TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
on SENATE BILL-307

August 4, 1993

Room 140, Main Capitol Building

A PROPOSED PENNSYLVANIA ANTITRUST STATUTE

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, Esq., of HARSCO Corporation, who has experience as a practicing attorney with a law firm and as in-house 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 want 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 anticompetitive 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[1] 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 the economic philosophy of making Pennsylvania an attractive climate for business, and the principle effect of this legislation will be to merely add another layer of regulation upon our members' business activity.

SB-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 does not have the expertise or manpower to do this.

While Senate Bill-307 substantially parallels the major provisions of the federal statutes, several 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 "in the Commonwealth". 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 an 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 anticompetitive 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 "in lieu of criminal prosecution." 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 injury. 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 this section by inserting the word "directly" between "person" and "injured" to clarify this provision.

Section 9 (a) (3) of the bill precludes an action for damages based on transactions that have already been the subject of a final judgment "entered in an action by or on behalf of ... the person under the antitrust laws of" another jurisdiction. However, this would not preclude indirect purchaser actions by the Commonwealth following federal actions brought by or on behalf of direct 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 "continuing violations."

Section 9 (b) provides that a "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." 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 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 "has reason to believe" that a 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 "probable cause" or "reasonable cause" 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 (the other being Vermont) 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 enforced their criminal antitrust laws, 13 rarely enforced them, and only six states reported frequent use of their criminal provisions.[2]

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 happy to entertain any questions or comments that you may have at this time.

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[1]Literally meaning "Parent of the Country"

[2]Vakerics, Thomas V., Antitrust Basics, 1982.