

JUDICIARY COMMITTEE

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Public Hearing on Senate Bill 307
Antitrust

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Stenographic transcript of meeting held
in the Auditorium of the LRSM Building,
University of Pennsylvania, Philadelphia,
Pennsylvania

Wednesday
August 11, 1993
At 11:00 o'clock a.m.

MEMBERS OF THE JUDICIARY COMMITTEE PRESENT:

- THOMAS R. CALTAGIRONE, Chairman
- REPRESENTATIVE FRANK DERMODY
- REPRESENTATIVE KATHY MANDERINO
- REPRESENTATIVE ROBERT REBER, JR.
- REPRESENTATIVE DAVID KRANTZ

Also Present:

Kenneth Sutter, Counsel

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WITNESSES

Dan Clearfield, Esquire

PA Office of the Attorney General

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Steven A. Asher, Esquire

Former Chairman of the Philadelphia Bar

Association Antitrust Law Committee

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Bruce Wilson

Senior Vice President, Law, Consolidated

Rail Corporation

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1 CHAIRMAN CALTAGIRONE: This is the House
2 Judiciary Committee. We are taking public testimony
3 regarding Senate Bill 307, the Antitrust Legislation. We
4 will start off with the first testifant, Dan Clearfield
5 from the Office of the Attorney General.

6 Dan?

7 MR. CLEARFIELD: Good morning, Mr. Chairman,
8 members of the Committee, on behalf of Attorney General
9 Preate, I am delighted to accept your invitation to
10 address the need for the passage of Pennsylvania Antitrust
11 Act and, specifically, to support your efforts to enact
12 such legislation in the form of Senate Bill 307.

13 We believe that a state Antitrust Act
14 represents absolutely essential protection for both
15 business and consumers alike in this Commonwealth and is
16 long overdue.

17 As you may know, Attorney General Preate has
18 repeatedly gone on record over the last five years through
19 letters, speeches and at public hearings such as, similar
20 to this one, supporting the passage of a state antitrust
21 statute.

22 He has characterized it as the cornerstone
23 of the state's system to protect its businesses and
24 consumers.

25 Over that time, that we have advocated for

1 its passage, we received verbal and written expressions of
2 support for enactment from several attorneys general from
3 other states, from the former head of the U.S. Justice
4 Department's Antitrust Division, Jim Rile, and most
5 importantly from scores of individuals and businesses,
6 both large and small, throughout the Commonwealth.

7 I think the testimony that you will hear
8 today from Conrail's Bruce Wilson, is testament to the
9 support that exists in the business community by at least
10 the more enlightened of larger businesses in the
11 Commonwealth.

12 And I can assure you that if they had the
13 resources and the time, many, many, many small businesses
14 would be here today with me urging you to enact this
15 essential business protection.

16 Just three weeks ago, I was giving a
17 presentation before a small group from the Pennsylvania
18 Manufactured Housing Association which you may know
19 consists of manufactured home dealers, manufactured home
20 community owners, and manufactured home manufacturers.

21 And in response to a question, one of the
22 members made an unsolicited plea for an antitrust act in
23 the state and told me how important he thought it would be
24 for the Attorney General's Office to have the ability to
25 seek out and to stop anti-competitive conduct that affects

1 businesses that he deals with.

2 And it affects him every day in his attempt
3 to fairly and honestly compete in his industry.

4 So while I commend the Members of the House
5 Judiciary Committee for your efforts to examine the
6 specifics of a Pennsylvania antitrust statute, and
7 obviously it is very appropriate to do so, generally we
8 believe that the time for debate as to the need for such
9 legislation has long passed.

10 The time to act is upon us.

11 Now, it is almost universally acknowledged
12 that the need for an antitrust law continues and is as
13 strong as ever.

14 Competition which encourages efficiency and
15 low prices is recognized by virtually everyone as the
16 keystone of the nation's economic strength.

17 And fair competition is the essence of what
18 the antitrust laws protect.

19 The antitrust laws guarantee this
20 fundamental freedom. And as the late Justice Thurgood
21 Marshall characterized the law, they are the Magna Carta
22 of free enterprise. As he said, this body of law "is as
23 important to the preservation of economic freedom and our
24 free enterprise system as the Bill of Rights is to the
25 protection of our fundamental personal freedoms."

1 As the only state in the nation that does
2 not have a statutory or constitutional antitrust
3 provision, and we double-checked that since the testimony
4 you heard last week and that is accurate, and antitrust
5 provisions that parallel the federal antitrust laws,
6 Pennsylvania needs an antitrust act -- businesses
7 particularly have the same Bill of Rights as those
8 throughout the country.

9 With due respect to those who have seen fit
10 to oppose Senate Bill 307 and its predecessors, arguing
11 against the passage of this essential economic Bill of
12 Rights, make as much sense as contending that Article I of
13 the State Constitution, the Declaration of Rights, which
14 guarantees every Pennsylvanian essential personal freedoms
15 is unnecessary because it is redundant in the Bill of
16 Rights in the United States Constitution.

17 Even without our own state antitrust law,
18 Attorney General Preate's Antitrust Section has had some
19 amazing successes in getting millions of dollars in
20 refunds to consumers statewide in many well-known cases,
21 such as the Panasonic and Mitsubishi vertical-price-fixing
22 situations.

23 And in a case where two Bucks County milk
24 distributors paid \$275,000 for rigging a school district
25 of Philadelphia milk contract.

1 And a case in which seven Bucks County
2 heating oil dealers paid over \$158,000 in damages for
3 overcharging customers.

4 And in another large case we received a
5 settlement of nearly \$800,000 from a Lancaster County
6 manufactured house dealer and nine park owners for
7 illegally tying the purchase of new manufactured housing
8 units to the lease of scarce park spaces in the
9 fast-growing Lancaster county area.

10 In fact, in fiscal year 1992, our Antitrust
11 Section was able to recover almost \$2 million in
12 restitution fines and costs for the people of
13 Pennsylvania.

14 But the problem is that our victories in
15 many of these and other successful cases are largely due
16 to information supplied to us by other states which do
17 have subpoena power with their own antitrust laws. And
18 they are all based on the federal law.

19 The information we get is from informants
20 who supply it on a voluntary basis or from other sources
21 that are essentially voluntary.

22 We shouldn't be forced to rely on such acts
23 of fate for the protection of Pennsylvania jobs and
24 businesses.

25 Now, let me quickly, because I know we have

1 other witnesses, try to summarize the main reasons why we
2 believe that a state antitrust law is so essential.

3 And the first and most important reason is
4 simply that Pennsylvania consumers and particularly its
5 businesses, need this essential economic protection.

6 Of course, all Pennsylvanians will benefit
7 from the greater assurance that competition will be free
8 and fair and that consumers will benefit from lower prices
9 and better service that comes from unrestrained
10 competition.

11 But in my opinion, by far the greatest
12 beneficiary will be the Commonwealth's businesses and
13 industry that participate in the free market every day.

14 And the experience of our Antitrust Section
15 in the last few years, working with the limited tools
16 provided by the federal antitrust laws proves this.

17 For example, attached to my written
18 testimony is a list of over a dozen cases that our
19 Antitrust Section has successfully prosecuted recently
20 that had a substantial positive impact on Pennsylvania
21 businesses.

22 In many instances, the beneficiaries were
23 small to medium-sized firms that simply would not have had
24 the resources to fight the anti-competitive conduct with
25 which they were faced.

1 They were fortunate that our Antitrust
2 Section was able to proceed, notwithstanding the lack of a
3 state act.

4 Moreover, in an analysis we did in
5 preparation for this appearance today, we looked at the
6 complaints that we received over the last two years
7 alleging anti-competitive or unfair tactics and we found
8 that almost 50 percent of those complaints that turned
9 into investigations, came from businesses and
10 professionals. By far the largest group of any that were
11 providing us with complaints.

12 Now, a state antitrust law that empowers the
13 Attorney General to root out anti-competitive activities,
14 therefore, is as important to business as the State
15 Consumer Protection Law is to consumers in fighting scams
16 and ripoffs.

17 And I don't think any business would stand
18 up and say, we don't need the State Consumer Protection
19 Act because that would be bad for the business climate.

20 Companies that are participating in today's
21 economy in the Commonwealth freely and fairly and honestly
22 are not going to be troubled or threatened by a state
23 antitrust law.

24 If businesses really thought that way, that
25 is, that the bill was really bad for them they surely

1 wouldn't be contacting us to request assistance against
2 anti-competitive activities to such a degree.

3 That is probably the first and most
4 important reason, but there are many others.

5 Right behind that is the need for
6 investigative power on the part of the Attorney General's
7 office.

8 There are many cases where we cannot proceed
9 or are severely hampered because no Pennsylvania antitrust
10 statute of general applicability provides the Office of
11 Attorney General with investigative powers such as it has
12 in the consumer protection area, and with the rigging of
13 bids on municipal contracts.

14 And those two pre-complaint investigative
15 authorities already exist in the present law.

16 Investigative subpoena powers are especially
17 important in antitrust cases because of the great
18 difficulty in securing evidence of conspiracies which are
19 at the heart of price fixing and similar trade restraint
20 cases, and in analyzing complex mergers for possible
21 anti-competitive acts.

22 In many cases, involving conspiracies to fix
23 prices, the only way you are going to find out whether
24 there was a conspiracy or get the evidence to indicate
25 that is if you can subpoena evidence over individuals and

1 require them to testify under oath in certain
2 circumstances.

3 You are just not going to get past the
4 conspiracy unless you have that authority.

5 Information which we have obtained from the
6 cases that we have brought was either voluntarily provided
7 or publicly available, as we mentioned before.

8 There have been many cases where the lack of
9 this investigative power has severely hampered us.

10 Earlier this year, for example, our Office
11 learned that a newly formed affiliate of Russell Stover
12 Candies based in Kansas City had agreed to acquire certain
13 assets of Whitman's Chocolates Division of Pet, including
14 the right to use the famous Whitman's sampler trademark
15 and certain machinery and equipment used at its sole
16 manufacturing plant in northeast Philadelphia.

17 You may know that Russell Stover is the
18 largest manufacturer of gift-boxed chocolates in the
19 United States. And Whitman's, prior to its acquisition,
20 was the third largest manufacturer in that market.

21 At the time the deal was announced, Pet,
22 which owned Whitman's, also announced that it was closing
23 its Philadelphia plant, as Russell Stover planned to
24 produce the Whitman candies in Kansas City.

25 Our Office immediately began to review the

1 merger to review its possible anti-competitive effects on
2 Pennsylvania economies.

3 A thorough review was made even more
4 necessary because there were almost 700 jobs that would be
5 lost if that plant was closed. And, of course,
6 unfortunately, eventually it was closed.

7 Our pre-complaint investigation, however,
8 was severely hampered by our inability to subpoena
9 relevant information relating to the boxed chocolate
10 market that was in the merging parties' hands.

11 Now, despite this and based on the very
12 limited information produced by the merging parties and
13 other information, we were able to obtain from cooperating
14 witnesses and other sources, we were able to conclude that
15 we could make a case that the merger would have a harmful,
16 anti-competitive effect on Pennsylvania's economy.

17 And I should mention that before we filed
18 our complaint, we had the testimony of several experts in
19 the area and a good deal of information which led us to
20 believe that merger was anti-competitive.

21 So our case was firm, based on factual and
22 legal grounds when we filed it. And we believed we had a
23 good faith basis for bringing that case or else, of
24 course, we would not have brought it.

25 We filed the action in federal court

1 challenging the acquisition under federal antitrust laws
2 and, as you may know, our request for preliminary
3 injunction was denied.

4 Now, while we can't say with certainty that
5 federal court would have ruled differently if we had been
6 able to use our precomplaint discovery to obtain more
7 documents and testimony to present at the hearing, I can
8 tell you from my own participation in the case, that
9 definitely it would have been of tremendous assistance to
10 us in the prosecution of the case.

11 If we had just been able to take one more
12 week and demand the documents or subpoena or depose
13 witnesses before we were able to file our suit, it may
14 have made the difference in presenting evidence to the
15 judge.

16 It may have convinced him to stop at least
17 preliminarily that merger. But we were unable to do that
18 because we don't have that authority.

19 Now, there are many other examples where our
20 lack of precomplaint investigative authority hurts us.

21 As I mentioned, particularly in the area of
22 conspiracies to fix prices. And I'm summarizing here from
23 my written preparation.

24 For example, right now we are investigating
25 an allegation that a waste hauling company is attempting

1 to monopolize and drive out competition in a particular
2 market here in Pennsylvania.

3 We are going to be severely limited in our
4 ability to pursue that complaint because of our inability
5 to subpoena people and demand that they testify under
6 oath.

7 And in many cases, price fixing, vertical
8 and horizontal cases, are very difficult to pursue without
9 that investigative authority.

10 Now, in providing the Attorney General with
11 investigatory powers, it is important that an
12 overly-restrictive standard not be used which will make it
13 more difficult and burdensome for the Office to obtain the
14 relevant information needed.

15 The reason to believe language now contained
16 in Senate Bill 307 is substantially identical to the
17 language now contained in the Pennsylvania Anti-Bid
18 Rigging Act, and that is the act that prohibits the fixing
19 of bids on municipal account contracts and that we
20 enforce.

21 And we have a well-documented record of
22 operating under that standard effectively and
23 responsibly. Also Consumer Protection has
24 pre-investigatory authority for the Bureau of Consumer
25 Protection.

1 There is no standard in the Consumer
2 Protection Act by which the Attorney General's request for
3 information must be judged. It simply says, whenever the
4 Attorney General wants the information, he may send a
5 subpoena.

6 The United States Department of Justice
7 operates under a reason to believe standard under the
8 Clayton Act.

9 And two-thirds of the states that have
10 pre-complaint investigatory authority, and we counted them
11 and there are about 27 of the states, have a reason to
12 believe standard in their statutes.

13 Others don't have any standard. And then
14 there are a certain number that have what would probably
15 be a slightly more restrictive standard.

16 I think the essential point here is that in
17 the years during which the Anti-Bid Rigging Act, the
18 Consumer Protection Act and these 27 other jurisdictions
19 have operated under a reason to believe standard, there
20 have been virtually no publicized or published cases in
21 which the use of that subpoena power has been challenged
22 or challenged successfully.

23 And the argument that somehow this Office or
24 any other office is going to abuse that power, is simply
25 not supported by the available evidence.

1 There is just no evidence that that
2 happens.

3 And I should point out that even if it did
4 happen in any individual case, a business has the right,
5 absolute right, to go to Commonwealth Court and oppose
6 that subpoena.

7 And a Commonwealth Court judge can make a
8 determination as to whether that investigation is
9 appropriate.

10 But the standard must be one that permits
11 the investigation to go forward and not one that would be
12 so restrictive as to make it very difficult to allow us to
13 obtain the information we need to build these
14 investigations.

15 Several other reasons and, again, I will
16 summarize in the interest of time. The Attorney General
17 needs the ability to challenge anti-competitive conduct
18 affecting only intrastate commerce.

19 Now there is a limited number of cases and
20 albeit there is a limited number where there is no
21 substantial effect on interstate commerce. These are
22 purely local matters.

23 Right now, if there is a bid rigging
24 conspiracy that has no effect on intrastate commerce here
25 in Philadelphia, in northeast Philadelphia or in

1 Norristown or Allentown or Reading, the Attorney General's
2 Office cannot prosecute or proceed in that case.

3 Those small business people are the ones who
4 are going to be affected by that, because you havee
5 someone conspiring to fix those bids and restrain
6 competition, and are completely without a remedy.

7 And that just doesn't seem to make much
8 sense. Why should a small business person in Pennsylvania
9 not have the same protection large companies do because of
10 the fact that their business is, in fact, in intrastate
11 commerce?

12 The Attorney General's Office needs legal
13 standing to bring antitrust actions. Right now under the
14 federal law, we can only bring an action on behalf of the
15 citizens of the Commonwealth through our parens patriae
16 authority.

17 It requires that this be a substantial, have
18 a substantial effect on the economy of Pennsylvania and
19 effect a substantial number of citizens.

20 So relatively isolated instances of
21 anti-competitive conduct comes under the parens patriae
22 authority, so the assertion you heard last week that we
23 can do anything under the federal laws that we can do,
24 under a Pennsylvania law is not true.

25 If there is a limited conspiracy to fix

1 prices that affect one or two businesses, we are without
2 the standing to bring that action without a state
3 antitrust law.

4 And what happens in those kinds of cases is
5 that many times we pass then those investigations to the
6 federal authorities.

7 Because the Justice Department -- and they
8 have an antitrust section here located in Philadelphia,
9 does have the authority under federal law to bring action
10 for injunction, for civil penalties or they can prosecute
11 criminally.

12 So they have authority even if it is an
13 isolated instance. But that means that Pennsylvanians are
14 relying on federal officials to make judgments about what
15 actions to bring.

16 Now, our relationship with the federal
17 authorities has been excellent and they are thoroughly
18 professional and do a wonderful job. But they still are
19 operating under their own set of enforcement guidelines
20 and authority.

21 And there are cases that they bring and
22 where Pennsylvania citizens are protected, but there are
23 many cases where their priorities simply don't permit them
24 to bring those cases and they are not brought.

25 That is also true in, for general

1 substantive areas. For example, for years, the Justice
2 Department has declined to bring retail price fixing
3 cases.

4 They had decided that they did not believe
5 that that was an appropriate enforcement strategy.

6 So it was up to the Pennsylvania Office and
7 in this case combining with other states, to try to pool
8 our resources and use their investigative authority to
9 bring those kinds of cases.

10 Another example of where federal and state
11 priorities may differ was in a merger case just recently
12 involving AmeriGas. AmeriGas had purchased Petrolane
13 which was another, which was its largest competitor in the
14 propane area.

15 And the Federal Justice Department -- or,
16 I'm sorry, the FTC declined to stop that merger. They
17 believed that it was appropriate to go ahead.

18 But we investigated it because of the
19 particularly strong impact on Pennsylvania's economy.

20 We negotiated a settlement that was
21 favorable to the consumer and to other businesses who
22 wanted to compete with AmeriGas and Petrolane.

23 So there definitely are differences in
24 enforcement policy that need to be recognized. And we
25 would be able to present Pennsylvania's enforcement

1 priorities much more effectively if we had a state act.

2 Another reason is, of course, that we don't
3 have the ability to bring criminal prosecutions or bring
4 actions for civil penalties.

5 Obviously, the ability to bring criminal
6 prosecutions or to bring civil penalties is an important
7 deterrent to anti-competitive conduct. And without it,
8 again, our ability to root out that kind of conduct is
9 severely limited.

10 Let me skip to the discussions, to some of
11 the arguments against the Act which have been made and
12 discuss them for a moment, because I think they are
13 important.

14 You have heard last week and at other times,
15 they have been raised. And opponents have made two main
16 arguments to support their position.

17 First, they say a state antitrust law will
18 impose a severe economic burden on Pennsylvania
19 businesses.

20 They claim that an antitrust law would hurt
21 the business climate here in the Commonwealth.

22 Well, Senate Bill 307 mirrors federal law in
23 virtually every respect except for a few that I am going
24 to talk about.

25 It doesn't impose any material use burden,

1 no additional substantive standard on by business whether
2 it is Pennsylvania or anyplace else.

3 It is, frankly, befuddling to us how large
4 companies, such as those that testified last week, can
5 argue that the antitrust act is going to impose a
6 substantial new burden on them.

7 For example, Fisher and Porter, whose CEO
8 testified last week, operates in at least 30 states and
9 internationally. It operates pretty much all over the
10 United States and the world.

11 As we said before, every other state has an
12 antitrust law and they are obviously subject to the
13 federal law.

14 Now, how is their conduct going to be
15 changed by the passage of a state antitrust law? If they
16 are operating within the law, then their conduct is not
17 going to be affected one wit.

18 And I would submit that for large companies,
19 such as Fisher and Porter or Horst Company, it is going to
20 have absolutely no effect on them.

21 The effect is going to be, small companies
22 will have additional protection from anti-competitive
23 conduct that they may be subjected to from the larger
24 companies.

25 The second argument which is loosely

1 analagous to the first, is that Senate Bill 307 goes
2 significantly beyond the federal antitrust law and should
3 be opposed on that ground.

4 But we have looked at the law very
5 carefully, as you would expect, and we have only been able
6 to find six instances in which the state law differs in
7 any measurable way from the federal law.

8 In all other major respects Senate Bill 307
9 mirrors the federal law.

10 In fact, in three of the instances where it
11 doesn't conform, the state provision is more lenient from
12 the perspective of the potential offender.

13 For example, the state act would provide for
14 smaller criminal fines than the federal law does, for a
15 right of contribution among the defendants, which is an
16 enormous concession to potential violators of the law.
17 And from broader exemptions for public utilities and
18 non-profit health care facilities.

19 There are only three areas that we were able
20 to find where the state statute goes beyond federal law.

21 First, it would cover conspiracies affecting
22 intrastate commerce. And, second, give the Commonwealth,
23 and only the Commonwealth, the ability to recover damages
24 as an indirect purchaser.

25 And, finally, it would give this Office, the

1 Attorney General's Office, the ability to recover civil
2 penalties in lieu of criminal penalties.

3 Now, in regard to intrastate commerce, that
4 is not a criticism of the law, that is what the law is
5 there for.

6 Obviously, this is an area that is not
7 covered now by present law, and businesses and consumers
8 are not being protected.

9 As for the indirect purchaser issue, the
10 statute was carefully crafted to allow only the
11 Commonwealth to recover as an indirect purchaser.

12 And our own experience has shown that the
13 indirect purchaser problem is particularly acute with
14 purchases made by the Commonwealth through its bidding
15 procedures.

16 Certainly to the extent that this provision
17 does diverge, it is a fairly minimal one, because it deals
18 not with a new substantive right, but with recovery and
19 who is going to recover.

20 Finally, while it is true that the federal
21 government cannot obtain civil penalties, they can seek
22 criminal penalties.

23 The ability to seek civil penalties in lieu
24 of criminal penalties for, and the antitrust should be a
25 less onerous option to Pennsylvania citizens.

1 If there is a case in which criminal
2 penalties would not be appropriate, we would be able to
3 ask for civil fines, which are generally viewed as less
4 onerous and less of a problem for the business, as opposed
5 to only having one alternative, and that is to seek a
6 criminal penalty.

7 The other arguments made by the opponents to
8 the bill raise no substantial issue that in our view
9 should cause the General Assembly to question the need or
10 the appropriateness of a state act.

11 I want to add just one comment in conclusion
12 and that is, I would urge the Committee to consider this.

13 I think that this Bill, Senate Bill 307, is
14 as important a piece of pro-business legislation as this
15 General Assembly could pass in this or any other session.

16 And if it is considered carefully, I think
17 that that will be obvious to everyone, and its passage
18 will be assured.

19 And I will be happy to take any questions at
20 this time.

21 CHAIRMAN CALTAGIRONE: Thank you. Counsel
22 Sutter?

23 MR. SUTTER: We have heard from a number of
24 people that have indicated to us that where it is a
25 situation where it is a small town and a small town dry

1 cleaner, for example, and the town is really only able to
2 support one dry cleaner, in effect, this dry cleaner would
3 have a monopoly.

4 Can you respond to that in terms of how your
5 Office would view that and deal with that type of
6 situation?

7 MR. CLEARFIELD: Well, the federal antitrust
8 laws do not make illegal monopolies, they make illegal the
9 attempt by an entity that has monopoly power in a
10 particular market to either continue or to secure his or
11 her or its monopoly in some demonstrable way.

12 If you have a small town with a dry cleaner
13 and that is not a monopoly, I can tell you without
14 reservation that there is no way, shape or form that that
15 would be considered to be a violation of the antitrust
16 laws.

17 And that is happening throughout the United
18 States. I am sure that there are many, many circumstances
19 where that exists. And dry cleaners are not being sued by
20 other state attorneys general or private claimants. It is
21 just not a violation of the antitrust laws.

22 Again, what is protected is the ability to
23 have free and fair competition.

24 That doesn't mean that the result is going
25 to be a variety of competitors.

1 In some cases, so long as that free and --
2 that competition is free and fair and one entity emerges
3 as the only entity that can provide the service, then so
4 be it.

5 MR. SUTTER: Okay. I'm a little bit unclear
6 as to section 6 on page 2, acquisitions and mergers.

7 The way I read that, I think that passage is
8 included within section 5, when you say or attempt to
9 monopolize.

10 Can you explain to me why section 6 is
11 necessary?

12 MR. CLEARFIELD: Well, as I understand it,
13 generally an acquisition or merger would be considered in
14 each case as to whether, because of the combination, it
15 would lessen competition.

16 And the standard there is, may tend to
17 substantially lessen competition or tend to create a
18 monopoly.

19 Section 5, generally, as I said, is used
20 when you have an entity with market power and that entity
21 with market power is now trying to extend its market
22 power.

23 So that if you had an acquisition by someone
24 who had market power, section 5 may well come into play.

25 But you may have a merger where neither of

1 the entities or the parties has market power. That is the
2 ability to control prices or control services in a certain
3 way.

4 But it would still be anti-competitive
5 because of the effect on the consumer prices or effect on
6 the services.

7 So section 6 is broader in the sense they
8 would allow, just as the federal law does, would allow our
9 office or a private individual to consider a merger by two
10 large participants in the market even though neither of
11 them had market power.

12 MR. SUTTER: And it is your reading that
13 attempting to monopolize that would not be within the
14 scope of that then?

15 MR. CLEARFIELD: Well, it could depending on
16 the entity that was trying to acquire one of its
17 competitors, but it doesn't have to be.

18 But any merger where you, where two parties,
19 where you have two parties merging, which would lessen
20 competition in a substantial way in a particular market
21 would be subject to review under section 6.

22 Only mergers by someone who already had a
23 monopoly would be covered by section 5.

24 Follow me?

25 MR. SUTTER: Well, that is just not the way

1 I read it, when it says, or attempt to monopolize. So
2 maybe it is a semantic difference.

3 MR. CLEARFIELD: Just a second.

4 (Pause.)

5 Mr. Hisiro confirmed what I was saying.

6 Generally, the Justice Department or the FTC reviews every
7 merger of every corporation over a certain size. They
8 never review them under section 5.

9 Although he confirms that theoretically if
10 you, or the equivalent of section 5, in the federal law,
11 theoretically they could, if you had an entity that
12 already had a monopoly and was trying to acquire the last
13 remaining competitor in that particular market.

14 But generally you are going to be reviewing
15 these mergers under section 6, and section 5 wouldn't
16 apply.

17 Section 5, frankly, is a section that, you
18 know, is not used as often these days, because you just
19 don't have the same kinds of integration in particular
20 markets as when the antitrust laws were first passed, for
21 example.

22 There are still markets where that may exist
23 where in a particular county, for example, for example, in
24 the manufactured housing case that we brought.

25 We found that the particular company that we

1 looked at had managed literally -- was -- had controlled
2 or sold 80 to 90 percent of the manufactured homes in
3 Lancaster County.

4 And they also managed to tie-up virtually
5 every open space in a manufactured housing park in
6 Lancaster County.

7 So that case was considered under the
8 monopoly section because it did have that monopoly as well
9 as a tie-in.

10 But that is very rare or more rare than in
11 the past when there wasn't as much competition in many of
12 these fields.

13 MR. SUTTER: Is there an equivilent section
14 in the Clayton Act, equivilent to section 6?

15 MR. CLEARFIELD: Yes, this is identical to
16 section 6, is it not, word for word -- section 7, I'm
17 sorry, excuse me.

18 MR. SUTTER: Okay. I'm concerned about the
19 act taking effect in 60 days.

20 First of all, this is a highly specialized
21 area and I'm wondering if the Attorney General's Office
22 has the people resources and what the cost of implementing
23 this will be.

24 Can you give us any idea of that?

25 MR. CLEARFIELD: I can assure you that our

1 Antitrust Section is completely competent and ready to
2 administer and enforce this Act.

3 MR. SUTTER: And how many people are in the
4 Antitrust Section?

5 MR. CLEARFIELD: Well, there is a section
6 chief and there are four attorneys in the complement.

7 Right now we have an opening and we are
8 actively seeking to fill one of those positions.

9 But that is, right now the complement is
10 just five attorneys and the support staff. Two paralegals
11 would be included in that support staff.

12 But I can assure you that we will be in a
13 position to administer the Act and we will use this as
14 part of the tools that we would have available to us to
15 investigate the scores of complaints that we receive every
16 week that allege anti-competitive conduct.

17 What happens now is that in many cases we
18 unfortunately reach a dead-end because we don't have the
19 tools necessary to complete those investigations.

20 But I think if you inquire, if you inquire
21 to the antitrust bar in Pennsylvania, other antitrust,
22 excuse me, other attorneys general or any other national
23 organization that is familiar with this, they will tell
24 you that Pennsylvania Attorney General's Office,
25 particularly in the Antitrust Section, has just done an

1 amazing job with the limited tools that it has available
2 in the cases that it has brought. I think its reputation
3 is next to none.

4 MR. SUTTER: Well, will you need additional
5 resources?

6 MR. CLEARFIELD: We are not planning at this
7 point for additional resources.

8 MR. SUTTER: Two more quick points. I was
9 concerned with my reading of the investigatory power with
10 reason to believe, that that language in there, and you
11 did address that.

12 I'm wondering if you can just give me the
13 background material. In other states, you indicated that
14 two-thirds of the other states?

15 MR. CLEARFIELD: Yes, I can provide that.

16 MR. SUTTER: Okay.

17 MR. CLEARFIELD: I would just add, if you,
18 if it would be helpful, that our review indicated that the
19 reason to believe standard is really the standard that
20 most dominated these investigatory powers provisions of
21 other states.

22 The reasonable cause standard is actually
23 found most often in instances in which injunctions are
24 being requested as a basis for injunction.

25 And it is very similar to probable cause,

1 although they are not quite as onerous as, of course, is
2 the standard for arrest or a criminal search warrant. You
3 are talking about much more onerous provision. And
4 remember, this is a standard that will allow to us
5 investigate claims to determine whether there is a
6 substantial case.

7 And we don't want to impede that ability and
8 we also don't -- it seems to me, want to create a standard
9 which is going to require us to go to court when a
10 business protests and lay out our case in front of, I
11 mean, in front of this potential conspirator who is trying
12 to rig bids or take other action which is illegal.

13 So, you know, it is important that we keep
14 that standard in our mind.

15 And I can assure you that the protection
16 that exists in the act would protect any cowboy who might,
17 you know, in some future years, might use it
18 inappropriately.

19 I'm sure that is not going to happen under
20 my watch or under Attorney General Preate's watch.

21 MR. SUTTER: My last point is there was a
22 Senate amendment that exempted non-profit health care
23 facilities.

24 I am wondering if you will comment on that.
25 We heard some testimony at our last hearing that they

1 should not be exempted from the Act.

2 Do you have any thoughts on that?

3 MR. CLEARFIELD: Well, our position
4 officially is that we are neutral on that. That is really
5 up to -- if the Legislature believes it is a policy
6 matter, that that is something that it wishes to do, then
7 so be it.

8 We, I would comment, I guess, as a matter of
9 information that generally health care providers who
10 combine to provide services in a cost effective way and do
11 so for that reason, are generally not going to be subject
12 to challenges under the antitrust laws either under this
13 act or the federal laws.

14 And if the Health Department has mandated
15 certain activities or actions, then that is going to be
16 covered under the state action exemption that exists in
17 this act and exists in the federal common law.

18 But as I said, we are neutral on that
19 particular provision.

20 MR. SUTTER: Thank you.

21 CHAIRMAN CALTAGIRONE: Representative
22 Dermody?

23 REPRESENTATIVE DERMODY: I just have a few
24 questions.

25 As you testified, the new bill, Senate Bill

1 307, basically mirrors the federal law. And it now
2 contains a provision that would require our bill to be
3 construed consistently with the federal law.

4 MR. CLEARFIELD: Yes.

5 REPRESENTATIVE DERMODY: That is, which is
6 in there now.

7 So I guess the difference is, is that, would
8 be in the enforcement priorities; is that right?

9 The main reason why you would want such a
10 bill would be to, the differences in the various
11 differences in enforcement priority?

12 MR. CLEARFIELD: That would certainly be one
13 of the major reasons.

14 The ability to bring actions that the
15 Commonwealth believes are important as opposed to the
16 federal government.

17 And also the additional tools that we would
18 have to investigate and also prosecute anti-competitive
19 conduct in the form of civil penalties, criminal
20 prosecutions, investigative powers.

21 REPRESENTATIVE DARMODY: I guess what the
22 maybe thing would be that you don't have now is the
23 investigative part?

24 MR. CLEARFIELD: I think that is the
25 principal one.

1 REPRESENTATIVE DERMODY: The rest you can
2 work with the Justice Department, and it is working
3 actively in the area, right?

4 MR. CLEARFIELD: Yes.

5 REPRESENTATIVE DERMODY: You talked a little
6 bit about the large corporation, I forget the name, that
7 operated in 30 states that you felt shouldn't have any
8 problem at all.

9 MR. CLEARFIELD: Well, Fisher and Porter,
10 and they testified at the last proceeding.

11 REPRESENTATIVE DERMODY: It doesn't matter
12 who it is.

13 MR. CLEARFIELD: There are many others.

14 REPRESENTATIVE DERMODY: My question would
15 be, if you are operating in 30 states with a federal
16 antitrust law and each state has their own federal
17 antitrust law with different and various enforcement
18 priorities, you have to -- you can market your product or
19 sell it or whatever you are doing, operate one way in one
20 state, now you have to operate differently in that state
21 and differently in Pennsylvania.

22 That has to be a costly process. And that
23 has got to put them in a position that they have to have
24 legal staff and have different ways to run their business
25 throughout the whole country.

1 MR. CLEARFIELD: Well, Representative
2 Dermody, I think that is not going to be a problem in
3 Pennsylvania because the state law so closely parallels
4 the federal law.

5 There is no substantive right in this Senate
6 Bill 307 that doesn't exist under federal law.

7 So if they are operating in conformance with
8 federal law, they are going to be operating in conformance
9 with the state law.

10 And I would also say that they are operating
11 effectively today in that millieu and they seem to be,
12 based on their annual report that we examined and, again,
13 just an example, they are doing so very effectively.

14 REPRESENTATIVE DARMODY: The difference
15 would be as you state is that if the federal law is not
16 enforcing vertical price fixing, I think is what you
17 referred to here, and you decide to, then they have got a
18 whole different set of ground rules to live by in the
19 Commonwealth than they do elsewhere; correct?

20 MR. CLEARFIELD: Well, no, I don't think I
21 would be able to agree to that.

22 It is not a matter of new substantive
23 rights. Those rights, if it is violation, it is a
24 violation whether there is someone enforcing it or not.

25 The question is, whether an entity is going

1 to have the authority, the ability to try to enforce those
2 laws that are already on the books.

3 This law doesn't create any new restriction
4 on any corporation with respect to vertical price fixing.

5 REPRESENTATIVE DERMODY: That was a bad
6 example, of someone breaking the law. I understand that.

7 MR. CLEARFIELD: We will not prosecute
8 anyone who not breaking the law.

9 REPRESENTATIVE DERMODY: I understand you
10 would never do anything like that.

11 It would just seem that you would have to
12 run your businesses differently within the different
13 states and particularly if you have different enforcement
14 priorities. You get used to a way of doing things.

15 And all of a sudden the Commonwealth says
16 you can't do that anymore, but you can do it across the
17 border.

18 I think that creates some problems. That is
19 all.

20 You haven't had any problems working with
21 the Justice Department?

22 Have you referred cases to them they refused
23 to take, that sort of thing?

24 MR. CLEARFIELD: The process is not where
25 they would refuse to take a case.

1 What has happened is that we have had cases
2 that we have referred to them which have not been
3 prosecuted.

4 Now, they don't share with us their reasons
5 for not prosecuting the cases nor should they since that
6 is a law enforcement decision that they have to make and
7 it is obviously confidential.

8 But when we give over that case, we lose, we
9 have no more -- we lose our control over it.

10 And as I said, our relationship with the
11 Justice Department is good. We only have the highest
12 regard for them and their abilities.

13 But yet, as I am sure you would, as I am
14 sure you would agree, you always are going to feel more
15 comfortable if you have the ability to bring those cases
16 and make those decisions than if you are having to rely on
17 the good judgment of some other entity over which you have
18 no control.

19 REPRESENTATIVE DERMODY: Thanks.

20 CHAIRMAN CALTAGIRONE: Representative
21 Manderino?

22 REPRESENTATIVE MANDERINO: Thank you, Mr.
23 Chairman.

24 Mr. Clearfield, my first line of questioning
25 I guess is now shortened because I think you have done a

1 real good job, and I appreciate, explaining the
2 investigative standard.

3 But what I am curious about is -- I wrote
4 down 49 states have a state antitrust, 27 of those mirror
5 the federal language with regard to reason to believe for
6 the investigatory standard. Others have a more
7 restrictive standard.

8 What is the more -- what is or what are
9 examples of more restrictive standards that are used in
10 other states?

11 MR. CLEARFIELD: Well, 10 states do not
12 specifically provide for investigatory power.

13 REPRESENTATIVE MANDERINO: At all?

14 MR. CLEARFIELD: At all.

15 REPRESENTATIVE MANDERINO: So I had those --
16 so you are lumping those -- those are the more
17 restrictive.

18 They would not give you pre-investigatory?

19 MR. CLEARFIELD: We haven't investigated
20 each and every one of those to determine if they have
21 investigatory authority under other law, but there are 10
22 states that have the state antitrust statutory or
23 constitutional provision and every state but Pennsylvania
24 has them, but are not specifically provided with
25 pre-complaint investigatory authority.

1 There is another 10 or so states that use
2 the reasonable cause standard and there is about five
3 states that have other types of standards.

4 One state uses good cause, which lawyers
5 would debate as to whether that is more restrictive or
6 less restrictive.

7 I mean, we are talking about reasonable
8 cause, reason to believe, good cause, and only lawyers
9 would be able to find real differences in those terms.

10 REPRESENTATIVE MANDERINO: Except for the
11 fact when you are talking about reasonable cause or good
12 cause you are talking about an objective standard of proof
13 where some would argue that reason to believe is very
14 subjective and goes to what your intent was.

15 MR. CLEARFIELD: Well, the research that we
16 have been able to do indicates that in each instance the,
17 there is an understanding that you must rely on or look to
18 the law enforcement official who is attempting to exercise
19 a power under those standards.

20 So that there is an element of subjectivity
21 that is recognized as appropriate.

22 But as the standards change, that element is
23 lessened.

24 REPRESENTATIVE MANDERINO: But reason to
25 believe, so long as I subjectively had a good intent, I

1 mean I could have been out there in left field shooting or
2 aiming anywhere to see where something sticks. And no one
3 could say that I didn't have a good cause to do that.

4 MR. CLEARFIELD: Well, I understand your
5 point. But if a business wishes to challenge a subpoena
6 by our office, they have the right to and they can bring
7 that challenge to Commonwealth Court.

8 And President Judge Craig is going to be up
9 front there and I have to prove to him that I have a good
10 reason for being there.

11 And if you have been before Judge Craig, you
12 know that that is not an experience you relish. You know,
13 unless you are really sure of what you are doing.

14 So I would say that there is no business
15 that would not be in a position of challenging what they
16 believe to be a fishing expedition, if that would be
17 appropriate, or a subpoena that was not within the
18 standards. They have that ability under reason to
19 believe.

20 Now, the research that we have done
21 indicates that reason to believe requires that we are able
22 to show that target is, has, that there is a violation of
23 the law, that we are investigating, that is subject --
24 that the target is subject to.

25 Not that the target has necessarily done it,

1 but there is a violation of the law. In other words, we
2 have to articulate the violation that they are concerned
3 about.

4 And the target has the authority to or the
5 ability to respond to that.

6 Now, that gives that target the ability to
7 respond to, or to oppose that kind of a subpoena.

8 And, again, as I mentioned in my testimony,
9 we do have an anti-rigging act that has been on the books
10 for many years.

11 That says when the Attorney General believes
12 there is a violation he may issue a subpoena.

13 Under that statute there has never been,
14 never been, a challenge to a subpoena issued by the
15 Attorney General's Office in the entire history of that
16 statute.

17 The Bureau of Consumer Protection has a
18 similar pre-complaint discovery. There is no standard.
19 It simply says, whenever the Attorney General wants to, he
20 can ask for information.

21 There has never been a successful challenge
22 to that, to that subpoena.

23 We -- as I said, 27 jurisdictions have the
24 reason to believe standard. We, we, in the time we had,
25 we investigated challenges to that standard. And we were

1 able to find three reported cases in the last five years
2 where anyone challenged a subpoena by any of those
3 jurisdictions in investigative -- and in all three cases,
4 the motion to quash was denied.

5 I think the evidence is that this is, this
6 is not a problem in states that operate with this kind --
7 with a reason to believe standard.

8 It has not been a problem in Pennsylvania or
9 at a federal level or in other states. And there are many
10 many reasons for that.

11 REPRESENTATIVE MANDERINO: Can you tell me
12 how the federal courts have interpreted reason to believe
13 in the development of federal case law?

14 MR. CLEARFIELD: The reason to believe
15 standard has been discussed and has, in the cases that we
16 have been able to find in federal law, indicates that the
17 demand has to be shown, the demanding party has to show
18 the state the nature of the conduct constituting the
19 antitrust violation which is under investigation, and the
20 basis for the reason to believe that there has been a
21 violation.

22 REPRESENTATIVE MANDERINO: Towards that
23 particular entity that you want to investigate?

24 MR. CLEARFIELD: Yes.

25 REPRESENTATIVE MANDERINO: Or just towards

1 the problem in general?

2 MR. CLEARFIELD: No. You have to associate
3 the target with the violation. But that is all we have.

4 REPRESENTATIVE MANDERINO: Okay. Let me see
5 if I can -- we used by way of example earlier, milk price
6 fixing. Okay?

7 MR. CLEARFIELD: Yes.

8 REPRESENTATIVE MANDERINO: Now, if I as a --
9 if I were the Attorney General and I looked at
10 Pennsylvania and I said, gee, everybody's milk prices are
11 within a penny of each other and every time one goes up,
12 they all go up then and every time someone goes down a
13 penny -- there must be, well, and now I need an
14 explanation between what you can't do now.

15 Because obviously you have brought it under
16 the state price fixing law.

17 But what stops you under a reason to believe
18 standard to say, I'm going to issue subpoenas for every,
19 every milk dairy farm and milk producer that sells within
20 the Commonwealth of Pennsylvania, so that I can examine
21 all their books to see what is happening here?

22 My question is, can you do that now under
23 the state price fixing law? And if you can't, would you
24 be able to do it under this?

25 And if so, why should you be allowed to do

1 that?

2 MR. CLEARFIELD: I don't believe we could do
3 that under the State Anti-Bid Rigging Act, and that is
4 because we must articulate a belief that a violation of
5 the antitrust laws has occurred.

6 Now, taking your hypothetical on its face,
7 the fact that prices parallel each other isn't a violation
8 of the antitrust law.

9 So we would need something more to indicate
10 that a violation has occurred before we would be able to
11 subpoena that information or withstand the challenges to
12 subpoena the information.

13 And I think that is the key and that is the
14 protection you are looking for.

15 REPRESENTATIVE MANDERINO: What do you mean
16 by something more?

17 MR. CLEARFIELD: It may be an anonymous tip
18 from someone that indicated that information has been, has
19 been going back and forth, or the bids have been open
20 prior to the time that bids were officially going to be
21 opened.

22 It might be evidence of a specific pattern
23 and in a specific case.

24 For example, in the milk area we have
25 examined, using computer investigative tools, hundreds and

1 hundreds of bids and hundreds and thousands of prices
2 looking for patterns to determine whether there are
3 patterns in those bids.

4 And sometimes when you look at those
5 patterns which you can only do if you look at thousands of
6 pieces of data, you suddenly see, you know, over five or
7 six areas, you will see three or four targets who will bid
8 exactly the same on three or four items in a bid of maybe
9 10 or 12 items, which you wouldn't be able to see if, just
10 by looking at each individual one, because you would never
11 pick up that pattern.

12 That evidence is very compelling when you
13 see it.

14 And that, plus publicly available evidence
15 would seem to me to be enough to justify from an objective
16 standpoint, our pursuit of those particular targets. And
17 from an investigative standpoint. And our pre-complaint
18 investigative subpoena.

19 Now, it seems to me that we would from an
20 objective standpoint be satisfied with that. Because if
21 you came to me and said, why the heck are you bothering so
22 and so?

23 We would be able to, presuming that we
24 could, we wouldn't have a confidentiality problem, I'm
25 sure we could get around that. We would be able to show

1 you that pattern. We would be able to show you why we
2 were going after a particular target or set of targets.

3 And we certainly would never submit those
4 subpoenas if we didn't have that kind of data.

5 So the answer is, I don't think we could
6 send a subpoena to every milk producer in the Commonwealth
7 and say we would just like to take a look and see what is
8 going on.

9 Would you please send us all your -- we are
10 going to subpoena all of your documents.

11 REPRESENTATIVE MANDERINO: But you could do
12 that under a reason to believe standard?

13 MR. CLEARFIELD: No, I don't believe we
14 could.

15 Well, we could ask for voluntary cooperation
16 and obviously that is a wholly different story.

17 But in terms of demanding it and
18 withstanding a motion to quash in Commonwealth Court we
19 would have to show not only that we had reason to believe
20 -- we would have to show that there was a reason to
21 believe that there was a violation of the state act, of
22 the act, of the law.

23 And if we just said, well, you know, other
24 states have found violations, we wanted to see if there
25 were violations as well.

1 Under the case law, limited, albeit, that we
2 have examined, we simply wouldn't be able to do it in that
3 case.

4 The precomplaint subpoena power that we
5 would have is not a license to do broad, to demand data or
6 information from businesses in the Commonwealth just to
7 satisfy us that there are no violations occurring.

8 We would have to have more and that is what
9 the case law says.

10 Now let me quickly tell you reasonable cause
11 as we defined it requires that we not only have the reason
12 to believe there is a violation of the law --

13 REPRESENTATIVE MANDERINO: But some
14 substantive evidence connected.

15 MR. CLEARFIELD: We have to show the facts
16 and have a probability that those facts are true and a
17 possibility that those constitute a violation of the law.

18 Now that means basically, you know, in
19 context of getting a preliminary injunction for example,
20 that is not an unreasonable standard, that is how we have
21 to meet the standard.

22 But this is a standard that we are using at
23 the very initialization of an investigation.

24 And if we have to prove that, we have to
25 present evidence that indicates there is a probability

1 that certain facts, that facts are true, that is going to
2 create a very difficult burden on the part of the
3 Commonwealth to proceed with an investigation.

4 It is going to stymie investigations that
5 otherwise should go forward. In many cases, some cases we
6 won't find a violation.

7 But the question is, you know, from a policy
8 standpoint, do you want us, do you want to stymie those,
9 that ability to investigate those potentially very
10 damaging forms of conduct at the initialization, or do you
11 want to, do you want to allow them to go forward,
12 confident that if there is an abuse of power or if someone
13 is investigated where there is no reason to believe there
14 is an antitrust violation, that courts of the Commonwealth
15 can quash those subpoenas and protect the businesses from
16 unreasonable expense and annoyance.

17 REPRESENTATIVE MANDERINO: Section 12 that
18 Representative Dermody referred to earlier, the
19 consistency of federal laws provision.

20 MR. CLEARFIELD: Yes, ma'am.

21 REPRESENTATIVE MANDERINO: In your opinion
22 would this require the Pennsylvania courts in interpreting
23 whether or not there is a reason to believe to look to the
24 federal case law development and follow the same
25 standards?

1 And if so, have we ever done that in law
2 before? I mean, that you are aware of?

3 MR. CLEARFIELD: I think the answer to your
4 first question is yes.

5 And I don't see that a court would have much
6 wiggle room within that language.

7 I don't think they frankly had that much
8 wiggle room without this, but we are happy to have it. No
9 problem.

10 Have we ever done that in law before? I
11 think there are certainly, certainly the courts have
12 utilized their discretion to interpret state provisions
13 which are identical to federal provisions consistently and
14 have utilized federal law and federal juris prudence to
15 interpret certain provisions.

16 REPRESENTATIVE MANDERINO: But they don't
17 have to.

18 MR. CLEARFIELD: They don't have to.

19 REPRESENTATIVE MANDERINO: And here we are
20 telling them they have to.

21 MR. CLEARFIELD: I would say in my own
22 experience, and I can think about that and provide a more
23 complete answer, if you, if it would be useful.

24 I have seen other provisions in other states
25 that are very similar to this.

1 For example, it is not uncommon in the
2 consumer protection area to have a provision in the state
3 Consumer Protection Act of a state that says the
4 provisions of this act will be interpreted consistent with
5 the Federal Consumer Protection Act.

6 REPRESENTATIVE MANDERINO: I would be
7 curious and, again, I may be out in left field here, but I
8 will ask the question anyway, or while you are looking
9 into that, if that is the case, I mean, are we, are we
10 opening ourselves up to -- or by doing this, are you then
11 as a legislative body taking away something that is within
12 the province of the Judiciary with regard to how they
13 develop or how, how, what they do with the application of
14 a state statute?

15 And if so, is this a constitutional
16 section?

17 MR. CLEARFIELD: (Pause.)

18 REPRESENTATIVE MANDERINO: I don't know that
19 you can answer that now, and that may be off in left
20 field, a left field question.

21 But I guess my concerns are, to the reason
22 to believe standard to me being very subjective and
23 loose.

24 And I don't want to kid myself in thinking
25 that we have built in a protection here in section 12 that

1 in essence may not be a protection at all.

2 MR. CLEARFIELD: Because it may be
3 unconstitutional?

4 REPRESENTATIVE MANDERINO: I don't know. I
5 don't know if it is or not.

6 MR. CLEARFIELD: Well, we have not
7 considered that and we will.

8 The only thing I would say, is that if there
9 is a reason to believe standard in this statute and it is
10 identical to the reason to believe standard in the
11 pre-complaint investigatory powers section for the U.S.
12 Justice Department and for other states, it is very -- or
13 particularly for the Justice Department, it would be
14 extremely unlikely that a state court is not going to give
15 very serious consideration to those court decisions and
16 determinations made there.

17 It is the same standard that is being used
18 in exactly the same context.

19 Your point as to whether it should be
20 mandated or whether it should be obvious to any
21 intelligent thinking person is a good one, and I don't
22 know the answer.

23 I do know there are other examples in other
24 states, but not in this area.

25 REPRESENTATIVE MANDERINO: I guess that kind

1 of gets into my second concern. Which really goes more
2 to, I don't know how -- what we consider an
3 anti-competitive effect to which this law would apply and
4 how that can get into differences when you are talking
5 about what might be chosen to be prosecuted by a federal,
6 on a federal level under the federal statute versus on the
7 state level under state statute.

8 You used earlier the example of what we were
9 not able to do in the Whitman/Russell Stover case.

10 So maybe that is an example to use.

11 And, again, being a Philadelphia
12 Representative, I would have loved to have saved that and
13 saved Whitman's and those jobs.

14 But that aside, I think when you were
15 discussing that you talked about, I wrote down the
16 anti-competitive effect of that merger on Pennsylvania's
17 economy.

18 And my question is, maybe a little bit of a
19 devil's advocate. You said no one can argue that is a
20 good standard.

21 I am not sure that I would agree with that.

22 Section 6, going back to that, if you will
23 notice at the end, is that this amendment version strikes
24 out the words, in this Commonwealth, about anything that
25 tends to lessen or create a monopoly or in any limit trade

1 or economy in this Commonwealth.

2 And I realize that is stricken now which, if
3 it had been in there, my concern would be that we would be
4 able to say, you know, I might be able to say, no one can
5 argue that there is still a competitive market for
6 chocolates in the United States.

7 And since most markets for chocolates are
8 national, if not international or global, that shouldn't
9 have been a concern of ours.

10 But now, had we had a statute like this, now
11 maybe all of this would have given you is preinvestigatory
12 powers and you still wouldn't have been able to prove, but
13 I am not quite sure that a proper standard for whether or
14 not we have an antitrust violation is whether it is now
15 going to eliminate the last chocolate manufacturer in
16 Pennsylvania.

17 Am I making since my concern clear?

18 MR. CLEARFIELD: I think so.

19 REPRESENTATIVE MANDERINO: What I am saying
20 is, is the fact that we are saying that we are now going
21 to have an anti-competitive effect and part of that has to
22 do with the interpretation on Pennsylvania's economy, a
23 proper standard?

24 And are we, are we going to regret having
25 this interpreted and/or applied to those kinds of

1 instances?

2 MR. CLEARFIELD: Let me try to answer it
3 this way.

4 The standard as it is now written, as we
5 said, is identical to the federal law and it is the
6 federal law under which we brought the Whitman case.

7 And our job, and the job of any plaintiff in
8 a case like that, is first to identify the relevant market
9 in which the two parties participate and in which
10 competition would be substantially lessened if the merger
11 occurs.

12 Now, the market has a number of dimensions.
13 It is not only just the product, it is also geographic.

14 Sometimes the market is national. More
15 often it can be regional or local. And that demands as we
16 all know, just from our own understanding the way business
17 works, on things like distribution systems, the retail way
18 in which products are distributed retail, on a retail
19 basis.

20 In the case of Whitman's, just using it as
21 an example, what we discovered in the investigation that
22 we were able to do, was that there was legally a distinct
23 market for gift box chocolates.

24 That is, chocolates that were packaged in
25 such a way so as you could get one packaged for Mother's

1 Day as opposed to packages that you would give in another
2 kind of context, or that you would buy just for your
3 personal use.

4 It was also an element of the market that
5 was, could be differentiated because of the distribution
6 system.

7 It turns out that Whitman's and Stovers
8 particularly were distributed in large chain drug stores
9 and K-Mart type merchandising houses. And virtually sold
10 in those kinds of contexts. So they were competing head
11 to head in that kind of market and that is the way the
12 participants viewed it.

13 Now, those analyses were done nationally and
14 also for the most part regionally in the northeast part of
15 the country.

16 But it was pretty much a given and never
17 challenged that to the extent we could have challenged
18 that that was the market and that there was going to be a
19 lessening of competition in the market. It would have had
20 the same effect in Pennsylvania.

21 And so if your question is, could we go in
22 and under this section, whether in the Commonwealth it's
23 there or not there, and try to stop the merger simply
24 because jobs would be lost in Pennsylvania, the answer is
25 unequivocally, no. And we would never do that.

1 The standard is just not going to permit us
2 to do that. And it didn't, and that wasn't the basis for
3 the case of Whitman's.

4 But if the question is, can a market be, is
5 a market going to have a geographic dimension as well as a
6 private dimension, most certainly it can be.

7 It is a very fascinating area. It is very
8 arcane and we were unsuccessful in convincing the district
9 judge that the market was as we had advocated it.

10 But we still had a very substantial basis
11 for presenting that testimony and making those
12 assertions.

13 REPRESENTATIVE MANDERINO: One of the ways
14 that you mentioned that Pennsylvania's antitrust law, as
15 written in Senate Bill 307, would be more restrictive than
16 the federal law, was with regard to conspiracies in
17 intrastate commerce.

18 MR. CLEARFIELD: Yes.

19 REPRESENTATIVE MANDERINO: Now, if it is not
20 what we were just talking about, can you give me an
21 example of what that would be?

22 What would be an interstate commerce
23 conspiracy that you would then be able to prosecute that
24 you can't now?

25 MR. CLEARFIELD: From a substantive

1 standpoint, the unlawful activity would be exactly the
2 same. A bid rigging or a conspiracy to say, to fix a
3 price or to drive a competitor out of the market.

4 Where we differ would be that the effect
5 would be purely local.

6 So let's say we have four or five roofers in
7 a particular locale where they are the only roofers.
8 Potter County. And they make their own shingles and they
9 buy their own, the tar comes from a local plant. So there
10 is no effect on interstate commerce.

11 And they have all decided if you want a roof
12 on your house, it is going to cost you \$3,000. And they
13 get together every week and check to see if that \$3,000 is
14 an appropriate level.

15 And maybe the going rate in any other county
16 would be half that. That would be a conspiracy to fix the
17 price for that service. And it is wholly intrastate.

18 And assuming we couldn't find any effect on
19 interstate commerce and as I gave the hypothetical you
20 couldn't, it wouldn't be a violation of the federal law,
21 not because it wouldn't be illegal, but because it
22 wouldn't affect interstate commerce.

23 REPRESENTATIVE MANDERINO: Now, why is that
24 not able to be prosecuted under the state price fixing
25 law?

1 MR. CLEARFIELD: Because the state price
2 fixing only applies to contracts with municipalities.

3 REPRESENTATIVE MANDERINO: Oh, I'm sorry.
4 See, I was not familiar with that.

5 MR. CLEARFIELD: Yes.

6 REPRESENTATIVE MANDERINO: Is that correct?

7 MR. CLEARFIELD: Yes, yes.

8 Now, so that to the extent that they did
9 that with municipalities, we would have that opportunity.
10 But if it was simply a business with consumers, we
11 wouldn't.

12 REPRESENTATIVE MANDERINO: So the example
13 you gave earlier about the milk pricing, the example you
14 gave earlier about the milk pricing system, you were able
15 to prosecute that under the state price fixing act because
16 it dealt with the school district of Philadelphia?

17 MR. CLEARFIELD: Correct. It doesn't have
18 to be a municipality, it also be the school board.

19 REPRESENTATIVE MANDERINO: Thank you, Mr.
20 Chairman.

21 CHAIRMAN CALTAGIRONE: Representative Reber?

22 REPRESENTATIVE REBER: Thank you, Mr.
23 Chairman. I will try to be brief.

24 Let me say this at the outset. I deeply
25 appreciate, and I have had an opportunity with the length

1 of time of questioning, to read the briefs, as the saying
2 goes.

3 MR. CLEARFIELD: It was probably during my
4 answers.

5 REPRESENTATIVE REBER: Well, both, questions
6 and answers.

7 I would commend the Chair that the members
8 of the Committee that aren't present certainly should be
9 advised to take a look at the testimony of the Attorney
10 General since, obviously, that is the investigatory
11 agency, obviously, that will be operating under the Act.

12 And I know when I argued before appellate
13 courts I always wished they had read the briefs before the
14 oral argument.

15 And in the course of having an opportunity
16 to read this, I find it to be very compelling. Not
17 necessarily agreeing with everything, but I want to
18 commend you or staff or whoever was involved in that.

19 MR. CLEARFIELD: It was a group effort, and
20 we appreciate that.

21 REPRESENTATIVE REBER: Let me say this,
22 Counsel Sutter talked about resources. I would suspect
23 there is probably not a plea for additional resources.

24 As a matter of fact, if this is, in effect
25 enacted, I would suspect that some of your time spent

1 trying to be creative heretofore will be less involved
2 because of the powers that will be engendered to you as a
3 result of this Act.

4 So the resources issue probably was
5 appropriate.

6 I want to support Representative Manderino,
7 for the reason to believe.

8 For the 13 years I have been in this House,
9 I have always been relatively consistent about getting
10 involved in a lot of different nuances, standards and
11 immunities or whatever the case might be.

12 And I tend to be as cautious in moving into
13 other areas and notwithstanding the fact that a reason to
14 believe standard does exist in the anti-bid rigging
15 statute currently on the books.

16 Two things on the not-for-profit health care
17 facilities exemption, does your feeling of neutrality as
18 you expressed it, that exists on that, similarly exist on
19 the section 10 subparagraph (f) and that is on page 9, the
20 business of insurance exemption.

21 I would like your comments on that
22 particular exemption. Whether that should be maintained
23 intact or whether there is any feeling one way or the
24 other on that?

25 Because I don't know if you were present or

1 that staff may have reported to you, but at the last
2 hearings I had some questions.

3 I have some concerns about what has gone on
4 in the past in Pennsylvania with reputable insurance
5 companies.

6 And I'm not suggesting that there was any
7 overt act of attempt to boycott, but I am familiar with
8 some, you know, indirect criminal conspiracy -- but as a
9 result of that, what could be otherwise considered to be a
10 type of boycott.

11 Just could you comment on that exemption,
12 the feelings of Attorney General's office?

13 MR. CLEARFIELD: Let me answer it this way.
14 A general answer.

15 My understanding is that this exemption
16 parallels the federal --

17 REPRESENTATIVE REBER: And that is testimony
18 that was given in response, correct.

19 MR. CLEARFIELD: And we have taken the
20 position that it is appropriate for the State Act to
21 parallel to the extent appropriate and necessary, the
22 federal law.

23 And we think that -- to the extent we have
24 committed to that, is because we think that the passage of
25 the act is so important.

1 And for that reason, we would be, we have
2 accepted provisions even though, if we were writing an Act
3 from scratch, we might, we might have many mutual
4 concerns.

5 And I think that if we are going to take
6 that position and it is a position that we think helps to
7 mitigate if not eliminate some of the concerns of larger
8 businesses that would be subject to different standards or
9 that they would have to deal with special, special areas
10 of law that we have to take it and be consistent about
11 it.

12 So the answer would be that, we, we, we
13 would, we have accepted this provision as a part of our
14 willingness to accept the law that is consistent with the
15 federal law.

16 REPRESENTATIVE REBER: In subparagraph 2,
17 there does provide, there would be provided to you the
18 opportunity to investigate and consider whether a boycott
19 exists.

20 What, what, what is your understanding or
21 what, at this point in time at least, would be the
22 position of the Attorney General as to the type of
23 activities that may initiate activities under the boycott
24 provision?

25 MR. CLEARFIELD: Well, I can give you an

1 example that is real-world example.

2 In 1988, I believe, Attorney General
3 Zimmerman joined with -- then Attorney General Zimmerman
4 joined with 16 other attorneys general in suing a number
5 of insurers and reinsurers in the general liability
6 insurance area.

7 Because they alleged that the reinsurers had
8 indicated that they would not reinsure any insurer that
9 included a certain provision in its policy to the
10 insureds.

11 Specifically, it was a question of whether
12 they would be libel for conduct or accidents that occurred
13 after the policy had terminated or lapsed or whether it
14 was life -- the life of the insurance.

15 And that was characterized as a boycott.
16 And it was filed in Federal District Court in San
17 Francisco. I think as of last month they had just gotten
18 past the preliminary motions. It has taken almost six
19 years.

20 But the point is that is a type of action by
21 insurance companies that could, that was subject and is
22 subject to the federal laws and would continue to be
23 subject to the law.

24 So a boycott where a group of insurers would
25 say, or reinsurers, we are not going to reinsure any of

1 your policies, if you include certain provisions, or we
2 are not going to reinsure, we are not going to write
3 insurance to anyone who doesn't accept certain terms,
4 would constitute a boycott that would be subject, would
5 continue to be subject to the antitrust laws because of
6 this exception.

7 REPRESENTATIVE REBER: Let me ask you this.
8 This type of situation.

9 Suppose there had been a longstanding
10 insuring for a particular type of risk in the Commonwealth
11 by a number of companies.

12 And then for some reason, all of a sudden
13 the market totally dries up. And everyone says, we are
14 not going to insure in the Commonwealth of Pennsylvania
15 for this particular type of risk.

16 But yet they are doing it in other states.
17 But yet after a period of time goes by and something
18 miraculous happens and on top of that, there then again
19 becomes the opportunity for a significantly higher
20 premium, it reappears.

21 Let me ask you this. Do you feel
22 comfortable that you have the authority to investigate
23 that type of conduct under the boycott provisions?

24 MR. CLEARFIELD: I think there is an element
25 of boycott that there could be a boycott in that kind of

1 case.

2 REPRESENTATIVE REBER: In my mind there is
3 reasonable cause, certainly a reason to believe that
4 something may have gone on.

5 MR. CLEARFIELD: Well, see I want to be
6 careful about that because what you posited, what we are
7 missing here and what is extremely important is some
8 collective activity on the part of the participants in the
9 market to agree to do this.

10 REPRESENTATIVE REBER: Well, that is what
11 worries me and that is what I am suggesting.

12 There is something unique about the overall
13 issue where you don't have to have the five CEOs from the
14 five major insurers in a particular area of risk, and sit
15 down in a board room and conspire.

16 But it is an indirect type of thought
17 process that goes on. And there certainly is no paper
18 trail. No evidentiary trail whatsoever, to be quite
19 honest, and yet it happens. It happens.

20 And it is happening, I think, in Florida
21 because of the hurricane situation there.

22 MR. CLEARFIELD: We have run into that quite
23 often where -- not necessarily in the insurance area --
24 but we will get complaints and we may have received some
25 from some members of the Committee where we will be told

1 that the gas stations in a particular county are, or in a
2 particular location, all have the same prices and it must
3 be, they must be conspiring for the prices.

4 Well, the answer may be that they are all
5 just driving around looking at the prices and that is not
6 a violation of the antitrust law.

7 And it sounds to me that is a similar kind
8 of situation.

9 REPRESENTATIVE REBER: It is not really
10 because I don't have the problem where the availability is
11 there and the price is just at a, I mean, that is in
12 essence the problem.

13 I am worried about when it used to be there
14 and it is not there, and all goes away.

15 MR. CLEARFIELD: Maybe this would be
16 useful.

17 Probably if we had investigative subpoena
18 problem and an antitrust law, we would probably proceed
19 the following way.

20 We would probably contact the principals and
21 discuss with them on an informal basis, without any
22 demands, the issue.

23 What kind of insurance was it, why did it go
24 away? What did you do, you know, in its stead.

25 And we would again, and usually visit, in

1 almost 99.9 percent of the cases, businesses are very
2 cooperative and willing to sit down and talk to us about
3 these issues and we would talk with the various
4 participants in that process and try to find out as much
5 as we could about the process.

6 Without any other information, we would look
7 at that and try to determine whether there was any
8 indication, any, any, any facts that would indicate that
9 there was some conspiracy or some concerted action to get
10 rid of that insurance for a particular reason.

11 And then we would proceed.

12 So we would start in that way without
13 challenging or without subpoenaing documents, without
14 more.

15 Now, if someone came to us with those facts
16 and said, and I used to work there and I have some letters
17 or I can tell you that we got together, we talked about
18 this, you know, at the Pennsylvania -- well, strike that.
19 At a hypothetical company's --

20 REPRESENTATIVE REBER: ABC corporation in
21 jurisdiction --

22 MR. CLEARFIELD: Then that would be a
23 significantly different matter because we would have
24 obviously in essence a substantial basis for believing
25 that there was illegal activity.

1 But that is probably the way we would
2 proceed and attempt to gain some knowledge of that, of the
3 activities and why it occurred and then would proceed.

4 And, generally, if we had no other
5 information, we would present that to the Complainant or
6 to you, if you quizzed us about that and say here is the
7 situation.

8 We are not telling you that it definitely
9 hasn't happened.

10 All we can tell you is that we don't have
11 enough flex (a) to say it has or to proceed with an
12 investigation under a reason to believe standard.

13 REPRESENTATIVE REBER: Getting back to
14 summarized paragraph 2, as it is currently written under
15 the boycott provisions, you do feel comfortable that you
16 would need no additional expansion to look into areas
17 where there is, in your opinion, a boycott or an attempt
18 to boycott?

19 This would give you enough latitude, the
20 exemption within the exemption to go into that for an
21 investigation?

22 MR. CLEARFIELD: Yes.

23 REPRESENTATIVE REBER: Thank you, Mr.
24 Chairman.

25 CHAIRMAN CALTAGIRONE: Any other questions?

1 (No audible response.)

2 CHAIRMAN CALTAGIRONE: Thank you very much.
3 We appreciate your testimony.

4 MR. CLEARFIELD: Thank you.

5 CHAIRMAN CALTAGIRONE: We will next move to
6 attorney Steven A. Asher, Chairman of the Philadelphia Bar
7 Association, the Antitrust Law Committee.

8 MR. ASHER: Mr. Chairman and Members of the
9 Committee, my name is Steven Asher. I am an attorney with
10 the firm of Kohn, Nast & Graf in Philadelphia.

11 I appreciate the opportunity of coming here
12 this morning and addressing the Committee's consideration
13 of Senate Bill 307.

14 I come to this with a certain perspective
15 because Pennsylvania does not have an antitrust statute.
16 In general application, citizens of the state, small
17 businessmen and businesswomen who feel injured by
18 antitrust violations often seek out counsel privately.

19 Our firm has experience in this area. And
20 so on an ongoing basis over a period of years, we have a
21 sense of the frustration felt by citizens of Pennsylvania
22 who do not have access to a state antitrust legislation
23 and who have a state Attorney General's office with
24 limited authority. A great deal of energy and competence,
25 but limited authority to proceed in the antitrust area.

1 So to some extent, we speak on behalf or
2 speak on behalf of many of the citizens of Pennsylvania
3 who very much would like to see this kind of legislation
4 come into being.

5 Very often people come to us and we refer
6 them to other state attorney general offices.

7 These are citizens of Pennsylvania, who have
8 businesses. Very often, for example, they will have a
9 distributor who is given a distributorship by a national
10 corporation to cover primarily Southeastern Pennsylvania
11 and maybe one or two counties in New Jersey and Delaware.

12 Possibly a county in Maryland believes that
13 his distributorship has been victimized and has a good
14 antitrust claim.

15 And says, I can't go to the Pennsylvania
16 Attorney General because they don't have a statute, but
17 because you have one company in New Jersey, why don't you
18 go down to the New Jersey office or Delaware office.

19 And I think for Pennsylvania citizens to
20 have to do that is terribly unfair. And I think we have
21 an opportunity to rectify that right now.

22 It has been said that the federal government
23 has authority in this area and why don't they simply go to
24 the federal government?

25 Well, the local office of the antitrust

1 division of the Justice Department is an outstanding
2 office. John Hughes runs it, has run it for many years.

3 It is generally considered to be the
4 outstanding local office of the Justice Department
5 Antitrust Division anywhere in the country.

6 But there are real limitations in that
7 office's ability to deal with Pennsylvania problems,
8 problems that are unique to Pennsylvania.

9 The federal government really only likes to
10 look into substantially larger issues. Especially the new
11 Assistant Attorney General in charge of the Antitrust
12 Division, Anne Bingaman said, we want to look into larger
13 cases of national import.

14 We will leave the small, relatively smaller
15 cases to the state antitrust enforcement authorities.

16 If Pennsylvania doesn't have that kind of
17 authority, there is nothing they can do about it.

18 Let me give an example of the limitations of
19 federal enforcement.

20 A few years ago, back into the 1980s, the
21 federal government decided to look at trash hauling
22 violations and waste hauling violations throughout the
23 United States.

24 They commenced grand juries in Georgia in
25 Ohio, in California. And they put a lot of energy into

1 this.

2 But the result of this prosecution was about
3 three different grand juries that came down with six or
4 eight or ten different guilty pleas throughout the
5 country.

6 The state of New Jersey said, we have got a
7 problem here and our problem is not being addressed by the
8 federal government. And there is no way the federal
9 government could mask the kind of difficulties to address
10 our problem in New Jersey.

11 So New Jersey mounted its own investigation,
12 something the federal government could not, and was not in
13 the position to do. And they obtained 57 convictions or
14 guilty pleas, and completely cleaned up the trash hauling
15 industry in that state, at least for a period of time, to
16 the extent those things can be handled.

17 But that is an example of the limitations.
18 When you have a -- when a state has a concern, it really
19 has to have the tools and the ability to go in and handle
20 it itself.

21 The federal government, we take cases down
22 to the federal government all the time and they are
23 looking for matters involving tens of millions of dollars
24 that have a real regional or national import.

25 Another limitation, and we have discussed

1 this, is the interstate commerce provision.

2 There are going to be some kinds of
3 antitrust problems.

4 An example may be, for example, a funeral
5 home problem in a given area in which the funeral homes in
6 a given area, in a county, a city decide they are all
7 going to charge the same prices. They have a lot of
8 contact with each other, it is an easy fix to pull off.

9 That wouldn't, in all likelihood, be covered
10 by federal statute.

11 There have been some FTC investigations into
12 the funeral home industry, and I am not saying there are
13 any violations, but that is the kind of thing which I
14 think a state can address directly.

15 With respect to monopolies, Pennsylvania has
16 its own monopoly problems that the citizens of
17 Pennsylvania care about that perhaps federal authorities
18 don't.

19 I don't know if it is a violation or not,
20 but any citizen in the Commonwealth of Pennsylvania who
21 has had to travel between Pittsburgh and Philadelphia
22 complains at least under his or her breath about the US
23 AIR's rates between Philadelphia and Pittsburgh.

24 And gee, I just flew down to Disney World
25 for half the fair, or even to Disneyland in Anaheim for

1 two-thirds of the fair. Why does it cost me so much?

2 I am not saying it is a violation, it is not
3 a violation, but there is something that Pennsylvania
4 citizens would like to get to the bottom of.

5 And if that can be investigated by the
6 Attorney General's office, that is something that all
7 Pennsylvania citizens would like to look into.

8 Antitrust legislation is not anti-business
9 legislation.

10 There was an investigation conducted by
11 federal authorities a few years ago into bid rigging on,
12 by electrical contractors in Mobile Refinery, the ARCO
13 Refinery, the Lukens Steel Plant, that resulted in
14 convictions, resulted in guilty pleas.

15 When Mobile and ARCO and Lukens wanted to
16 get their money back, they didn't have to commence an
17 investigation from ground zero to try to get people to
18 admit in a civil deposition that they admitted to bid
19 rigging, that they fixed the bid.

20 And I will tell you, from having done this
21 for most of my career in a civil deposition, no one will
22 ever admit to rigging a bid, no matter what it is.

23 Only someone in the grand jury with the full
24 authority of a grand jury will you get those kinds of
25 admissions.

1 Because the government went in and got the
2 prosecutions, those companies, instead of having to
3 literally pay, you know, perhaps a half million, a million
4 dollars in legal fees to conduct a three-year private
5 litigation that may or may not have resulted in any kind
6 of benefit, were able to retain counsel.

7 And because they had the guilty plea, the
8 guilty plea with prime facie evidence, they were able to
9 -- and everyone knew that the wrong was done -- they were
10 able to go in to file a case, settle it in short order,
11 and get their money back.

12 The same thing happened in New Jersey.
13 PSE&G Utility there. Public Service Electric & Gas.

14 There was a prosecution in that case by the
15 state authorities into bid rigging on contracts for
16 PSE&G.

17 The utility did not then have to commence a
18 massive litigation for three or four years. They simply
19 filed suit and immediately they were able to achieve a
20 settlement.

21 So it is the businesses of Pennsylvania
22 which go out and purchase from vendors, millions and
23 hundreds of millions of dollars of products every year --
24 they have an interest in making sure that those prices are
25 not fixed, and they have an interest in having strong

1 antitrust legislation here.

2 Let me address a few issues which came up in
3 the questioning of Mr. Clearfield from the Attorney
4 General's Office and just add a few comments.

5 One difference between the Pennsylvania bill
6 and the federal bill, is the availability of civil
7 penalties.

8 This is extremely important and a very
9 important benefit because the federal government, as a
10 practical matter, will only commence criminal
11 investigations.

12 It is, you know, taking an elephant gun to
13 go after ants. And it results in some very sad and
14 unfortunate consequences.

15 There was a prosecution in this area a few
16 years ago of jewelry dealers and antique dealers.

17 And these consisted of mostly people in
18 their 80s. A lot of them refugees from Europe and
19 whatever. They had really been more or less honest
20 citizens their whole life.

21 When they would go into an auction they
22 would have their little ways of doing business. You know,
23 they would wink, they would nod. Whatever it was. It was
24 the way they had always done it.

25 These were people who had just been honest

1 and above board their entire lifetime, but they had
2 certain ways of doing business which they never told them
3 was wrong.

4 The federal government, when it came to
5 their attention, had no recourse but to bring a criminal
6 prosecution which really caused a lot of personal grief
7 and havoc.

8 The judges involved were sorry it had to
9 come to that. Even the attorneys of the federal
10 government were sorry that it had to be handled in this
11 way.

12 And some of the attorneys representing these
13 people went down to Washington and said, isn't there some
14 other way administrative penalty, a civil penalty that
15 this can be dealt with?

16 And they said that is not the way the
17 Justice Department operates. It is very important to have
18 this kind of civil penalty where you don't have to have
19 people plead guilty for minor conduct that may be
20 marginally illegal conduct.

21 Let me just address one or two more things
22 with respect to health care facilities.

23 In general, I think it is important that
24 this bill get enacted.

25 There are 49 states that have antitrust

1 legislation, all of them are slightly different.

2 And all of them from year to year tinker
3 with it to meet the needs of the particular state and
4 every year there are some amendments to some of them.

5 So I think it is important that Pennsylvania
6 go ahead and give its citizens the statute it needs, and I
7 wouldn't get too bogged down in terms of fine tuning.

8 If there is one fine-tuning that you may
9 want to look into, though, it is the health care
10 exemption.

11 It is, the health care industry in
12 Pennsylvania is one of the most vigorous sectors of the
13 economy.

14 I will assure you that actors in the health
15 care industry are extraordinarily knowledgeable and
16 aggressive entities.

17 We are not talking about community
18 hospitals, vintage 1952. You are talking about very
19 shrewd and aggressive business people.

20 That we recently, for example, filed suit on
21 behalf of a school district in Pennsylvania against Blue
22 Cross for their 75 percent requirement.

23 If you don't have 75 percent of the people
24 signed up on Blue Cross then Blue Cross won't cover at
25 all.

1 Now, whether that is violation or not is
2 something the courts will have to consider, but I think
3 from our experience we see that the health care industry
4 is not, doesn't need any special solicitude.

5 And to the extent that they play hardball,
6 which they do, they should be covered by the act. And
7 they may have certain exemptions in terms -- to the extent
8 the state actually monitors and supervises health care
9 industry in Pennsylvania. But I'm not sure that they need
10 another exemption.

11 In any event, I would say go ahead and enact
12 the act and if that is problematic, deal with it at a
13 later date.

14 And I think that is, I think that is it. I
15 will be glad to answer any questions which may come up.

16 CHAIRMAN CALTAGIRONE: Representative
17 Manderino?

18 REPRESENTATIVE MANDERINO: Thank you, Mr.
19 Chairman.

20 Mr. Asher, does your firm also defend or
21 represent businesses that might be under investigation
22 and/or being charged with federal antitrust?

23 MR. ASHER: Yes, we do.

24 REPRESENTATIVE MANDERINO: Okay, thank you.

25 Do you see any problems or concerns with

1 using a reason to believe standard in terms of the
2 investigatory powers of the State Attorney General?

3 MR. ASHER: Well, let me address that in two
4 ways with respect to your question to Mr. Clearfield.

5 I do not believe that the section -- the
6 investigative section of the act would be judged
7 consistently with federal law.

8 I believe that the only provisions of the
9 state act which would be judged consistently with federal
10 law are the basically the business provisions.

11 The equivalent of section 1 of the Sherman
12 Act, that you can't restrain trade, that monopolies are
13 illegal, and that mergers which tend to reduce competition
14 are illegal.

15 I believe that the investigatory provision
16 is unique. That it does not have an analog in federal law
17 and that this juris prudence would develop in Pennsylvania
18 courts.

19 I know that is what happened under the New
20 York Antitrust Act, which is called the Donnelly Act. And
21 I know that New York has its own juris prudence. They do
22 not look to federal law and that is the way that has
23 developed.

24 I also would agree with Mr. Clearfield that
25 it is very difficult to abuse those sections.

1 I have been on the other end of cases where
2 representing private citizens or companies that have been
3 served with subpoenas, and the first thing you do is you
4 run into court and scream bloody murder and say this is an
5 outrage, where is the proof?

6 And it puts the Attorney General somewhat in
7 a difficult position in the early stages of an
8 investigation to come forward and tell the judge what this
9 whole thing is about.

10 But judges are very solicitous of the
11 concerns of the defendants. They want to make sure that
12 Attorney General has good reason to proceed before it
13 starts looking at documents and compelling testimony.

14 So I don't have a problem with that, even
15 from the point of view of a defense attorney.

16 REPRESENTATIVE MANDERINO: And I guess my
17 second question, if you would be kind enough to comment.

18 I have a phrase -- do you think that a
19 standard in terms of applicability of the whole
20 legislation of whether or not something has an
21 anti-competitive effect on our Commonwealth's economy is
22 -- has that been used in other states?

23 And is that a potential minefield that we
24 have to be careful of?

25 MR. ASHER: Well, it is not a minefield.

1 Every state that has an antitrust law that I know of, or
2 almost all of them, every one that I know of has a
3 provision making it analogous to federal law.

4 The extent to which you have a particular
5 market, as Mr. Clearfield said, varies with the kind of
6 commodity.

7 When you go out to buy a car, you probably
8 won't go more than 35 miles to buy a car.

9 On the other hand, if you are buying
10 backpacks from catalogues, you look at L.L. Bean and Lands
11 End, and that is very much a national market.

12 So it really depends on the individual facts
13 of the case how the market is defined. And I think that
14 is responsive to your question.

15 REPRESENTATIVE MANDERINO: Thank you. Thank
16 you, Mr. Chairman.

17 CHAIRMAN CALTAGIRONE: Thank you very much
18 for your testimony.

19 MR. ASHER: Thank you.

20 CHAIRMAN CALTAGIRONE: We will next hear
21 from Bruce Wilson, Senior Vice President of the Conrail
22 Corporation, Philadelphia.

23 MR. WILSON: Mr. Chairman, Members of the
24 Judiciary Committee. I appreciate the opportunity to be
25 here today to testify on the proposed Pennsylvania

1 Antitrust Act.

2 My position at Conrail is that of senior
3 legal officer. Before joining Conrail I spent ten years
4 with the United States Department of Justice in the
5 Antitrust Division, including five of those years as Chief
6 Deputy Assistant Attorney General.

7 And what I am going to try and do is share a
8 little perspective which I picked up in both those jobs.
9 As you consider this important piece of legislation.

10 I have a prepared statement, Mr. Chairman,
11 and which I would ask be received for the record and I
12 will try and summarize that, and make some general points
13 and then some specific comments on sections of the
14 legislation.

15 You might ask with some reason of why should
16 we have this kind of legislation in the Commonwealth of
17 Pennsylvania?

18 I think it is probably beyond dispute today
19 that our competitive system works pretty well when it
20 works, as a means of allocating resources and determining
21 price.

22 So I am not going to go into whether
23 competition is a desirable system or not. I think we can
24 all assume that with some safety.

25 But I think you want to have an antitrust

1 act in Pennsylvania for two reasons. First to get to
2 those cases, and I don't think there are really a whole
3 lot of these, but Mr. Clearfield and Mr. Asher pointed out
4 some instances where this legislation can operate.

5 You want to get to those cases which the
6 federal government cannot reach because its jurisdiction
7 is limited to matters which affect interstate commerce.

8 More importantly, you want to get to those
9 cases which the federal government does not reach.

10 Fifteen years ago when I was with the
11 Antitrust Division we had 440 lawyers. I checked this
12 morning and they have about 300 today. That is six per
13 state. That is not very many to look after the economy
14 of, the entire economy of the United States.

15 And it means even if we are getting our pro
16 rata share of those lawyers, that we don't have a lot
17 looking after the economic security, if you will, of the
18 Commonwealth of Pennsylvania.

19 Perhaps more importantly, and Mr. Asher
20 alluded to this point, the federal government, from time
21 to time, and I think properly so, reallocates its
22 resources and redirects its attention to matters which
23 affect the entire economy of the United States.

24 I think back to such cases as the case
25 involving AT&T which, whether you like the result or not,

1 was a major case and which resulted in some major changes
2 in that industry.

3 Largely, I think, for the benefit of
4 consumers in lower prices.

5 From time to time they have directed large
6 amounts of resources toward deregulating industries which
7 theretofore were regulated.

8 And it brought about some really substantial
9 changes in those industries.

10 Other than they also, from time to time, go
11 after local waste haulers, after local road builders,
12 after local auction markets. And you have heard those
13 stories this morning.

14 Present Assistant Attorney General for
15 Antitrust, Mrs. Bingaman, I understand, as she has visited
16 the various sections and field offices, that the
17 Department of Justice has said we want to stop going after
18 the road builders and waste haulers and these local kinds
19 of violations.

20 Let's refer that, those kinds of violations
21 to the states, and redirect the federal government's
22 resources toward the larger competitive problems which
23 face our economy today.

24 So my guess is there will be more and more
25 cases which the federal government will not reach as a

1 matter of prosecutorial discretion.

2 And those cases, I understand, will be
3 referred to the states for enforcement.

4 Mrs. Bingaman reiterated that before the
5 American Bar Association's Antitrust Section Meeting in
6 New York yesterday.

7 So I think it is important for those reasons
8 that we have something that the Attorney General of the
9 Commonwealth of Pennsylvania can enforce.

10 Now, if we are going to have this kind of a
11 law, why is it important that it mirror the federal juris
12 prudence?

13 Why is it important that we rely on the
14 federal law, the federal antitrust law as it has
15 developed?

16 It is important, I think, for two reasons.
17 First, this should be a bill to protect competition and
18 competitive process in the Commonwealth. It shouldn't be
19 a bill for the enrichment of lawyers.

20 We have spent 103 years now since the
21 passage of the Sherman Act, developing the federal juris
22 prudence, these antitrust laws, the federal laws and this
23 bill before you, are very general in nature.

24 And it has taken a lot of court made law to
25 construe the sections of this bill.

1 What is an attempt to monopolize. What is
2 monopolization. When does a merger tend to substantially
3 lessen competition.

4 So I think we ought to take advantage of
5 that juris prudence. We shouldn't introduce a whole lot
6 of complexity by having different standards in the
7 Commonwealth of Pennsylvania than we have in the rest of
8 the country.

9 Second point, and this goes to my present
10 position at Conrail. Is that there is a lot of antitrust
11 enforcement which goes on in major companies in the form
12 of compliance programs.

13 We don't want to violate the antitrust
14 laws. The sanctions are severe. We believe in
15 competition. And we want to comply with the antitrust
16 laws.

17 Where you have different standards under the
18 federal law, than those which might be applied under the
19 Commonwealth's law, it makes that compliance program much
20 more difficult.

21 If I have one set of standards to which I
22 can try to direct behavior, then my compliance program
23 becomes much more simple than it is if I have to comply
24 with one standard for the federal government, another
25 standard for the Commonwealth of Pennsylvania, another

1 standard for the Commonwealth of Massachusetts and another
2 standard for the state of New York.

3 So that is why I urge that this bill
4 relying, directing as it does, that its provisions be
5 construed in accordance with the comparable provisions of
6 federal law, be passed in its present form in that
7 respect.

8 Now, with respect to the specific comments
9 on this bill. I would like to talk I think just briefly
10 about four sections.

11 The first is the Commonwealth as indirect
12 purchaser and as being entitled to recover damages as
13 indirect purchaser.

14 REPRESENTATIVE MANDERINO: What section?

15 MR. WILSON: That is section, page 5,
16 section 9 (a)(2). Lines 18 to 25.

17 REPRESENTATIVE MANDERINO: Thank you.

18 MR. WILSON: The federal laws have
19 prohibited antitrust recoveries in the case of indirect
20 purchasers.

21 They say that the direct purchaser has the
22 cause of action. The indirect purchaser or the person
23 that purchases from the first purchaser, which in the line
24 of distribution does not have an antitrust cause of
25 action.

1 The reason for this is that over the years
2 there developed some terribly complex issues of how do we
3 allocate the recovery.

4 And people spent hours upon hours upon hours
5 in courtrooms trying to figure out how we would allocate
6 the recovery from the chain of distribution.

7 Federal government, federal courts finally
8 said, enough of this, the direct purchaser has a claim,
9 the indirect purchasers do not.

10 I am a little leery of getting back into
11 that kind of complexity under this bill.

12 It is, obviously, only the Commonwealth
13 under this bill has an indirect claim. And if that is
14 what the, if that is what the Legislature desires, fine.

15 I am told that the Commonwealth has
16 practiced, when it purchases, of requiring its vendors to
17 assign any potential antitrust claims to the
18 Commonwealth.

19 So that if the pencil distributed, if there
20 is a price fix on pencils by the manufacturers, and the
21 Commonwealth buys its pencils from a distributor, when the
22 Commonwealth buys those pencils, it gets an assignment of
23 the claim, that makes the Commonwealth a direct purchaser
24 and seems to me to solve that problem.

25 And it seems to me that that really can be

1 solved simply by continuing the present purchasing
2 practice or if one wanted to solve it on a more permanent
3 basis, by amending the Commonwealth's procurement
4 regulations or procurement laws to require that kind of an
5 assignment.

6 The second area concerns the effective date
7 of this legislation, since it is criminal legislation, I
8 think we are safe in assuming that it does not apply to
9 conduct which takes place before the effective date.

10 That point is made at some length in my
11 testimony.

12 The third point which I wanted to make
13 concerns regulated companies. And I think this bill has
14 an excellent provision for determining when conduct is
15 regulated to such an extent that it therefore should not
16 be subject to the antitrust laws.

17 And lastly, there was some question on the
18 construction of the Attorney General's reason to believe
19 here when he issues a civil investigative demand, is that
20 going to be governed by federal law or by state law.

21 I suggest it probably doesn't make a whole
22 heck of a lot of difference.

23 It is really a question of fact as to
24 whether the Attorney General had reason to believe that a
25 particular violation may have taken place when he issued

1 the civil investigative demand.

2 And it is going to be a factual
3 determination and whether it is a federal standard or a
4 Pennsylvania standard doesn't seem to me to make a whole
5 lot of difference.

6 So with that, Mr. Chairman, I would be happy
7 to answer any questions that you may have.

8 CHAIRMAN CALTAGIRONE: Thank you for your
9 testimony.

10 On your testimony on page, the bottom of
11 page 3 and the top of page 4, the retroactivity. Could
12 you explain that a little bit, please?

13 MR. WILSON: Yes, Mr. Chairman. There is a
14 four-year statute of limitations under this bill.

15 The bill becomes effective 60 days after
16 enactment. Some lawyer, somewhere, probably is going to
17 say that this now applies to conduct which occurred three
18 years and nine months ago.

19 When there was no Commonwealth law
20 prohibiting the conduct.

21 Since it is a criminal statute and since
22 criminal statutes, their operation is limited by the
23 prohibition of the constitution against ex post facto
24 laws, I don't think that is a good argument.

25 But if there is any question about that we

1 ought to make it clear.

2 That when, when the statute takes affect it
3 applies to conduct which occurs after the effective date
4 of the statute and not the conduct which occurs before.

5 CHAIRMAN CALTAGIRONE: Okay. Representative
6 Manderino?

7 REPRESENTATIVE MANDERINO: If I may, Mr.
8 Wilson, following up on that question.

9 Senate Bill 307 is both a civil and criminal
10 statute; correct?

11 MR. WILSON: Yes, that is correct.

12 REPRESENTATIVE MANDERINO: Now, I guess my
13 question again, we talked a lot about how this might
14 potentially be different than federal law and everyone
15 seemed to be indicating that for the most part this
16 mirrors federal law.

17 So then my question would be if, if what
18 this is doing, if conduct, say the Act goes into place in
19 60 days, and unless you are going to wait another four
20 years or not four years, but unless you are only going to
21 start from that date, and bring cases of, where the
22 evidence itself of the potential antitrust violation
23 happened after that 60 days, what have we done with all of
24 those cases where the evidence exists now?

25 It would have been a violation federally but

1 the federal government chose because of different
2 priorities not to prosecute and right now they were
3 potentially engaged in criminal activity.

4 We just didn't have the tools in
5 Pennsylvania to proceed.

6 And maybe, is there a distinction between
7 whether or not because of the nature of our criminal law
8 in not making crimes retroactive, that we could still
9 proceed civilly but maybe not criminally.

10 And if you want to comment on that.

11 MR. WILSON: Yes. The answer lies in that
12 this is not just a civil, and criminal statute, it is a
13 conspiracy statute. A conspiracy is a continuing
14 offense.

15 If, if, I will use Mr. Asher's example,
16 because it is a good example. If I am a funeral director
17 and I have been fixing prices with the other four funeral
18 directors, and I will put it right in the middle of the
19 state someplace so there is no question of federal
20 jurisdiction.

21 The other four funeral directors in town and
22 I have been fixing prices since 1950. And this statute is
23 passed and goes into effect 60 days from now on October
24 11th.

25 Unless I would take some affirmative steps

1 to withdraw from that conspiracy, because a conspiracy is
2 a continuing offense, if I have one day where I am
3 applying prices that I have been agreeing on since 1950, I
4 think you have got jurisdiction under this statute to get
5 that kind of conduct.

6 What I was really concerned about on looking
7 backward, let's say, is acquisitions that may have taken
8 place and have been completed.

9 I don't think we want to go back and try and
10 undo something which was lawful when done. And that is
11 the difference.

12 REPRESENTATIVE MANDERINO: So your caution
13 was to conspiracies or to something that is not a current
14 conspiracy per se, but could potentially have been a
15 violation of this when it happened?

16 MR. WILSON: Right.

17 Let's suppose that I am still that funeral
18 director and I get up and I read in the Harrisburg paper
19 that this statute has been passed and I say, woops, I
20 better do something and get out of this conspiracy.

21 And I go and I write all my fellow
22 conspirators a letter and say I am not going to do this
23 anymore and I cut my prices by 33 percent and withdraw
24 from the conspiracy, I don't think you want to go back and
25 get him.

1 But if he doesn't do that and there is one
2 day into the prohibited period, then you have got a case.

3 REPRESENTATIVE MANDERINO: Thank you, Mr.
4 Chairman.

5 CHAIRMAN CALTAGIRONE: Are there any other
6 questions?

7 (No audible response.)

8 CHAIRMAN CALTAGIRONE: Thank you very, very
9 much. I appreciate your testimony.

10 Is there any other -- anyone present that
11 wants to share testimony?

12 (No audible response.)

13 CHAIRMAN CALTAGIRONE: If not, we will
14 adjourn the testimony for today. Thank you.

15 (Whereupon, at 1:05 p.m., the hearing was
16 adjourned.)

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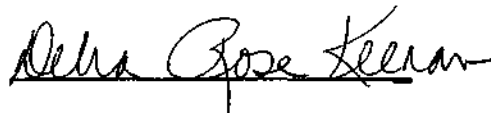
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