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REMARKS OF JOHN H. BROUJOS ON ANTITRUST LEGISLATION BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES

AUGUST 4, 1993

Testifying on S B 307, Providing for a State Antitrust Act

GENERAL ANTITRUST STATEMENT

The thrust of an antitrust law is to prevent the suppression or limitation of competition required to make the price determination in a market enterprise economy work.

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

You are performing an important task: ensuring the competitive health of our economy.

There are pros and cons on the enactment of this legislation. But the net effect will be to encourage competition by

1. Prosecuting the flagrant violators of the rules of competition
2. Discouraging collusion by the prospect of prosecution
3. Ensuring that potential actors are not discouraged from entering the competition.

IS THERE A NEED FOR A STATE ANTITRUST LAW ?

A major opposition to this bill has centered on whether there is a need, since there is a federal antitrust act. Here is what the conservative United States Supreme Court (certainly no enemy of business) says:

> "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." California v ARC America Corporation, 109 SCt 1661, 1989, citing 21 CongressionalRecord 2457, 1890 In fact, 21 states had adopted antitrust laws prior to the Sherman Act of 1912.

Traditionally, antitrust common law was born in and nourished by states.

This bill provides for a state antitrust law. Pennsylvania has no such act. Every other of the fifty states has an antitrust law or has a relevant constitutional provision (except perhaps Vermont).

The General Assembly has in the past failed to pass similar bills introduced in the 1979, 1989, and 1991 Sessions.

THERE IS A NEED FOR A STATE ACT

When any person following me tells you that there is no need for a state act, that the federal law is sufficient, ask that person, "What response do you have to the following propositions?":

<u>A. Certain damages may only be recovered under a state act.</u>

HOW ABOUT $32 MILLION OF DAMAGES FOR A CONSPIRACY OF COMPANIES TO FIX THE PRICE OF CEMENT? That is the amount paid by several defendants in settlement under FEDERAL and STATE laws between 1979 and 1981 in the California case cited above. State law permitted damages to indirect purchasers.

<u>B. A state act will provide jurisdiction that the federal act does not provide.</u>

Federal jurisdiction does not apply to acts of persons occurring solely within the geographic boundaries of Pennsylvania and not constituting interstate commerce. Although most transactions involve interstate commerce, there are some conceivable factual situations which may require a state law. Mobile home industry, beer price-fixing, and band instrument sales are a few.

An example is the concern of the attorney general in 1991 with the question of prosecution of heating oil companies for price practices. The attorney general complained of the lack of a state law.

In New Jersey, that state's antitrust law was the basis for successful prosecution of carting or municipal waste hauling contract cases. A letter attached clearly indicates the value of a state law.

Criminal sanctions under the federal action can only be invoked by federal authorities.

The major problem I have with business opposition to antitrust legislation is the impression they give that somehow it is wrong to have a law that prosecutes local price-fixing by companies that cut out competition and raise prices artifically to consumers.

The next problem I have is business opposition using the argument

that an antitrust law should be defeated because it would be used to harrass business. That is a poor excuse to oppose a bill that promotes competition.

DON'T CLOSE THE BARN DOOR AFTER THE HORSE IS GONE

There are a variety of monopolistic practices or actions in restraint of trade that can occur by businesses within the state. Why permit situations to arise where our prosecutors need a tool to prosecute and it is not on the books?

How many times have we said in legislative matters, "Gee, if we only had a law to cover that situation..." Now you have the opportunity to close that gap.

C. Only a state act will provide investigative authority to obtain information necessary to protect consumers and businesses.

The state cannot use federal procedural investigative powers. There is a history of the failure of the federal government to prosecute cases, for whatever reason, leaving the state without a remedy against antitrust activities.

D. A state act needs the precedent and stability of the Sherman Antitrust Act language.

A state bill should follow the federal act for a variety of reasons: language tested by court cases; precedent; and predictability as to the type of corporate acts proscribed by law.

Most state acts follow a uniform act prepared by a national organization that seeks uniformity in states' laws to develop some predictability on which parties can rely in their commercial transactions.

A SUMMARY OF ARGUMENTS OF SOME CRITICS. You may expect a variety of arguments against this bill, some of which have been referred to above. This list attempts to anticipate and to answer these arguments.

A. The federal Antitrust Act is sufficient.

ANSWER: It is not sufficient.

1. It does not cover certain consumer complaints, like indirect purchasers.

2. If the federal government does not act, a state may not bring federal criminal sanctions.

3. It does not provide the state with investigative powers.

4. Any act performed within the state that does not involve interstate commerce cannot be prosecuted under the federal act. No one can say that there are NO such acts.

There are prosecutions under present state antitrust laws throughout the United States. During the week of May 21, 1991, a check of 13 states indicated that some states have at least five prosecutions a year.

B. Any act which constitutes a restraint of trade can be prosecuted under federal antitrust law.

ANSWER: Not correct. As recently as 1989, the U. S. Supreme Court held that prosecution under a state antitrust law is permissible for recovery of damages by indirect purchasers, where the federal law DOES NOT PERMIT RECOVERY. The Court held that the federal act does not preclude recovery under a state law. California v ARC America Corporation, 109 SCt 1661, 1989

THERE ARE SOME ACTIONS FOR DAMAGES FROM RESTRAINT OF TRADE THAT CAN ONLY BE BROUGHT UNDER A STATE LAW.

C. A state law would clutter up the courts with complicated proceedings.

There has been no testimony forthcoming to support this argument. The U. S. Supreme Court discarded a similar argument in the above California case. A lower court had stated that the state antitrust action interfered "with the Congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims."

The Supreme Court said that when state actions are brought in state courts, "any complication of federal direct purchaser actions in federal court would be minimal." (page 1666)

D. Businesses would face multiple actions in two courts.

The Supreme Court in California had the answer to this point also. It would not permit federal action to have the effect of "pre-emption of any state-law claims against antitrust defendants," simply because multiple litigation "could threaten the defendants with bankruptcy and reduce their willingness to settle."

There is no federal policy against states imposing liability in addition to that imposed by federal law. The Supreme Court has held that "state causes of action are not pre-empted solely because they impose liability over and above that authroized by federal law." California, supra.

THERE IS NO INCONSISTENCY IN STATE AND FEDERAL ANTITRUST LAWS. The Supreme Court in California said that "State ...statutes pose no ...risk to the enforcement of the federal law."

E. Only the federal government has the "specialized agencies... with expertise and sophistication" to prosecute antitrust cases.

ANSWER: We cannot rely exclusively upon the federal government for prosecution of antitrust activity. As a matter of policy, the federal government may choose not to prosecute. The federal government chose not to regulate the savings and loans institutions (while increasing deposit insurance!) After losses exceeding $130 billion, Congress reacted with legislation. If our state someday needs an antitrust law to prosecute some uniquely state cases and the law is not on the books, the public can properly ask, "Why not?" Now is the opportunity.

It is ironic that business organizations that decry the overbearing regulation of the federal government and preach the return to states of power to regulate and enforce suddenly want prosecution only on the federal level.

There are many areas of dual federal and state jurisdiction, such as in environmental law. State security regulations appear to parallel federal regulations, but in reality fill gaps in federal regulation.

F. Attorneys General will misuse and abuse a state law.

ANSWER: 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 a most cynical reason for opposing the bill. And it is a desperate reason. The Chamber insults the Office of Attorney General by implying that the present Attorney General will stage "well orchestrated news conferences...as business bashing in matters that are often never heard of again." (Chamber Testimony, April 30, 1990, page 4) If Attorneys General use antitrust laws to harrass, how come the United States Department of Justice won 100% of its cases in 1984?

Upon contacting a professor at the Georgetown Law Center, he said there was no indication of this type of abusive behavior under the federal law and there is no reason to believe it would occur under state statutes.

G. A state antitrust law will create an unfavorable business climate in the state.

ANSWER: Where else will a company go, since all other states have antitrust laws? The Chamber in effect 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."

The attempts by the present federal Administration to re-examine the impact of antitrust laws on international trade is a legitimate function that addresses the application of antitrust laws, not the existence of antitrust laws.

H. Indirect purchasers should not be permitted to sue for damages, since this would "introduce...complexity into antitrust trials,... produce appeals, and generally clog the judicial system."

ANSWER: This is directly contrary to the California case, referred to above. Opponents with this argument are fighting a rear guard action on grounds that have been disposed of by the Supreme Court as late as 1989.

PRICE-FIXING OCCURS AT THE TOP AND THE OVERCHARGE IS PAID FOR AT THE BOTTOM.

When Toyota required $150 for a coating that the buyer did not want; and the distributor agreed that the charge was improper; did the buyer get back the $150 ? No. No indirect purchaser protection.

I never heard the persons victimized in the multi-million dollar Minolta camera case and in the Pennsylvania Toyota case complain abaout complexity and clogging.

THE ATTITUDE OF BUSINESSES

There are two purposes of antitrust legislation:

A. To deter anticompetitive conduct
B. To provide compensation to victims

It is ironic that any business organization would oppose a bill intended to benefit businesses.

When a business organization opposes this bill, ask it: "Do you represent all the businesses of the state? How about the legitimate small businesses that want protection from monopolistic practices?"

An antitrust act protects good businesses from actions of bad businesses that abuse legitimate business practices. Good businesses want this act. They deserve this act. Many of the complaints to the Attorney General's office are from businesses.

Who are opponents trying to protect ? When they object to too many parties being able to sue, such as indirect purchasers, they are shielding monopolistic practices. There must be some remedy for the victims. They must have the opportunity to receive sufficient compensation to justify their taking on a gargantuan cause against a formidable financial entity.

If it is the opponent's decision to represent businesses as harrassed by the acts of some overzealous attorney general, it is the function of the legislature to protect the innocent consumer and give him his day in court through class actions and multiple damages.

TYPES OF PROSECUTIONS WITHIN A STATE FOR STATE ACTS

Conspiracy to fix cement prices: Illinois Brick v Illinois, 431 US 720

Oil companies fixing price of home fuel oil.

Insurance companies agreeing in concert to terminate writing policies within state.

Wholesale newspaper distribution territories. (Feds decided not to prosecute) (Connecticut obtained voluntary compliance after investigation UNDER A STATE LAW)

Beer price fixing. (in Philadelphia)

Sale of band instruments.

Merger of Horne's and Kaufmann's Department store chains. (Allegheny County)

Sale of airline gates. (Philadelphia International Airport)

Waste haulers.

Jewelers, bid rigging.

Home heating oil.

INVESTIGATIVE POWERS

The bill provides that the attorney general will have powers to investigate in furtherance of the objectives of the bill. These investigative powers are essential to accumulate the evidence necessary to try a case. This is no new power. It exists in other arenas of prosecution.

The state cannot use the federal investigative and procedural powers under the federal act.

STATE STATUTES ALLOWING INDIRECT PURCHASER TO SUE FOR DAMAGES

As an example of other states' use of state law where federal law does not allow recovery:

Alabama: ...allows recovery by any person "injured or damage...direct or indirect."

California: ...allows recovery "regardless of whether such injured person dealt directly or indirectly with the defendant."

Other states with right to sue as indirect purchaser:

Minnesota	Kansas	Mississippi
Colorado	Illinois	New Mexico

D. C. Code	Michigan	Rhode Island
Hawaii	Maryland	South Dakota
		Wisconsin

CRITICISM OF THE INSURANCE EXEMPTION (Section 10)

You must be made aware that the insurance exemption is so broad that certain anti-competitive acts against individuals (even businesses, and even the Commonwealth as indirect purchaser) cannot be prosecuted. Since the bill does not apply to the business of insurance that is regulated by the Insurance Commissioner, and since the Unfair Insurance Practices Act regulates the "business of insurance," and since a consumer and a business entity have no cause of action under the Unfair Insurance Practices Act, ergo your consumers and businesses have no claim for relief from conspiracies in restraint of trade or from monopolistic practices.

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

THE RISK THAT AN INDIVIDUAL CANNOT BE PROSECUTED FOR A CRIMINAL PENALTY UNDER SECTION 7 (a) (1).

In Section 3 "person" is defined to include an individual.

In Section 7 on criminal penalties, only "a partnership, corporation, association or other entity which violates section 4 or 5 commits a felony of the third degree."

In addition, the traditional language in Section 4 (from Section 1 of the Sherman Antitrust Act) provides that a contract, combination, or conspiracy by <u>two or more persons</u> in restraint of trade or commerce is unlawful.

A strict reading may exclude an individual from penalty. This is worth scrutiny by your counsel. I may be wrong.

IN SUMMARY, you have an opportunity to pass a bill that is supported by many businesses and will be a major business asset in Pennsylvania. An effective antitrust act will promote competition as a Magna Carta of free enterprise.

Thank you for the opportunity to appear.

ANTITRUST

ANTITRUST LAWS IN GENERAL, AND THE SHERMAN ACT IN PARTICULAR, ARE THE MAGNA CARTA OF FREE ENTERPRISE. THEY ARE AS IMPORTANT TO THE PRESERVATION OF ECONOMIC FREEDOM AND OUR FREE-ENTERPRISE SYSTEM AS THE BILL OF RIGHTS IS TO THE PROTECTION OF OUR FUNDAMENTAL PERSONAL FREEDOMS. AND THE FREEDOM GUARANTEED EACH AND EVERY BUSINESS, NO MATTER HOW SMALL, IS THE FREEDOM TO COMPETE--TO ASSERT WITH VIGOR, IMAGINATION, DEVOTION AND INGENUITY WHATEVER ECONOMIC MUSCLE IT CAN MUSTER.

U.S. V. TOPCO ASSOC. 405 U.S. 596, 610 (1972)

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March 19, 1991

FROM J. BROUJOS
ON SB 307

SUPPORT FOR
INDIRECT PURCHASER

Hon. John H. Broujos
Member, 199th District
House of Representatives
Commonwealth of Pennsylvania
6 N. Hanover Street
Carisle, PA 17013

Dear Representative Broujos:

This is in response to your request for information following our telephone conversation of March 18, 1991, and your letter of March 15, 1991.

In my capacity as the current Chair of the National Association of Attorneys General Multistate Antitrust Task Force, as an Assistant Attorney General for the State of Connecticut in the antitrust field since 1973, and as an Adjunct Professor at the University of Connecticut School of Business Administration MBA Program, I believe I am in an excellent position to make certain critical observations regarding the implications of the decisions of the United States Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), and California v. ARC America Corp., 109 S.Ct. 1661 (1989).

Notwithstanding the concern expressed by innumerable business interests that permitting indirect purchasers to sue under state antitrust law would open up a flood gate of non-meritorious and duplicative litigation, perhaps resulting in multiple recoveries against defendants who are sued in both federal and state court, there has, to my knowledge, not been any empirical evidence to support these fears. Indeed, the numbers of indirect purchaser cases to date have been modest. See generally, "ARC America Task Force Report," 59 Antitrust L.J. 273 (1990).

I have enclosed a copy of both Tom Greene's article from the Antitrust Magazine of the American Bar Association, Section of Antitrust Law, and my own op-ed piece from the New York Times on

the importance of states providing an indirect purchaser remedy for violation of antitrust laws.

It is demonstrably clear that citizens of those states which do not provide for indirect purchaser recovery are losing out on the ability to collect money which is rightfully theirs. As importantly, defendants who should be brought to court and forced to return illegal overcharges are simply not being pursued. ARC America constitutionalizes the ability of the states to help consumers recover.

I hope you will find this information useful, and I wish you the best of luck in your attempt to provide the Commonwealth of Pennsylvania with a state antitrust act.

Very truly yours,

RICHARD BLUMENTHAL
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c: Hon. Ernest Preate, Jr., Attorney General
Garl Hisiro, Assistant Attorney General