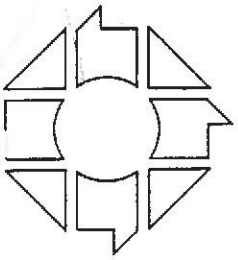

Pennsylvania Business Roundtable



# STATEMENT

## Pennsylvania Business Roundtable

## PRESENTED BY

**Jay H. Tolson**
**Chairman and Chief Executive Officer**
**Fischer & Porter Company**
**and**
**Chairman, Roundtable Legal Affairs Subcommittee**

## BEFORE

## House Judiciary Committee

## ON

## Senate Bill 307 - State Antitrust Legislation

## Wednesday, August 4, 1993

My name is Jay Tolson, Chairman and Chief Executive Officer of Fischer & Porter Company and Chairman of the Pennsylvania Business Roundtable's Legal Affairs Subcommittee.

The Roundtable is an association of senior executives from 40 major corporations in Pennsylvania. It was organized in 1979 to bring together senior officers of 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 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 the alleged monopoly? The definition of what constitutes a monopoly in 1993 is far different than that of 1953 or 1923. 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, etc. 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 a bill must be enacted.

Section 3, Definitions - Attorney General - includes a 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 state antitrust claims on a contingency fee basis.

We draw your attention to Sections 4, 5 and 6 dealing with Unreasonable Restraints of Trade" (Section 4), Monopolies (Section 5) and Acquisition and Mergers (Section 6). 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 federal law is available.

Under Section 6, Acquisition and Mergers, the language "in this Commonwealth" was stricken from the bill. We believe 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 makes 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 is also a 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 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 federal antitrust laws. Any of these cases should be permitted to proceed 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, etc., 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 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 the investigation of the Attorney General, states that: "If the Attorney General has reason to believe that a violation of this act has occurred, etc.". 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 in 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 restraint 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 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 federal statute and therefore see no reason for the passage of S.B. 307.