber believes that Senate Bill 307 runs counter to economic philosophy of making Pennsylvania an attractive climate for business, and the principal effect of this legislation will be to merely add another layer of regulation upon our members' business activity.

Senate Bill 307, particularly in Section 11, explicitly provides the Attorney General with broad investigatory powers, including the right to subpoena witnesses, examine those individuals, request documents and review evidence. With all due respect to Attorney General Preate, this legislation, if enacted, would be on the books for many years to be enforced by many as yet unknown attorneys general. There is a risk that a state antitrust law in general and the subpoena power in particular, could be used for irresponsible, politically-motivated, and misdirected investigations. This risk is due in part to the fact that such investigations could potentially be triggered by third parties. For example, a labor union could seek to

exert pressure on the Attorney General to enjoin an acquisition where there is a possibility of a plant closing. As an elected official, there would be an inherent temptation for any attorney general to evaluate such an acquisition in terms of protecting local interests rather than upon economic efficiencies or competitiveness. This potential risk is very troubling to our members.

We also believe that the Pennsylvania Attorney General's Office does not have the manpower or expertise to effectively monitor and apply the proposed legislation. At the federal level, the Department of Justice and the Federal Trade Commission each employ a large staff of attorneys, accountants, economists and other professionals with specialized expertise in the application of antitrust laws. Senate Bill 307 specifically provides that it will be applied and construed consistently with the federal laws. The problem is that the Pennsylvania Attorney General's Office, in our opinion, does not have the expertise or manpower to do this.

While Senate Bill 307 substantially parallels the major provisions of the federal statutes, certain provisions cause extreme concern for our members, specifically, Section 6, Acquisitions and Mergers. This language was originally inserted pursuant to an amendment in the Senate Judiciary Committee and further refined on the

Senate floor by deleting the words, quote, in the Commonwealth, unquote. In that Senate Bill 307 cannot reasonably be intended to regulate activity outside of this Commonwealth, it is unclear why this language was deleted.

As stated earlier, our position is that a antitrust statute is not necessary or appropriate in Pennsylvania. If, however, we are forced to accept such a statute, we strongly urge that Section 6 of the bill relating to acquisitions and mergers be deleted.

Section 6 is comparable to Section 7 of the federal Clayton Act. Only approximately 10 other states have, as part of their antitrust statutes, a provision directly regulating mergers and acquisitions. In states where there is no counterpart to Section 7 of the Clayton Act, a private party or the state Attorney General can rely on other provisions of the state statute, such as those regulating restraints of trade or monopolies, to attack an anti-competitive merger or acquisition.

We believe that it is in the best interest of Pennsylvania's business community that Section 6 be deleted from Senate Bill 307. If it is so deleted, we will have greater comfort that the Attorney General will focus his attention on actual restraints of trade, such as price-fixing and division of customers and territories, instead of preventing business growth via acquisition.

Section 7, Penalties. Section 7(g) of the proposed legislation purports to address a potential conflict issue between federal and state law by providing that a prior federal criminal proceeding will preclude a similar state criminal prosecution. However, Section 7(c) of the proposed legislation provides for substantial civil penalties which the Attorney General may seek, quote, in lieu of criminal prosecution, unquote. A defendant required to pay a substantial fine in a federal criminal prosecution will not be protected from the civil penalty provisions of Section 7(c). In addition, the Commonwealth, as an indirect purchaser, can seek both civil penalties under Section 7(c), and damages as an indirect purchaser under Section 9(a)(2). These are a few examples of the types of duplicative litigation and recovery that may occur.

Section 9, Private Right of Action. Section 9(a)(2) of the proposed legislation provides that the Commonwealth will be able to recover damages regardless of whether it was a direct or indirect purchaser. The U.S. Supreme Court has held in the Illinois Brick case that under federal law, only direct purchasers may recover damages. In that case, the Supreme Court determined that to allow indirect purchasers to bring an action would so complicate the proof of damages sustained by each party in a chain of distribution and create such a risk of duplicate recoveries

that it was advisable to limit antitrust recovery to direct purchasers only.

Although a subsequent Supreme Court case held that the states could adopt laws allowing indirect purchasers to recover, this does not mean that such a provision is an advisable policy. It is true that Section 9(a)(2) attempts to address the possible problem of duplicative recoveries by providing that in an action by the Commonwealth as an indirect purchaser, the court will take necessary steps to avoid duplicate liability for the same issue. However, the problem is that, unlike in the single federal system where competing claims can be easily coordinated and consolidated, it is much more difficult and impractical to coordinate and consolidate competing claims in different states if a direct purchaser brings an action in another state and the Commonwealth brings an action in Pennsylvania.

As we understand the intent of Section 9(a)(1) of the bill, private parties may only recover if they are direct purchasers and may not recover if they are indirect purchasers. Nonetheless, we believe language should be added to the section by inserting the word, quote, directly, unquote, between, quote, person, unquote, and, quote, injured, unquote, to clarify this provision.

Section 9(a)(3) of the bill precludes a second

action for damages based on transactions that have already been the subject of a final judgment, quote, entered in an action by or on behalf of the person under antitrust laws of, unquote, another jurisdiction. However, this would not preclude indirect purchaser actions by the Commonwealth following federal actions brought by or on behalf of certain purchasers, and certainly does not address circumstances in which an action under Pennsylvania law is adjudicated before an action in another jurisdiction.

The limitations period provided in Senate Bill 307 appears to expose a defendant to a broader range of damages than federal law. Although Senate Bill 307, like Section 4 of the Clayton Act, provides that an action must be brought within four years of the date of when the cause of action accrues, the proposed legislation differs from federal laws with respect to the method of determining when the cause of action arises. The importance of this difference is best illustrated in the context of, quote, continuing violations, unquote.

Section 9(b) provides that a, quote, cause of action arises under this section at the time the conduct in violation of this act is discovered or should have been discovered, or, for a continuing violation at the time the latest violation of this act is discovered, or should have been discovered, unquote.

Under federal antitrust law, a cause of action based on a particular violation generally accrues when the plaintiff is injured to the extent damages are ascertainable. For continuing violations, a cause of action arises each time the plaintiff is injured, and a federal plaintiff will normally only be able to bring suit for ascertainable damages flowing from conduct that has occurred less than four years before the suit was filed.

Senate Bill 307, however, could be read as allowing a plaintiff to bring suit for all damages flowing from a long pattern of conduct if the violation is a continuing one and the latest violation occurred within four years of bringing suit. This potentially could occur even if the facts giving rise to the claim had long been known to the plaintiff and the injury from the violation had been suffered many years before.

Additionally, Section 9(3)(c) expressly allows treble damages as a matter of right to any private plaintiff. This is inconsistent with the Uniform State Antitrust Law recommended by the National Conference of Commissioners on Uniform State Laws. This model law suggests that the trier of facts be authorized to award treble damages only if the circumstances warrant.

Section 11, Investigation. Section 11(a) of the proposed legislation provides that if the Attorney General,

quote, has reason to believe, unquote, that violation has occurred, he has the authority to investigate. Previous versions of this legislation in past sessions were criticized for not providing a standard such as, quote, probable cause, unquote, or, quote, reasonable cause, unquote, which had to be met prior to instituting an investigation. Although a standard has been added, it is vague and it is unclear as to whether it is to be applied on an objective or subjective basis. In addition, we believe that Section 11(b) should be clarified to provide that in an action by the Attorney General to enforce a subpoena or request, the Attorney General has the burden of proof to show that he has met the standard set forth in Section 11(a).

While certain segments have long lamented the fact that Pennsylvania is one of two states which does not have its own state antitrust law, the lack of such a statute has not been a major deterrent in the ability of the Attorney General's Office to prosecute cases under the federal antitrust statutes or to execute its parens patriae powers.

Additionally, a 1982 survey of 40 states concluded that 12 states never enforce their criminal antitrust laws, 13 rarely enforce them, and only 6 states reported frequent use of their criminal provisions.

We are all familiar with the old adage that if something is not broken, we ought not fix it. On behalf of the Pennsylvania Chamber, I respectfully submit to this committee that federal laws are capable of adequately reaching the concerns addressed in Senate Bill 307 and as such, abrogate any need for similar legislation in the Commonwealth.

Thank you for your time and attention. Mr. Gupp and I would be glad to answer any questions or concerns that you may have at this time.

CHAIRMAN CALTAGIRONE: Thank you.

Members? Staff?

(No audible response.)

CHAIRMAN CALTAGIRONE: Thank you for your testimony. We certainly appreciate it.

We'll now adjourn the hearing. Thank you very much.

(Whereupon, the hearing was concluded at 12:05 p.m.)

* * * * *

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

Emily Clark, CP, CM
Registered Professional Reporter

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House of Representatives

COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

AGENDA

August 4, 1993

Public Hearing on Senate Bill 307
Antitrust Legislation
Room 140 Main Capitol Building
10:00 AM

John H. Broujos, former Member, PA House of Representatives

John Dankowsky, PA Business Roundtable

Jay Tolson, Fischer Porter Corporation

Sam Marshall, Vice President and Counsel, PA Insurance Federation

Rebecca Cummings, PA Chamber of Business and Industry