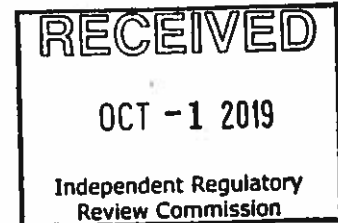


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myers briler & kelly
ATTORNEYS AT LAW

September 30, 2019



VIA ELECTRONIC MAIL (antitrust@attorneygeneral.gov)

Office of Attorney General, Antitrust Section
Attn: Tracy W. Wertz, Esquire
Strawberry Square, 14th Floor
Harrisburg, PA 17120

Re: *Comments to Notice of Proposed Rulemaking #59-10
(Unfair Market Trade Practices)*

Dear Ms. Wertz:

This letter is submitted on behalf of Chesapeake Energy Corporation ("Chesapeake") and its affiliate companies.

Chesapeake is an energy company focused on discovering and developing unconventional oil and natural gas assets in the United States. Chesapeake is one of the largest producers of natural gas in the Commonwealth of Pennsylvania. It has field offices in Sayre and Harrisburg and employs more than 115 persons in the Commonwealth. Chesapeake purchased the mineral interests underlying more than half a million acres of land in Pennsylvania from which it produced an average of 137,000 boe of natural gas per day in 2018—enough to power 8.8 million homes per day. Since 2011, Chesapeake has paid more than \$135 million in impact fees to local Pennsylvania communities and state agencies. Those fees have been used to fund road improvements, emergency preparedness, environmental protection, social services, records management and tax reduction. Chesapeake is a proud investor in Pennsylvania and looks forward to continuing to responsibly develop natural gas resources.

Chesapeake appreciates the opportunity to submit the following comments to the Office of Attorney General's "Unfair Market Trade Practices; Notice of Proposed Rulemaking" which was published in the Pennsylvania Bulletin on August 31, 2019.

GENERAL COMMENTS

The Notice of Proposed Rulemaking omits important context that bears on the legitimacy and validity of the proposed regulations. As you know, there are currently pending before the Supreme Court two petitions for allowance of appeal from the Commonwealth Court decision interpreting the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 *et seq.*, which forms a partial basis for the proposed rulemaking. *See Anadarko Petroleum*

Corp. v. Commonwealth, 206 A.3d 51 (Pa. Cmwlth. 2019), petition for allowance of appeal filed (Pa. Apr. 15, 2019) (No. 226 MAL 2019) (hereinafter referred to as "the Pending Litigation").

The Attorney General commenced the Pending Litigation after the U.S. District Court for the Middle District of Pennsylvania granted preliminary approval to settle a federal class action arising out of dispute over calculation of royalties on the sale of natural gas extracted from the class members' property. See *Demchak Partners Ltd. P'ship, et al. v. Chesapeake Appalachia, L.L.C., et al.*, No. 3:13-cv-2289-MEM (M.D. Pa. Sept. 30, 2015), ECF No. 91. The Office of Attorney General objected to the class action settlement in federal court on the same day the Office initiated the Pending Litigation in Bradford County on behalf of the same landowners and with respect to the same mineral lease agreements and royalty payments.

The Pending Litigation represents the first time that the Attorney General sought to utilize the UTPCPL to pursue claims *against purchasers* and the first time that the UTPCPL was used to prosecute alleged antitrust violations. Chesapeake and the other defendants filed preliminary objections challenging the Attorney General's novel attempt to pursue remedies against purchasers as well as antitrust remedies through use of the UTPCPL. The Honorable Kenneth D. Brown, who was specially assigned to preside over the matter in Bradford County, denied the preliminary objections but characterized the statutory interpretation questions as "close and extremely difficult" and "a significant interpretative issue" and, as a result, *sua sponte* certified the issues for immediate appeal to the Commonwealth Court. The Commonwealth Court affirmed in a decision which was adopted by only four of seven judges and was the subject of a sharply worded dissent. Importantly, the Commonwealth Court decision is not yet final. Chesapeake and the other named defendants filed petitions for allowance of appeal to the Supreme Court seeking review of the very same statutory interpretation issues that the Attorney General is proposing to "codify" through the proposed rulemaking. Specifically, Chesapeake is asking the Supreme Court to consider, *inter alia*: (1) whether the General Assembly intended the UTPCPL—a statute created specifically to protect consumers—to also provide a right of action on behalf of *sellers against consumers*; (2) whether the UTPCPL can be used to pursue alleged antitrust violations when the General Assembly declined to enact a state antitrust statute. The petitions for allowance of appeal are fully briefed and remain pending before the Supreme Court.

The Notice of Proposed Rulemaking references the Commonwealth Court's decision in the Pending Litigation but fails to acknowledge the potential for review and reversal by the Supreme Court. Because the Commonwealth Court decision is not yet final, it is premature for the Attorney General to seek to "codify" that decision through proposed rulemaking. For this reason alone, consideration of new regulations purporting to interpret the UTPCPL should be deferred until appellate review is concluded.

SPECIFIC COMMENTS

Chesapeake offers the following comments to the Notice of Proposed Rulemaking:

I. The Proposed Rulemaking Represents an Unconstitutional Effort to Bypass the General Assembly.

In the Notice of Proposed Rulemaking, the Office of Attorney General devises a new term—“unfair market trade practices”—and opines that such practices constitute “unfair methods of competition or deceptive trade practices” which are prohibited by the UTPCPL. See Proposed 37 Pa. Code § 311.2. The Attorney General defines “unfair market trade practices” to include various “contracts, combinations or conspiracies” in restraint of trade, see Proposed 37 Pa. Code § 311.2 (definition of “unfair market trade practices,” sub-sections (i)-(vi)), and actual, attempted and joint monopolization, (*id.* at sub-sections (vii)-(x))—the same conduct prohibited by the federal antitrust laws.¹ The Attorney General’s attempt to delegate to himself the authority to bring antitrust claims under the UTPCPL is invalid for at least two reasons.

First, the Attorney General can exercise only those powers conferred by the General Assembly and the General Assembly has deliberately declined to enact a state antitrust statute. The Office of Attorney General is a constitutional office. The Constitution directs that the Attorney General “shall exercise such powers and perform such duties as may be imposed by law.” Pa. Const. Art. 4, § 4.1. Those powers are “strictly a matter of legislative designation and enumeration” and consequently “legislation enacted by the General Assembly is the exclusive source of the powers and duties of the elected Attorney General pursuant to Article IV, Section 4.1.” *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986) (citation omitted). While the Commonwealth Attorneys Act authorizes the Attorney General to “represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth,” 71 P.S. § 732-204(c), Pennsylvania has no state antitrust statute. The General Assembly considered antitrust legislation at least 25 times since the UTPCPL was enacted in 1968 but each time failed to pass a state antitrust law. See Failed Antitrust Bills (attached). Through the proposed rulemaking, the Attorney General is attempting to *create* state liability for antitrust violations and at the same time *confer upon himself* the power to prosecute those claims. This violates Article 4, § 4.1.²

Second, the Attorney General’s proposal to regulate “unfair market trade practices” conflicts with the grant of authority in the UTPCPL and the intent of the General Assembly in enacting the UTPCPL. The statute was designed and intended to protect *consumers* against

¹ Section 1 of the Sherman Act states in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1. Section 2 of the Sherman Act makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations” 15 U.S.C. § 2.

² As demonstrated in the Comparison Chart attached as Exhibit A, the Attorney General’s proposed definition of “unfair market trade practices” parrots various provisions from the antitrust bills rejected by the General Assembly.

unfair or deceptive business practices by *sellers*.³ By contrast, antitrust laws protect competition.⁴ The proposed regulations are thus inconsistent with the legislative intent underlying the UTPCPL and are not necessary for enforcement or administration of the statute. Moreover, as noted above, the General Assembly considered and rejected proposed legislation that would have prohibited the same restraints on trade and monopolization that the Attorney General proposes to regulate through rulemaking. See Comparison Chart attached as Exhibit "A." Antitrust enforcement is not within the purview of the UTPCPL and therefore the proposed rulemaking exceeds the authority conferred by 72 P.S. § 201-3.1. Further, the Attorney General is wrong in positing that the Commonwealth Court in the Pending Litigation endorsed his effort to create state antitrust liability through rulemaking. See Notice of Proposed Rulemaking at pp.2, 4. That issue was not before the Commonwealth Court. In any event, the Attorney General cannot confer upon himself through rulemaking the very authority which the General Assembly refused to enact by statute.⁵

³ See, e.g., *Meyer v. Cmty. Coll.*, 93 A.3d 806, 814 (Pa. 2014) ("[T]he legislature enacted the UTPCPL to account for the fundamental inequality between buyer and seller, and to protect consumers from exploitative merchants."); *Ash v. Cont'l Ins. Co.*, 932 A.2d 877, 881 (Pa. 2007) ("[t]he UTPCPL provides consumers with a cause of action against commercial misfeasance" and its "objective" is "protecting the consumers of this Commonwealth"); *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001) ("statutory language [is] directed against consumer fraud"); *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 591 (Pa. Super. 2013) ("legislative goal" of UTPCPL is "consumer protection"); *Commonwealth ex rel. Kane v. Flick*, 382 A.2d 762, 765 (Pa. 1978) ("We have held on numerous occasions that the legislative purpose in enacting the [UTPCPL] was to protect the consuming public. . . ."); *Commonwealth v. Hush-Tone Indus., Inc.*, 4 Pa. Commw. 1, 11 (1971) (UTPCPL "is a consumer protection law designed to broaden the protections afforded buyers by existing state law"); see also 39 Pa. Legis. J.—House 1089, 1163 (June 27, 1968) (statement of Rep. Manderino) ("The customer, the customer, the one whom we are really trying to protect by this consumer legislation . . .").

⁴ See, e.g., *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342-43 (1990) ("The antitrust laws were enacted for the protection of competition . . .") (citation and internal quotation marks omitted).

⁵ The Attorney General is urged to correct a central misstatement in the Notice of Proposed Rulemaking concerning "a public hearing" on one of the failed state antitrust bills. The Notice asserts that legislators and commentators advocated at and after the public hearing on SB 848 in the 2013-14 session that a state antitrust statute "would be redundant to the act [*i.e.* UTPCPL]" and that the Office of Attorney General should instead "use" the UTPCPL to prosecute antitrust claims. See Notice of Proposed Rulemaking at p.2. This assertion is inaccurate. There was no reference to the UTPCPL at the June 25, 2013 hearing before the Senate Judiciary Committee. (A copy of the transcript is attached as Exhibit "B.") To the contrary, the transcript reflects the speakers' views that a state antitrust statute was unnecessary because *federal* antitrust remedies were available to the Attorney General. (See, e.g., Tr. at pp. 27, 45, 46, 52, 69, 73.) This is also true today. There is no need for the Attorney General's substantial rewrite of the UTPCPL because *federal* antitrust remedies remain available through an action under *federal* antitrust law. Indeed, the Attorney General regularly brings antitrust actions under federal law in federal court and, for this additional reason, there is no need for the proposed regulations.

II. The Proposed Regulations Impermissibly Re-Write the General Assembly's Definition of "Trade" and "Commerce."

As enacted by the General Assembly, the UTPCPL prohibits enumerated acts or practices "in the conduct of any trade or commerce," 73 P.S. § 201-3, a phrase which is statutorily defined in 73 P.S. § 201-2(3). The Attorney General is proposing to rewrite and expand the General Assembly's definition of "trade" and "commerce" by inserting the two new phrases in bold below:

***Trade and commerce*—mean the advertising, offering for sale, sale or distribution, which are classes of transactions without regard to any further limitation or specification as to a person, of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth, including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure.**

See Proposed 37 Pa. Code § 311.2 (emphasis added). The proposed regulation would materially alter and expand the General Assembly's definition by making all "classes of transactions" subject to the statute without any "limitation or specification." This is impermissible. Statutes passed by the General Assembly cannot be amended through administrative rulemaking. *See, e.g., Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 193 A.3d 447, 476 (Pa. 2018) (regulatory definition that expands upon and does not track statute is void and unenforceable); *Commonwealth v. Kerstetter*, 94 A.3d 991, 110-11 (Pa. 2014) (regulation that conflicts with statute "must stand down").⁶

III. The Proposed Regulations Impermissibly Re-Define "Sale" to Include the Act of Buying.

As an apparent hedge against an adverse ruling by the Supreme Court in the Pending Litigation, the proposed regulations include a new definition of "sale" that would equate the act of selling with the act of buying and thereby make buyers and consumers also subject to liability under the statute. *See* Proposed 37 Pa. Code § 311.2. This is also impermissible because it defies the General Assembly's intent. The lack of a definition of "sale" in the UTPCPL evidences the legislature's intent that the term is to be construed according to its "common and approved" meaning. 1 Pa. C.S.A. § 1903(a); *Barasch v. Pa. Pub. Util. Comm'n*, 490 A.2d 806, 810 (Pa. 1985). Moreover, any such regulation would be invalid because it is patently unreasonable to define a term to include both its common meaning and the opposite of that common meaning.

⁶ Attached as Exhibit "C" is a redlined version of the UTPCPL showing the Attorney General's proposed redraft of the statutory provisions.

IV. The Proposed Definitions of “Deceptive Conduct” and “Unfair Conduct” Would Improperly Expand Statutory Liability and Are Unconstitutionally Vague.

The Notice of Proposed Rulemaking includes new prohibitions against “unfair conduct” and “deceptive conduct” and defines those phrases both broadly and subjectively so that virtually every business practice and transaction would arguably fall within the scope of the UTPCPL. Under the proposed regulations, “deceptive conduct” would be defined as “[a] method, act or practice which has the capacity or tendency to deceive.” See Proposed 37 Pa. Code § 311.2. “Unfair conduct” would be defined as “[a] method, act or practice, without necessarily having been previously considered unlawful, which violates public policy as established by any statute, the common law, or otherwise within at least the penumbra of any common law, statutory, or other established concept of unfairness; which is unscrupulous, oppressive or unconscionable; or which causes substantial injury to a victim.” See Proposed 37 Pa. Code § 311.2.⁷ The proposed new definitions and the corresponding reference in proposed 37 Pa. Code § 311.11(b) conflict with 73 P.S. § 201-2(4)(xxi) which states that “other fraudulent or deceptive conduct” not specifically enumerated in subsections (i)-(xx) is actionable only if it “creates a likelihood of confusion or of misunderstanding.” 73 P.S. § 201-2(4)(xxi). The Attorney General’s construction of “deceptive conduct” would lower the standard of liability set by the General Assembly from “likely” to deceive to “hav[ing] the capacity” to deceive.⁸ Again, statutes cannot be amended by regulation. Moreover, the proposed definitions are unconstitutionally vague. How can a person tell whether specific conduct falls within “at least the penumbra of . . . [an] established concept of unfairness” or qualifies as “oppressive or unconscionable”? The lack of a clear and objective standard renders the proposed regulations unconstitutional. *Nelson v. State Bd. of Veterinary Med.*, 863 A.2d 129, 138 (Pa. Cmwlth. 2004) (“A statute or regulation is unconstitutionally vague when its terms are not sufficiently specific to inform those who are subject to it what conduct on their part will render them liable to its penalties.”). This is all the more true of the regulation’s effort to impose liability based on a mere showing that the conduct at issue “causes substantial injury to a victim.” The proposal to expand the UTPCPL to regulate “deceptive” and “unfair” conduct as defined by the Attorney General is invalid for all of these reasons.

⁷ The proposed definition of “unfair conduct” appears to be based on factors considered by the Federal Trade Commission in developing rules under the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, to regulate cigarette advertising. See *Fed. Trade Comm’n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (citing Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964)). Factors considered in formulating specific rules under the FTC Act are not suited to serve as specific rules under the UTPCPL. Unlike the FTC Act which generally prohibits unfair or deceptive acts or practices and authorizes the FTC to issue rules governing specific conduct or to commence administrative proceedings to enjoin unfair or deceptive conduct on a prospective basis, 15 U.S.C. § 45(b), (m), the UTPCPL prohibits specifically enumerated practices and authorizes relief only in the event of a proven violation of one of those provisions, 73 P.S. §§ 201-2(4), 201-3.

⁸ The Attorney General admits in response to Question 10 on the Regulatory Analysis Form that the proposed regulations “would serve to lower the hurdle for consumers” under the UTPCPL.

V. The Proposal to Allow the Attorney General to Veto Class Action Settlements Would Re-Write the Statute and Violate the Separation of Powers.

In an apparent effort to avoid repetition of the situation in *Demchak*, the Attorney General is proposing to grant to himself extra-statutory authority to veto any settlement of any class claim under the UTPCPL. See Proposed 37 Pa. Code § 311.9(c). The proposal is directly contrary to the enforcement scheme in the UTPCPL. Under the statute, the Attorney General is only authorized to bring an action “to restrain by temporary or permanent injunction the use of [a] method, act or practice” declared unlawful in the statute. 73 P.S. § 201-4. The General Assembly left it to “the court” to determine whether restitution, 73 P.S. § 201-4.1, or civil penalties, 73 P.S. § 201-8(b), are warranted in an action brought by the Attorney General. The UTPCPL includes a separate private action provision which is complete in itself and does not allow for any involvement by the Attorney General. See 73 P.S. § 201-9.2. It would be inconsistent with the UTPCPL to permit the Attorney General to intervene or play any role in private actions under the statute.

The Notice of Proposed Rulemaking opines that “coordination” with private actions is necessary “to avoid protracted disputes over representation,” see Notice of Proposed Rulemaking at p.9, but the Attorney General has no authority to represent individuals seeking money damages under the UTPCPL. The Attorney General’s authority is limited to bringing “an action *in the name of the Commonwealth* . . . to restrain by temporary or permanent injunction” a violation of the act. 73 P.S. § 201-4 (emphasis added). It is also inaccurate for the Attorney General to posit that a “*parens patriae* action” under the UTPCPL is necessarily “superior” to a private class action. See Notice of Proposed Rulemaking at pp.9-10. Courts that have considered the issue have reached the opposite conclusion. See, e.g., *Commonwealth v. BASF Corp.*, No. 3127, Control No. 120186, 2001 WL 1807788, at *8 (Phila. Cty. 2001) (“In order to assure the finality of the Class Action settlement and to adhere to the District Court’s exclusive jurisdiction over the settlement, this court cannot allow the Commonwealth to assert *parens patriae* claims on behalf of Pennsylvania citizens who released the Defendants for the same conduct alleged in this action.”); *In re Am. Inv’rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, No. 05-md-1712, 2013 WL 3463503, at *9 (E.D. Pa. July 10, 2013) (enjoining Attorney General’s pursuit of restitution claims under UTPCPL on behalf of class members because “the potential for disruption to the terms of the [pending class action] settlement overrides the Attorney General’s need to pursue a [different] remedy in its state court proceeding”).⁹

More fundamentally, the proposal to confer on the Attorney General veto authority over class action settlements would be unenforceable. With respect to actions brought in state court, the Pennsylvania Constitution gives the Supreme Court exclusive authority over procedural matters. Pa. Const. Art. 5, § 10(c). The Supreme Court exercised that authority by promulgating detailed procedural rules governing class actions, including Pennsylvania Rule of Civil Procedure 1714 which confers on the courts the exclusive authority to approve class action settlements and directs that such approval may be given only after a hearing and notice to all class members. Pa. R. Civ. P. 1714(a), (c). The Attorney General’s proposal to grant himself

⁹ The case cited in the Notice of Proposed Rulemaking, *Commonwealth v. Budget Fuel Co., Inc.*, did not involve a claim under the UTPCPL. 122 F.R.D. 184 (E.D. Pa. 1988).

veto power over the settlement of UTPCPL class claims infringes on the Supreme Court's exclusive domain and is unconstitutional. *See, e.g., In re Suspension of Capital Unitary Review Act*, 722 A.2d 676 (Pa. 1999) (suspending statutory provision which is inconsistent with procedural rules promulgated by Supreme Court). In federal court, procedural matters are governed exclusively by the Federal Rules of Civil Procedure, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), and therefore federal class action settlements are subject only to the notice and approval requirements in the federal rules.

VI. The Proposed Regulations Would Impermissibly Rewrite the UTPCPL Remedies Provision.

The Notice of Proposed Rulemaking proposes to add a new definition of "rebate," *see* Proposed 37 Pa. Code § 311.2, and to rewrite two different provisions in the UTPCPL, 73 P.S. § 201-4 and 73 P.S. § 201-8, to correspond to the Attorney General's view that rebates paid to a consumer should not reduce any monetary award or other relief available under the UTPCPL. *See* Proposed 37 Pa. Code §§ 311.4, 311.7(b). The proposed regulations are invalid in that they purport to rewrite the statute. *See supra* § II. Further, the Supreme Court in *Commonwealth v. TAP Pharm. Prods., Inc.* deemed it untenable to refuse to account for rebates in awarding relief under the UTPCPL. 94 A.3d 350, 362 (Pa. 2014) ("[W]e are disturbed by the Commonwealth's failure to account in this litigation for the billion dollars of rebate monies it has received from defendant drug manufacturers in the relevant time period.").

VII. The Attorney General's Effort to Grant Himself Broad Subpoena Power Exceeds the Authority Conferred by the General Assembly.

The Notice of Proposed Rulemaking proposes to authorize the Attorney General to compel the attendance and testimony of witnesses and the production of records and to utilize the subpoenaed testimony and records in any action under the UTPCPL. *See* Notice of Proposed Rulemaking at p.10; *see also* Proposed 37 Pa. Code § 311.10. The proposed regulation would substantially expand the authority of the Office of Attorney General and is inconsistent with the UTPCPL. As noted above, the statute includes a comprehensive enforcement scheme that empowers the Attorney General only to bring an action for injunctive relief to restrain prohibited acts. 73 P.S. § 201-4. The General Assembly did not intend and the statute does not contemplate separate administrative investigation and enforcement proceedings by the Attorney General prior to or in conjunction with an injunction proceeding under § 201-4. In fact, the General Assembly initially included in the UTPCPL a provision authorizing the Attorney General to obtain information from suspected violators through a civil investigative demand, but that section—71 P.S. § 201-6—was deleted in 1976. Further, the Commonwealth Court has already rejected an effort to read *the very same subpoena provision*¹⁰ into the UTPCPL in

¹⁰ The proposed 37 Pa. Code § 311.10 is virtually identical to 71 P.S. § 307-3 which grants the Bureau of Consumer Protection power to issue subpoenas for use in purely adjudicatory as opposed to investigatory proceedings.

Commonwealth of Pennsylvania ex rel. Packel v. Shults, 362 A.2d 1129, 1133-34 (Pa. Cmwlth. 1976).

VIII. The Attorney General's Attempt at Statutory Interpretation Through Regulation Is Improper.

In the proposed regulations, the Attorney General purports to direct how the draft regulations and UTPCPL should be interpreted. See Proposed 37 Pa. Code § 311.11(a), (b). The proposal to apply the UTPCPL without limitation conflicts with the legislature's intent that the statute applies to "consumer transactions." See *Commonwealth of Pennsylvania, ex rel. Creamer v. Monumental Props., Inc.*, 329 A.2d 812, 824 (Pa. 1974).

IX. The Proposed Regulations Will Result in Increased Costs to Taxpayers.

Because the Office of Attorney General is proposing to expand its authority through administrative rulemaking to include the power to bring state antitrust claims under the UTPCPL, the power to review and veto UTPCPL class actions and the power to pursue UTPCPL claims against any type or class of transaction and against buyers as well as sellers, the new regulations, if promulgated, would certainly result in substantial cost to the Commonwealth, to persons doing business in the Commonwealth and to class members in actions brought under the UTPCPL. The Attorney General's assertions that the regulations would have "no adverse fiscal impact" and would result in "no expected costs" are wildly inaccurate. See Notice of Proposed Rulemaking at p.11; Regulatory Analysis Form No. 18.

* * * *

Thank you for your consideration of these comments.

Sincerely,


Daniel T. Brier

cc: Honorable Lisa Baker, Majority Chair, Senate Judiciary Committee (via UPS overnight mail)
Honorable Lawrence Farnese, Jr., Minority Chair, Senate Judiciary Committee
(via UPS overnight mail)
Honorable Rob Kauffman, Majority Chair, House Judiciary Committee
(via UPS overnight mail)
Honorable Tim Briggs, Minority Chair, House Judiciary Committee
(via UPS overnight mail)

Exhibit A

COMPARISON OF PROPOSED RULEMAKING TO ANTITRUST BILLS REJECTED BY GENERAL ASSEMBLY¹

Term	Bill No.	Prohibits restraint of trade (Proposed 37 Pa. Code § 311.2)	Prohibits monopoly (Proposed 37 Pa. Code § 311.2)	Authorizes AG to issue subpoenas (Proposed 37 Pa. Code § 311.10)	Authorizes <i>parens patriae</i> action by AG (Proposed 37 Pa. Code § 311.2, § 311.3, § 311.4)	Authorizes AG recovery for indirect purchases (Proposed 37 Pa. Code § 311.2)	Requires notice to AG (Proposed 37 Pa. Code § 311.9(c))	Authorizes AG to intervene in private action (Proposed 37 Pa. Code § 311.9(c))
1975-76	SB 369	✓	✓	✓	✓		✓	
1975-76	HB 174	✓	✓	✓	✓		✓	
1977-78	HB 845	✓	✓	✓	✓		✓	
1979-80	HB 1594	✓	✓	✓	✓	✓	✓	
1989-90	SB 1470	✓		✓	✓	✓	✓	
1989-90	SB 1473	✓		✓	✓	✓	✓	
1989-90	HB 2622	✓		✓	✓	✓	✓	✓
1989-90	SB 2396	✓		✓	✓	✓	✓	✓
1989-90	SB 2376	✓	✓	✓	✓	✓	✓	
1991-92	SB 351	✓	✓	✓	✓	✓	✓	✓
1991-92	SB 347	✓	✓	✓	✓	✓	✓	
1991-92	HB 191	✓	✓	✓	✓	✓	✓	
1993-94	SB 1630	✓	✓	✓	✓	✓	✓	
1993-94	SB 307	✓		✓	✓	✓	✓	
1993-94	HB 426	✓	✓	✓	✓	✓	✓	
1995-96	SB 611	✓		✓	✓	✓	✓	
1995-95	HB 525	✓	✓	✓	✓	✓	✓	
1990-00	SB 1562	✓		✓	✓	✓	✓	
2001-02	SB 21	✓		✓	✓	✓	✓	
2003-04	SB 120	✓		✓	✓	✓	✓	
2005-06	SB 106	✓		✓	✓	✓	✓	
2007-08	SB 203	✓		✓	✓	✓	✓	
2011-12	SB 1565	✓	✓	✓	✓	✓	✓	
2013-14	SB 848	✓	✓	✓	✓	✓	✓	
2015-16	SB 578	✓	✓	✓	✓	✓	✓	
2017-18	SB 858	✓	✓	✓	✓	✓	✓	

¹ This chart identifies instances of duplication between Proposed Rulemaking #59-10 and the 26 failed antitrust bills that are most pertinent to the attached comments. It is not an exhaustive comparison of the proposed regulations and failed bills.

Exhibit B

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In Re: Transcription of online video entitled
"Hearing to Consider Bill 848 (Antitrust)"

From the Pennsylvania State Judiciary Committee's
Website
Senator Stewart J. Greenleaf.

Date of hearing:
Tuesday, June 26, 2013

1 SENATOR GREENLEAF: This bill was
2 drawn up before committee and it was
3 designed to take testimony to deal with some
4 of the issues and questions that the
5 committee members had and possibly the
6 legislature in general would have. The
7 declaration and purpose of this legislation
8 quote is, "To promote free enterprise and
9 free trade in the marketplaces of this
10 Commonwealth by prohibiting restraints of
11 trade which are secured through monopolistic
12 or collusive practices which act or tend to
13 act to create competition between persons
14 engaged in commerce or trade, whether in
15 manufacturing, distribution of financing,
16 service industries or related for-profit or
17 non-profit pursuits." Basically, to make
18 sure that we have free enterprise and a fair
19 competition in the Commonwealth of
20 Pennsylvania which I think is a worthy
21 cause. It does not restrict the free
22 enterprise system. It encourages it and
23 makes sure it was fair. So, today, I want
24 to thank all of the witnesses that have come
25 here today to testify in regard to this

1 legislation and to our members of the
2 committee who are here today as well. And
3 we will take testimony now. The first
4 witness is James Donahue, Executive Deputy
5 Attorney General, Public Protection
6 Division; Tracy Wertz, Acting Chief Deputy
7 Attorney General, Antitrust Section; Joseph
8 S. Betsko, Senior Deputy Attorney General in
9 the Antitrust Section. All of the Office of
10 Attorney General, thank you, very much, for
11 being here today. And I know the Office of
12 the Attorney General is very interested in
13 this legislation and we appreciate you being
14 here today and to explain the need for it.

15 MR. DONAHUE: Thank you, Chairman
16 Greenleaf. Chairman Greenleaf, Chairman
17 Leech, thank you for the opportunity to meet
18 with you today about the State Antitrust
19 Bill. My name is James Donahue and I am the
20 Executive Deputy Director for the Public
21 Protection Division for Attorney General
22 Kathleen Kane. From July 1997 through
23 January of this year, I served as the Chief
24 of the Antitrust Section for the Office.
25 With me today is Tracy Wertz who is the

1 Acting Chief Deputy Attorney General and
2 Joseph Betsko who is the Senior Deputy
3 Attorney General in the Antitrust Section.
4 ~~We've prepared detailed written testimony~~
5 ~~which we're submitting.~~ My oral remarks
6 today will cover the highlights. The
7 antitrust laws have been described as the
8 Magna Carter of free enterprise and an
9 economic bill of rights. Those descriptions
10 apply because competition is at the core of
11 our economy. When markets are competitive,
12 overall economic activity increases. When
13 competition is stifled, economic activity
14 declines. As we note in our written
15 testimony, the Antitrust Law is derived from
16 old Common Law principles prohibiting
17 monopolies and then state law which codifies
18 those principles. What I'd like to do today
19 is spend some time here addressing why we
20 need this statute now. We need this statute
21 because we need competitive markets. In
22 competitive markets, prices are low. Over
23 my 28 years in the Office of Attorney
24 General, I've looked at internal documents
25 of dozens of businesses. The one common

1 thing in those business documents is the
2 amount of effort businesses place into
3 reducing their costs. In some cases the
4 entirety of business planning focuses on how
5 to shave a half percent out of a business's
6 cost structure. When markets are
7 competitive and there's vigorous antitrust
8 enforcement keeping them so, businesses have
9 a better ability to control costs. One
10 aspect of costs many businesses focus on is
11 health care. The changes in the health care
12 marketplace have led to huge increase in
13 consolidation. We currently have four open
14 hospital mergers and we've been told we're
15 getting another hospital merger coming in
16 tomorrow or Thursday. Our job in these
17 hospital transactions is to determine--did
18 my mic go off?

19 SENATOR GREENLEAF: They're hard to
20 read, but if you push the bottom button
21 there and the light should go on with a
22 green light.

23 MR. DONAHUE: The green light is on.

24 SENATOR GREENLEAF: There you go.

25 MR. DONAHUE: Sorry, I must have

1 accidentally hit the button. I apologize.
2 Anyway, we currently have four open hospital
3 transactions and we're getting a fifth soon.
4 Our job in these transactions is to take and
5 look at them and determine whether they're
6 actually efficiency enhancing, meaning they
7 reduce costs. And make access to healthcare
8 more available to consumers and to
9 businesses. Or whether they do the
10 opposite, whether they result in the
11 increase in price and exclusions for--from
12 the market or less access for consumers and
13 businesses. And we've seen transactions in
14 the healthcare market that have fit both
15 molds. And we've been very active in our
16 hospital reviews. In some cases, we've
17 advised the hospitals that we don't have a
18 problem with their transaction, other times
19 we've advised that we would go forth and
20 challenge those transactions. And we think
21 in those instances when we've done that,
22 we've saved the public and we've saved the
23 business community millions of dollars in
24 cost savings. You may have seen, you know,
25 some of the recent articles about hospital

1 pricing in Time Magazine and other places
2 and the big disparity in differences. So
3 why this is so important is that if you have
4 a high priced hospital that merges with with
5 a low priced hospital, their goal typically
6 is to bring the low priced hospital's prices
7 up to the prices of the higher priced
8 hospital. One of the key reasons that an
9 antitrust statute is needed now is to give
10 the office the ability to subpoena
11 information. Accurate, honest and timely
12 information is essential for a careful
13 investigation which yields the right
14 results. Without subpoena power, the office
15 has to rely on the targets of the
16 investigations to voluntarily give us or
17 give us the information. Or, we have to
18 rely on what we can obtain from our
19 colleagues in the federal government or
20 other states. Unfortunately, while many
21 persons are cooperative, not all are.
22 Moreover the discussions about
23 confidentiality of documents can
24 dramatically slow down an investigation.
25 This is especially a problem again in

1 healthcare where often times one of the
2 merging parties says that we need to merge
3 and we want you to overlook potentially any
4 competitive problems that are raised by this
5 transaction because we're in a state of
6 financial distress. Often times that puts
7 us in the untenable situation having an
8 entity in financial distress but not getting
9 the information because we've been arguing
10 over how the documents will be kept
11 confidential and that type of thing.
12 Another key reason we need an antitrust
13 statute is because antitrust violations
14 occur at all levels of the chain of
15 distribution. In recent years, many
16 antitrust violations have involved foreign
17 manufacturers of components in other
18 products. Those cases have involved
19 computer chips, LCD screens and automotive
20 parts among others. With limited
21 exceptions, we've not been able to recover
22 for the increased costs of these price
23 fixing conspiracies imposed on consumers and
24 state agencies. The reason we are not able
25 to recover is that we are indirect

1 purchasers of these products from the price
2 fixers. Under a 1977 Supreme Court case,
3 indirect purchasers are unable to collect
4 damages. The theory is that drug purchasers
5 will have the same incentive to sue and that
6 courts can (indecipherable 7:40) duplicative
7 recovery. The reality is that many direct
8 purchasers have little incentive to sue.
9 And because they don't want to sue the
10 people they do business with on a regular
11 basis. Many states, approximately 30 states
12 currently have some type of indirect
13 purchaser standing to collect damages. And
14 many of those states have set up in their
15 statutes as is set up in this statute a
16 requirement that the court avoid duplicative
17 recoveries in handling an indirect purchaser
18 case. I would like to point out that when
19 our authority is clear, we've been extremely
20 successful. Over the past year, we returned
21 almost twenty million dollars to
22 Pennsylvania governmental entities who were
23 victimized by a bid rigging scheme involving
24 municipal bond derivatives. Our work
25 involving hospital mergers have saved

1 consumers and businesses including health
2 plans and insurance companies tens of
3 millions of dollars. Lastly, we believe it
4 is important that Pennsylvania have a law
5 that prohibit retail price maintenance, the
6 practice of manufacturers setting the price
7 in which retailers can sell their
8 manufacturers--their goods. This practice
9 limits retail competition and stifles the
10 growth of efficient retailers. Pennsylvania
11 consumers should have the advantages of a
12 vigorous retail price competition. I just
13 want to make two other quick points, there's
14 been some concern about the insurance
15 industry. At present, there is an exemption
16 for the insurance industry called the
17 McCarran Ferguson Act. This act doesn't
18 change that exception. Now, I should be
19 clear that the McCarran Ferguson exception
20 applies to the business of insurance. And
21 that's generally seen as managing risks and,
22 you know, handling the actuarial part of the
23 insurance business. There is case law that
24 says the business of insurance does not
25 include the relationship between insurers

1 and providers. And as I'm sure many of you
2 are well aware, there is quite a dispute
3 right now ongoing about the relationship
4 between insurers and providers in the
5 western part of the State. So that type
6 of--the actions of providers generally don't
7 fall within the business of insurance. But
8 this bill really changes nothing in terms of
9 whether the insurance companies would be
10 regulated or not regulated by our office.
11 And I'd be happy to answer any other
12 questions that you might have.

13 SENATOR GREENLEAF: A couple and
14 then we'll take questions from the members.
15 We're one of the--the only state that has no
16 antitrust legislation or laws in place.

17 MR. DONAHUE: That's correct.

18 SENATOR GREENLEAF: And how does
19 this proposed bill compare to the other
20 statutes if you're familiar with them? Are
21 they very similar or does this go beyond
22 what the other states do?

23 MR. DONAHUE: No, many--the key
24 components for us in this statute are the
25 ability to issue subpoenas, the ability to

1 bring an indirect purchaser claim and a ban
2 on retail price maintenance. In terms of
3 the general violation, a contract
4 combination or conspiracy in restraint of
5 trade, that's in everybody's statute.
6 Thirty states have indirect purchaser
7 legislation. Or, you know, they have some
8 method of collecting damages from--sorry,
9 from indirect price fixers. I think about
10 26 of those states, it's by legislation and
11 in about four or five of those states it's
12 by an opinion of the Supreme Court of that
13 state that says their antitrust law covers
14 indirect purchasers. A smaller group of
15 states have a ban on retail price
16 maintenance. Maryland just passed such a
17 law a couple years ago. New York and
18 California have similarly passed a law. Or,
19 their courts have interpreted their long
20 standing antitrust statutes as being--as
21 covering that. I don't have a full count of
22 which other states believe that the retail
23 price minutes (indecipherable at 12:00) is
24 also banned by other antitrust statutes.
25 The important part I think we make in our

1 paper there is that the federal antitrust
2 statutes are based on the original state
3 antitrust statutes. Kansas passed the first
4 one in the late 1880's and then the Sherman
5 Act in 1890.

6 SENATOR GREENLEAF: So does business
7 have any reason to fear the adoption of,
8 Pennsylvania, giving an antitrust piece of
9 law?

10 MR. DONAHUE: I don't think so. I
11 mean, it really doesn't change the laws that
12 are applicable to businesses right now. The
13 only reason you would have to fear is if
14 you're breaking the law currently because it
15 would give us more investigative powers.

16 SENATOR GREENLEAF: Okay, Senator, I
17 don't know which one was first? Senator
18 Boscola?

19 MAN: She's first.

20 SENATOR GREENLEAF: Okay.

21 SENATOR BOSCOLA: Is it good
22 afternoon yet? Close. Around here, yeah.
23 If Pennsylvania would enact the antitrust
24 legislation, does the Attorney General's
25 Office anticipate needing more resources to

1 process the claims?

2 MR. DONAHUE: You know, the thing
3 that is most resource intensive is the
4 investigations. And we currently operate on
5 sort of a revolving fund basis. So, we try
6 to recover in our cases attorneys fees at
7 commercial rates for our investigations and
8 recover our costs. And then, we use that to
9 fund the next case. So we wouldn't
10 necessarily need additional resources in
11 that sense. We should be able to grow
12 our--the resources out of, you know, out of
13 our litigation.

14 SENATOR BOSCOLA: That makes sense.
15 And then, what would the ability to subpoena
16 documents--you'd be able to subpoena
17 documents, what would that do for
18 prosecuting antitrust cases in the
19 Commonwealth? Would it streamline the
20 process?

21 MR. DONAHUE: It would do a couple
22 things. Yes, it would streamline the
23 process. Because, you know, one of the
24 things that there--there are a couple of
25 problems about the lack of subpoena power.

1 The biggest thing about that is that we
2 can't compel people to give us information.
3 Often times, the information is, it's a
4 secret. You know, we don't have that
5 information. In that municipal bond bid
6 rigging case that I referred to which was
7 followed along a federal, you know, a case;
8 we were able to get tape recordings of
9 traders, conversations with people and their
10 emails. And in those documents is where the
11 evidence was of agreements to rig the bids
12 on those municipal derivatives. So without
13 the ability to compel that sort of
14 information, you know, people don't normally
15 turn over incriminating information to you.
16 So that's why that's so important.

17 SENATOR BOSCOLA: I just have
18 another question, I'm thinking that this
19 price fixing issue is the main reason why we
20 need antitrust. Is there any like solid
21 evidence out there that price fixing was
22 occurring but then you didn't have the tools
23 to pursue the case or recover the damages?

24 MR. DONAHUE: The one thing that
25 current--that this bill would change,

1 : . currently we do sue people for price fixing.
2 . And when we were direct purchasers. So the
3 . banks that paid the money to us in the
4 . municipal bond case were--they directly
5 . dealt with either state agencies or
6 . municipal agencies in terms of these
7 . derivative instruments. What we don't have
8 . the ability to do is to go after, you know,
9 . say Korean makers of LCDs. Or, you know,
10 . Japanese makers of auto parts or others who
11 . were price fixing. Because we don't buy
12 . from them. We buy a car or we buy, you
13 . know, a computer. And the price fixing
14 . occurred involving components of those
15 . items.

16 . SENATOR BOSCOLA: Got it, okay,
17 . thanks.

18 . SENATOR GREENLEAF: Senator Stack?

19 . SENATOR STACK: Thanks for being
20 . with us again, Mr. Donahue. Just to follow
21 . up a few things that Senator Boscola raised.
22 . And I have no problem with the Attorney
23 . General having subpoena power. But, I'm
24 . just trying to wrap my head around how far
25 . are we going with it? We're talking about

1 the antitrust issue. But do we envision
2 that that subpoena power will be vast and
3 beyond antitrust? Or are we talking in a
4 limited way? And I understand that
5 surrounding states have also expanded the
6 power of their Attorney General in antitrust
7 cases, but I also have become aware that in
8 Virginia they've run into some problems and
9 they're scaling that--they're trying to
10 scale back those particular powers. So how
11 would you comment about what would be the
12 scope of the powers we're talking about?
13 And I guess the last point I would throw out
14 to you is--and I always talk about
15 Pennsylvania being behind other states, you
16 know, often the last to do certain things.
17 But, this is really interesting that we're
18 the last state to try and do this. And
19 what's the tipping point? What's pushed it
20 over the top where we've said, look, we've
21 got to change things here?

22 MR. DONAHUE: Okay, in terms of the
23 subpoena power and the broadness of the
24 subpoena power, the--we have subpoena power
25 in a number of statutes. For example, in

1 the administrative code, it gives the
2 Attorney General the ability to subpoena
3 information and conduct studies for issues
4 involving consumer protection. We've been,
5 I think we've been a good steward of that
6 power by not using that just willy nilly for
7 anything. The idea here is that these
8 statutes would involve the ability to
9 subpoena information in a, you know, in a
10 pure antitrust case which didn't involve
11 deception which is something we don't have
12 right now. We do have the ability to
13 subpoena information in a bid rigging case
14 where the governmental--where there is
15 a--where the bids being rigged are
16 governmental bids. Businesses often go out
17 for bids too, but we don't have any
18 jurisdiction over whether somebody would rig
19 a bid on a business contract to build a
20 building or something like that. That's
21 outside of the anti-bid rigging act. So we
22 have a number of statutes right now that
23 currently give us the ability to issue
24 subpoenas. And the office traditionally has
25 only used those for the specific purpose

1 they're intended. And I don't see any
2 reason why that would change. The other
3 question you asked was about the ability,
4 you know, why--what is the tipping point?
5 Why should we do this now? And I think the,
6 yeah, there's a couple reasons. And I don't
7 want to sound like a broken record and keep
8 coming back to healthcare. But healthcare
9 is an extremely important part of the
10 economy both in terms of an input to what
11 businesses use in producing their products,
12 but also to a significant player here in
13 Pennsylvania. We have some of the most
14 prominent hospitals in the world here
15 located within the state. So, it's a very
16 important part of the economy. And it's a
17 very complex business. And we get, you
18 know, probably more complaints about stuff
19 in healthcare than any other area. And
20 being able to fully investigate those
21 complaints and look at them is, I think,
22 very important as that market is going to go
23 through a lot of changes for whatever
24 reason. They're going to go through a lot
25 of changes over the next couple years. And

1 that's one of the reasons we think that this
2 bill is so important to us.

3 SENATOR GREENLEAF: Senator Farnese?

4 SENATOR FARNESE: Thank you, Mr.
5 Chairman. Thank you for your testimony, Mr.
6 Donahue, I appreciate it. It was very
7 helpful. Just a couple of follow up
8 questions. On the resources for the
9 Attorney General's Office, in terms of the
10 number of cases, I've looked at some states
11 around, you mentioned two of the states that
12 I actually looked at to see exactly what
13 their current case load was of antitrust
14 case. And I sort of was surprised when I
15 saw. For instance, Maryland, Maryland does
16 about one case per year with the number of
17 cases in settlement. They have four
18 antitrust lawyers on staff. They can get
19 attorneys fees in their statute. New York,
20 most cases in New York are federal, of
21 course, because of the federal statutes.
22 But allow them, of course, they take
23 advantage of the pendent jurisdiction and
24 they can bring the state law claims in the
25 federal court. They have 14 assistant

1 generals working on antitrust cases there.
2 In Delaware, they have one person doing
3 antitrust work. And once again, they
4 utilize, they take advantage of the
5 multistate litigation and the feds bring the
6 action and they share it. But again they
7 believe that they have a positive flow, the
8 money coming in is positive. So, I don't
9 know, sort of Senator Boscola asked about
10 your resources right now, do you
11 anticipate--right now you have a full
12 complement of attorneys to handle these
13 types of cases? I know you originally said
14 that resources were the number one--or the
15 investigation was where you bring resources.
16 I would also offer that not only is the
17 investigation, but the litigation of these
18 types of cases is extremely document
19 sensitive, as you know. I mean, I've been
20 involved in actions where they've got rooms
21 the size of this with 15 or 20 lawyers just
22 coding documents all day long. And the
23 large law firms make a lot of money doing
24 this. So, it's very easy to get papered to
25 death in a case like this. So again, do you

1 think you have the complement ready right
2 now to begin handling these cases if, in
3 fact, the statute goes in effect? And
4 again, I think it's important that the
5 subpoena power--this is not within the
6 context of litigation, this is
7 pre-litigation, this is investigation work.
8 So people understand what we're talking
9 about. A lot of people think subpoenas are
10 part in parcel of a lawsuit, whether it be
11 in a criminal or a civil case. You're
12 talking about, you're doing your
13 pre-investigation work before litigation is
14 even started. That's the subpoena power
15 that you're seeking through this statute. I
16 just want to make sure we're clear on that.

17 MR. DONAHUE: Yes, to take your last
18 point first, yes, we're absolutely clear.
19 It's pre-complaint subpoena power and it
20 enables us to investigate. One of the
21 reasons that that's important is there's a
22 lot of criticism about the filing of cases,
23 especially the filing of antitrust cases and
24 the filing of class actions. And often
25 times there might be a little clip in the

1 What we did there is we got digital files,
2 digital electronic files of the traders
3 tapes and each state took a bank. And, we
4 divided that work up that way. We are
5 looking at some tools now, some computer
6 tools that will enable us to sort through
7 documents quicker. And we're looking at,
8 you know, we're actually testing that in an
9 investigation right now. One of those tools
10 that uses artificial intelligence to help us
11 find documents. And we're hoping that with
12 those types of tools that we use together
13 with ourselves and other states that we will
14 have the resources to do this. And, you
15 know, if worse comes--not if worse comes to
16 worse, you know, we roll up our sleeves and
17 get to work. It's not, you know, people
18 come in and say, why do you want to work for
19 the Office of Attorney General? And they
20 say, well, I want to be able to go home and
21 have--that's not the antitrust section. One
22 of our attorneys here, her first week here,
23 we worked till midnight every night to bring
24 a case there. So, we have dedicated people,
25 hard working people. And we're trying to

1 use everything we can, working with other
2 people and technology to get through this
3 stuff.

4 SENATOR FARNESE: Just one more
5 question if I can, Mr. Chairman, I
6 understand there's concerns about the
7 resources of your office. Another thing I'm
8 very concerned about is the resources and
9 ability of the Commonwealth Court. My
10 understanding is pursuant to the statute
11 that original jurisdiction would then vest
12 with the Commonwealth Court. And I haven't
13 really, I don't think there's anybody here
14 from the court system that's going to
15 testify as to whether or not they're going
16 to be able to handle this load. Again,
17 we're not talking about your normal run of
18 the mill litigation which might originate in
19 Commonwealth Court whether it be an election
20 case or some kind of other Workers'
21 Compensation matters, whatever it might be.
22 These, again, are very complex document
23 intensive cases. In federal court, if you
24 look in federal court, they usually have a
25 separate documenting track that handles your

1 antitrust cases and a federal judge is
2 usually assigned to those. You know, even
3 if there's a negligible increase in the
4 amount of case load that the Commonwealth
5 Court is going to have, I think we need, I
6 think the legislature needs confidence that
7 the court is going to be able to handle it,
8 that they're going to have the personnel,
9 that they have an ability to set these cases
10 up and someone's going to handle them with
11 the expertise in antitrust law and handle
12 this kind of stuff. Again, I think it's
13 going to be a cost not only to the Attorney
14 General's Office, but again, you know,
15 there's going to be a cost associated with
16 this to the court system to bear that. And
17 I don't know if we've--I haven't really
18 heard a lot about that in some discussions
19 I've had, but I think we need reassurances
20 from the court that not only are they going
21 to be able to handle this, but they're
22 prepared for this kind of litigation

23 MR. DONAHUE: Well, let me address
24 that two ways. First off, there has to be
25 some Pennsylvania court that would have

1 jurisdiction over this. And we had the
2 exact same concern about the county courts
3 if we were to bring these sort of complex
4 cases into the--you know, into the county
5 courts. Because they have the same issues
6 as everybody else. We have had some--we do
7 have--

8 SENATOR FARNESE: Which is why the
9 federal courts are necessarily or usually
10 are the place for this type--because in
11 federal court you get a very quick docket,
12 you get a Judge that doesn't take any BS and
13 the case just goes right through. And
14 there's no backlog. That's my big concern.
15 With federal court, you don't see that as
16 much.

17 MR. DONAHUE: And many of our cases
18 are brought in federal court and our
19 colleagues cases. As you mentioned New York
20 will bring a case with a federal count and
21 with a state law count. And there are a lot
22 good reasons why we would continue to go
23 into federal court in many circumstances for
24 the very issues that you raise. Because we
25 know there are some federal court judges who

1 are experienced in, you know, particular
2 issues. And, you know, it makes sense to go
3 there. Or there may be companion litigation
4 going on already where it makes sense to go
5 before the same judge. I'm not a big fan of
6 like going into four different courts on the
7 same case. If there's already a case going
8 on in federal court and we've got a federal
9 claim, even though we have a state law
10 claim, I would probably go into federal
11 court in that circumstance, yeah, yeah.

12 SENATOR FARNESE: You're not going
13 to have any choice. The case would go to
14 federal court. I don't believe you'd be
15 able to litigate, you know as well as I do,
16 you couldn't litigate two cases, one in
17 federal court and one in state court. The
18 case would just go to federal court. It
19 would be a pendent claim.

20 MR. DONAHUE: Now, I can't speak for
21 Commonwealth court.

22 SENATOR FARNESE: Right, that's my
23 concern.

24 MR. DONAHUE: I wouldn't--

25 SENATOR FARNESE: Let me just close

1 with this, have you had any discussions with
2 the court or maybe Mr. Chairman sometime you
3 could look into the court to see, you know,
4 what their abilities are right now to handle
5 these kinds of cases moving forward? You
6 know, just throwing that out there.

7 SENATOR GREENLEAF: We can make an
8 inquiry for you.

9 SENATOR FARNESE: Thank you, Mr.
10 Chairman. Thank you, Mr. Donahue, for your
11 testimony. Again, I understand what you
12 want to do. I think it's-- certainly
13 supportive of it. I just want to make sure
14 in terms of the resources that are there,
15 not only for your office, but for the
16 judicial system as well too that's going to
17 be handling them.

18 MR. DONAHUE: I just want to clarify
19 we do have original jurisdiction in
20 Commonwealth Court in a lot of the actions
21 we bring. And some of your charities
22 actions and consumer protection actions are
23 also extremely complicated and document
24 intensive, so it's not that they're
25 unfamiliar with these type of cases. Thank

1 you.

2 SENATOR GREENLEAF: Senator
3 Vulakovich?

4 SENATOR VULAKOVICH: Thank you, Mr.
5 Chairman, I was going over pages 8, 9--8 and
6 9 and 10. I was wondering if we would pass
7 this piece of legislation, what--I guess,
8 standing would the Attorney General have
9 with regards to the recent West Bend
10 Allegheny Highmark merger and you might say
11 versus UPMC. For example, they recently
12 came out and said that the--I know there's
13 exemptions for insurance. But then you
14 mentioned this one act, was it McCarran?

15 MR. DONAHUE: McCarran Ferguson.

16 SENATOR VULAKOVICH: McCarran
17 Ferguson, yes. Which I believe provides a
18 limited exception for the business of
19 insurance. How would the Attorney General
20 play into a situation where UPMC comes out
21 and says that we're no longer going to
22 accept Highmark Insurance for our doctors,
23 our hospitals, we're going to stop that,
24 cease and desist at the end of the year.
25 Would you be able to then take a position on

1 that? If somebody came to you? Because--

2 MR. DONAHUE: If--alright.

3 SENATOR VULAKOVICH: If--on Page 9,
4 let's see, Page 9--oh, on the last Page 10
5 of your testimony, "Section 908 Senate Bill
6 848 gives the Attorney General the authority
7 to issue a subpoena whenever the Attorney
8 General believes that a person may be in
9 control of information relevant to any civil
10 investigation brought to protect free
11 enterprise." Do you guys--would you partake
12 in something like that with what's going on
13 right now with these new IDFS systems?

14 MR. DONAHUE: Without violating our
15 normal policy about not commenting on stuff
16 which might be under our--under
17 investigation by this office, yes, we would
18 look at whether a refusal to deal by
19 somebody is a violation of an antitrust
20 violation. In some circumstances, it is a
21 violation. In other circumstances, it's
22 not.

23 SENATOR VULAKOVICH: Okay, now, is
24 there a conflict of interest? You have the
25 Insurance Department. And then, you have

1 the Attorney General. If we didn't have, if
2 we don't pass this piece of legislation, can
3 you still do what I just talked about?
4 Still interfere in that?

5 MR. DONAHUE: The problem in, you
6 know, a case like that, is unless we have
7 access to the detailed internal information
8 of the companies, you know, we may not be
9 able to come to a conclusion as to whether
10 they're engaged in unlawful conduct or not.

11 SENATOR VULAKOVICH: Because you
12 won't have subpoena power.

13 MR. DONAHUE: Right.

14 SENATOR VULAKOVICH: Okay, but, if
15 we pass this piece of legislation, then that
16 could be something that you would be
17 involved in? I guess what I'm looking at
18 here is, are we going to have an issue here
19 with what the Department of Insurance does
20 as opposed to what you guys do? Or is it a
21 balancing effect that is good? I don't
22 know.

23 MR. DONAHUE: First, we do work with
24 other state agencies and in all of these
25 hospital transactions I've been talking

1 about, we have worked closely with the
2 Department of Health, Department of State
3 and the Insurance Department. And we've
4 reached out, to them, you know, some of these
5 issues, especially when we get into these
6 sort of modern type of transactions like
7 Highmark West Penn or the fact that UPMC,
8 you know, largely a hospital system has now
9 gotten into the insurance business. You
10 know, there have been arguments made by some
11 of these companies that their activities and
12 their activities outside of the pure
13 business of insurance is outside the
14 jurisdiction of the Insurance Department.
15 So, what we have done, you know, in the past
16 over the years, not just, you know,
17 recently, but over the years we've worked
18 with the Insurance Department. When we've
19 had a case which involves insurance, we've
20 talked to them about it. So I would
21 envision that we would continue to work with
22 the Insurance Department if we were to
23 conclude that there was something that we
24 needed to take action on in Western
25 Pennsylvania.

1 SENATOR VULAKOVICH: One other
2 question, have you talked to the Insurance
3 Department--since a lot of this what you've
4 talked about here today in your testimony
5 does involve a really new area with
6 insurance companies and providers of
7 healthcare being in the same business, you
8 know, we have Geisinger and UPMC over here
9 and now we have a new one and they're
10 literally across street from each other.
11 So, you know, I tried to follow all of that
12 when the insurance (indecipherable 35:40)
13 doctors uncovered. Hospital's uncovered.
14 Get paid out of plan. And before I did the
15 piece of legislation over the hospital, I'm
16 trying to decide here, is this something
17 that we stick our nose into, this business
18 area? But you've got two or three people,
19 two or three million people that have
20 Highmark and all of a sudden you have the
21 major provider or the major insurer and then
22 you have the major provider. And now, all
23 of this is coming together in a gray blurry
24 area. And it seems to me like something's
25 going to blow up here. And so my question

1 is, the insurance company, I would think
2 that because you spent a lot of time talking
3 about the possibility of insurance here with
4 the exemptions and a piece of, I guess, a
5 court ruling; is it possible to have a
6 discussion with the Insurance Department to
7 say, do they see something here that could
8 cause a problem?

9 MR. DONAHUE: We communicate with
10 the Insurance Department all the time. And,
11 you know, especially with issues like the
12 high profile issues that are occurring in
13 Western Pennsylvania.

14 SENATOR VULAKOVICH: Okay and? And?

15 MR. DONAHUE: And, you know,
16 the--we've--I guess I'll say, we continue to
17 work together. I don't know what else I can
18 say there.

19 SENATOR VULAKOVICH: Alright, okay.

20 Thank you.

21 SENATOR GREENLEAF: Senator
22 Rafferty?

23 SENATOR RAFFERTY: Thank you, Mr.
24 Chairman, I'll be brief. I didn't practice
25 antitrust law and I'm fascinated by some of

1 the questions that Senator Larry Farnese
2 came up with it and found it very
3 interesting, but what I do know is I
4 happened to be presiding at the
5 Appropriations Hearing a few years back at
6 the request of the chairman when the then
7 Attorney General Linda Kelly was speaking
8 about the budget for the Attorney General's
9 Office. And Senator Lisa Baker began to
10 question her about antitrust statute and
11 antitrust section, concerned about some of
12 what was occurring within Pennsylvania. And
13 Linda Kelly I thought gave a very direct and
14 very forthright answer. And said, I
15 especially need it as we see in the
16 healthcare industry more and more mergers
17 occurring. And it would be very helpful to
18 us as we have to review these hospital
19 mergers and health care mergers that we're
20 able to obtain some of that information
21 before we have to render a decision. I have
22 the utmost respect for today's Attorney
23 General Kathleen Kane and I'm taking as an
24 inference for her wanting the same authority
25 and abilities you being here that she's

1 supportive of an antitrust statute as well.
2 And it seems that we do find, first of all,
3 I'm supportive of it. . And I think that we
4 do find and have found and continue to find
5 funding when we want in this building for
6 the Attorney General's Office. In fact, I'm
7 one who every year I've been in this
8 building have advocated for additional
9 funding for the Attorney General's Office
10 and did so again this year for Attorney
11 General Kane. I know 253 people will be
12 saying they did it if she gets additional
13 funding in the budget. But there are a few
14 of us who do advocate for the Attorney
15 General and I will join with Senator Farnese
16 on the question about the courts. But it
17 seems that we also find funding mechanisms
18 for the courts when we need to do so here in
19 the Commonwealth. Whether it's direct
20 funding or giving them a share of traffic
21 fines, we're able to pump money into the
22 courts. And I think that we would be
23 willing to do that. Because the bottom line
24 for me, we're protecting the public. If
25 there's an antitrust action, I understand

1 insurance companies and the businesses and
2 the hospitals. I know everybody's coming up
3 here to talk about that afterwards. The
4 bottom line for me is, if there is an action
5 taken, the goal is to protect the public.
6 And that's something that we're to do as
7 legislators, you're to do as the
8 attorney--well, Kathleen Kane is to do as
9 the Attorney General, her office is to do
10 and I think you're performing it well. And
11 Linda Kelly wanted to do as Attorney General
12 as well. This is twice now I've heard it
13 from the AG's Office the need for the
14 statute. So I'll be supportive of it. And
15 I'll continue to work--if that grows if we
16 need additional funding, I'll continue to
17 work on that as well. But I'm very
18 interested in working with Senator Greenleaf
19 and the members of the committee on some of
20 the additional aspects of it and funding
21 aspects of it, but I think what we can do to
22 promote public protection is in our best
23 interest in this building and I will be
24 supportive of the legislation. Thank you,
25 Mr. Chairman.

1 SENATOR GREENLEAF: Senator Gordner?

2 SENATOR GORDNER: Thank you, just a
3 couple of questions. One, in the proposed
4 bill there is a provision that says that
5 ~~there is no statute of limitations for any~~
6 ~~civil~~ action for the recovery of damages.
7 Many states do have a statute of
8 limitations. I believe at the federal
9 level, there's a four year. Does the
10 Attorney General say that you need that? Or
11 would you be willing to discuss an amendment
12 that would put some reasonable statute of
13 limitations on that provision?

14 MR. DONAHUE: Well, let me be clear,
15 there is a statute of limitations for all
16 claims except for claims on behalf of
17 Commonwealth agencies. And the reason there
18 is no statute of limitations on behalf of
19 the claims the Commonwealth may have is that
20 we've incorporated the normal principle of
21 time doesn't run against the King. So
22 unless expressly excluded by statute, there
23 is no statute of limitations generally on
24 any claim the Commonwealth might have on
25 behalf of its agencies for, you know,

1 violations of law that impact them. So, I
2 just want to be clear that it's not a broad
3 across the board, there's no statute of
4 limitations. And it's not something really
5 different than applies in other
6 circumstances. It's, we're applying that
7 principle that exists across, you know,
8 across the board. But in terms of whether
9 if it, you know, making it consistent with
10 the federal statute which does have a four
11 year statute of limitations with a couple
12 extenders in there, that's not a problem for
13 us.

14 SENATOR GORDNER: Okay, again, you
15 ~~say in your~~ testimony you do a lot of things
16 ~~under common law now.~~ Under what you're
17 doing under common law, is there a statute
18 of limitations in regard to these types of--

19 MR. DONAHUE: Not to a claim--under
20 common law, there would be a statute of
21 limitations because there's a general
22 statute of limitations for a claim on behalf
23 of a consumer. So let's say, the case we've
24 been talking about, the municipal bond
25 derivatives. So one of the--even though

1 they're called municipal bonds, like the
2 Turnpike Commission, some state agencies
3 issue these municipal bonds. That's the
4 same the IRS gives to them even though
5 they're not issued by municipalities,
6 but--so their claim, if we were to assert
7 those claims under common law, there would
8 be no statute of limitations for a common
9 law claim a state agency would have as a
10 victim of bid rigging. That's the status of
11 the law currently.

12 SENATOR GORDNER: Okay, let me also
13 talk about the indirect purchaser section
14 here which I believe not all states that
15 have antitrust laws have. Can you give me
16 the arguments why that would be necessary
17 for a final version of this?

18 MR. DONAHUE: The principal reason
19 that would be necessary is that there has
20 been a considerable amount of
21 anti-competitive activity among
22 manufacturers, especially foreign
23 manufacturers. And the only way we can
24 reach them is with an indirect purchaser
25 statute. You know, a price increase in a

1 component of a, you know, of a computer or a
2 car or that sort of thing, that gets passed
3 onto us. But we don't, we currently don't
4 have the ability to go out for that. And
5 the majority of states now currently have
6 that ability to, you know, get those
7 damages.

8 SENATOR GORDNER: Okay and I'm going
9 to go ahead and ask this question, if this
10 legislation passes and this Attorney General
11 has the ability to use this, does--is it the
12 intent of this Attorney General to take on
13 this as a major emphasis of her tenure in
14 office?

15 MR. DONAHUE: The--I think the
16 Attorney General has said that, you know, I
17 think she's listed a wide range of
18 priorities. You know, protection of
19 children, protection of the elderly and
20 increasing antitrust enforcement and a
21 number of other things. So this would be
22 one of her priorities. But it wouldn't be,
23 you know, the priority. There are a whole
24 list of things that she has said that are
25 extremely important that she would like to

1 focus on.

2 SENATOR GORDNER: Thank you.

3 SENATOR GREENLEAF: Any other
4 questions? Thank you so much for being here
5 today. Thank you. Okay, our next witness
6 is Scott Dupree of counsel, Shook, Hardy and
7 Bacon LLP and Samuel Denisco, Vice President
8 Government Affairs, Pennsylvania Chamber of
9 Commerce. Gentlemen, thank you for being
10 here today, please take a seat and there's
11 two microphones there. So make sure they're
12 on when you speak. I know there's a button
13 at the bottom of the base of the microphone.

14 MR. DENISCO: Thank you, Mr.
15 Chairmans. Sam Denisco with the
16 Pennsylvania Chamber. In the interest of
17 time, I know we're running behind, I'm going
18 to defer to Mr. Dupree who is going to
19 deliver his testimony on behalf of the
20 Pennsylvania Chamber.

21 MR. DUPREE: Mr. Chairman, members
22 of the committee, thank you for the
23 opportunity to testify today on behalf of
24 the chamber regarding SB 848. My name is
25 Scott Dupree. I practice commercial law and

1 corporate law with Shook, Hardy and Bacon.
2 We have an office in Philadelphia, but I
3 actually reside in the Kansas City office.
4 Although, I do represent clients that are
5 nationwide employers that operate throughout
6 the country. Oh, I believe so, yes, sir.
7 I'm sorry, I'm sorry. I--yeah, I'm very
8 sorry about that. I'm actually--well, I'll
9 try to click my heels three times and maybe
10 we'll get back there. But actually I'm
11 having a little bit of trouble speaking as
12 well because I'm either wrestling with a
13 cold or allergies.

14 SENATOR GREENLEAF: Take your time.

15 MR. DUPREE: My apologies. I
16 actually was first admitted to practice a
17 quarter of a century ago. And during most
18 of that time, I've spent the better part of
19 my time advising clients and litigating
20 claims that relate to antitrust issues. It
21 forms a significant part of my practice.
22 And, in fact, in the first couple of years
23 out of law school, I worked in the General
24 Counsel's Office of the U.S. Federal Trade
25 Commission where I gained an appreciation

1 for the objectives of antitrust law to
2 promote competition, vigorous competition
3 while enhancing the welfare of consumers.
4 With that in mind, for--with those
5 objectives in mind, I have serious concerns
6 about Senate Bill 848. And I've tried to
7 detail them at some length in the written
8 testimony that I've provided. In the
9 interest of time and to avoid boring you
10 all, I'm not going to read that testimony,
11 but I would like to hit the high points.
12 And there are four major objections that I
13 have cited in that testimony. The first is
14 that, in essence, notwithstanding the fine
15 testimony of the Office of the Attorney
16 General, ~~this appears to be a bill that~~
17 ~~creates a solution in search of a problem.~~
18 As the Attorney General representative duly
19 noted, they've done an outstanding job of
20 bringing actions under the federal antitrust
21 laws because ~~the federal antitrust law~~
22 ~~already provide them with authority to bring~~
23 ~~direct triple damages actions, injunctive~~
24 ~~actions parens patriae actions on behalf of~~
25 the residents of the Commonwealth. As the

1 first several pages of their testimony
2 recount in some detail, they have been
3 enormously successful in obtaining
4 substantial judgments and settlements on
5 behalf of the Commonwealth and its residents
6 for a great period of time. The statute
7 ~~itself~~, the substantive violations
8 enumerated in the statute essentially
9 parallel those that already exist under
10 federal law. Now, I notice that he did
11 refer to the RPM provision and he's
12 referring to a change in federal law that
13 occurred not too long ago called the ~~Legdon~~
14 ~~Decision~~ (sic). The only change that that
15 law created was to rather than make resale
16 price maintenance claims ~~per se~~ unlawful, it
17 applied the so called ~~rule of reason~~ so that
18 basically courts were required to analyze
19 the economic effects of relationships
20 between different parties at different
21 stages of the chain of distribution. And
22 the purpose of that, again, is to promote
23 consumer welfare. Now, it's not clear to me
24 based on the way this statute is worded that
25 this statute would change that rule. But

1 apparently, from what I understand from the
2 Office of the Attorney General, that's their
3 intent. So, that's my first major point.
4 My second major point is that this bill will
5 substantially increase the potential
6 liability of persons doing business in the
7 Commonwealth of Pennsylvania without
8 substantially benefitted consumers in
9 Pennsylvania. On the first point, the
10 representative of the Office of Attorney
11 General noted that--and correctly, that
12 this, the statute will--would authorize
13 indirect purchaser claims. Which are not
14 authorized under federal law. And let's
15 talk about that for a minute. You know, we
16 throw around these antitrust terms of our
17 direct purchaser, indirect purchaser. So
18 what are we talking about? Direct
19 purchasers are persons who deal directly
20 with--purchase directly from an alleged
21 antitrust violator. They absorb the entire
22 amount of any price fixing overcharge. They
23 sometimes pass, they certainly try to pass
24 along that overcharge to others further
25 along in the chain of distribution. And

1 those persons who are more remote from the
2 antitrust violator are called indirect
3 purchasers. They are--they tend to be
4 ultimately anywhere from--well, at some
5 level they are either wholesalers or
6 consumers. And so, they absorb a smaller
7 amount of the overcharge to the extent the
8 overcharge is even passed along to them.
9 And so, as a result under federal law,
10 federal law only recognizes remedy on behalf
11 of direct purchasers for three reasons.
12 First, understandably, if you recognize
13 indirect purchaser claims, you inevitably
14 create an increased risk of duplicative
15 liability by an antitrust defendant for the
16 very same conduct for the very same
17 overcharge that's passed down from level to
18 level in the chain of distribution. Second,
19 you increase the complexity of antitrust
20 litigation. And in the process, which you
21 can easily understand because you're
22 involving a lot more hogs at the trough--if
23 I can use a Kansas expression--in
24 prosecuting these claims and in allocating
25 the harm among persons in that chain of

1 distribution. And in the process of doing
2 that, you are protracting the litigation and
3 making it more costly. Thirdly, the direct
4 purchasers do have the best incentive to
5 bring antitrust claims to vindicate the
6 antitrust laws as private Attorneys General.
7 Now, I heard the representative of the
8 Office of Attorney General discount that
9 claim. But, I'll tell you what, in
10 representing antitrust defendants in
11 litigation, I have never found direct
12 purchasers to be reluctant to bring
13 antitrust claims where they think that
14 they've been wronged by antitrust conduct.
15 And in fact, with the increased emphasis in
16 in-house counsel shops in being able to
17 justify their existence as--if they can--as
18 profit setters. Not just a cost, but a
19 profit setter for their companies, in-house
20 counsel are constantly looking for
21 opportunities to bring claims just like this
22 as direct purchasers in order to show that
23 they can actually add to the bottom line of
24 their companies. So, I just don't buy it,
25 buy the notion that direct purchasers are

1 . reluctant somehow to enforce the antitrust
2 laws. This bill incorporates all those
3 complexities. And then, it goes, one
4 further. Because it does not indicate
5 whether or if so how an antitrust defendant
6 could defend itself against the indirect
7 purchaser claims by arguing the so called
8 pass on defense. That is, if you as an
9 indirect--as a direct purchaser or as a
10 wholesaler, for example, pass on all or part
11 of your overcharge from price fixing scheme,
12 for example, well, were you even harmed
13 then? You've been made whole by passing on
14 that overcharge to someone else further down
15 in the chain of distribution. Can an
16 antitrust defendant defend by asserting that
17 pass on defense? Under federal law, you
18 cannot. And that's part of the reason why
19 out of fairness federal law does not
20 recognize indirect purchaser claims. It's
21 not clear under this statute whether or not
22 that defense would be recognized. And that
23 creates a number of problems that I've
24 described in more detail in the written
25 testimony that I won't go into right now.

1 But I'd be happy to answer questions about.
2 The flip side of that--I'm sorry, I don't
3 want to preempt you, did you have a
4 question? Oh, I'm sorry. I'm sorry. The
5 flip side of that is, it's not clear to me
6 that consumers actually gain from this. The
7 representative of the Office of the Attorney
8 General said, well, you know if you're not
9 violating the antitrust laws, you've got
10 nothing to fear from this. And therefore,
11 businesses shouldn't be concerned about this
12 bill. But that's not exactly the case.
13 This will ultimately inevitably as Justice
14 White recognized in the ~~Illinois-Brick~~^{Illinois-Brick}
15 decision and for a number of reasons
16 enumerated in my written testimony lead to
17 an inevitable increased risk in duplicative
18 liability by anybody who is the subject of
19 an antitrust claim. It also creates a
20 certain coercive effect, let's face it, the
21 indirect purchaser part of it in particular
22 to settle those claims. That inevitably is
23 an additional cost of doing business in
24 Pennsylvania. And like any other cost of
25 doing business, a rational business is going

1 to ultimately factor that into the price of
2 the goods that the consumers pay. So,
3 consumers pay more, what do they get out of
4 this bill? The Attorney General can bring
5 ~~parens patriae~~ claims on their behalf. The
6 Attorney General doesn't have to prove that
7 anyone in particular was injured under
8 Section 906 as long as they can come up with
9 a statistical method that a court is willing
10 to buy off on. And then, if the Attorney
11 General wins a judgment or a settlement
12 under this bill, then under 905A, they can
13 take their attorneys fees and costs or the
14 attorneys fees and costs of any counsel that
15 they hire to bring these claims off the top.
16 And then, simply donate the rest to a
17 charitable organization that is in good
18 standing with the Department of State
19 anytime that they feel that it's just too
20 difficult to identify people who are
21 actually harmed. In the words of the
22 statute any time they determine that it's
23 economically impractical to identify people
24 who are actually harmed by the alleged
25 conduct. So at the end of the day, the

1 lawyers make out good. .And as a lawyer I
2 kind of like the sound of that. But the
3 lawyers make out good, it's not clear that
4 consumers actually benefit from this
5 statute. So that's my second point. I'll
6 brush over the other two points very
7 quickly, but I'm happy to answer questions
8 on them. The third point is that this
9 admittedly as the representative of the
10 Attorney General's Office testified to at
11 length does enhance the authority and powers
12 of the Attorney General, the investigative
13 powers of the Attorney General. But, it
14 doesn't really provide significant
15 safeguards or limitations on the exercise of
16 that power. In that sense, I believe,
17 although I must confess, I haven't done a 50
18 state survey in anticipation of this
19 testimony. But, I believe that the
20 investigative provisions of this bill may be
21 out of step with the provisions that you
22 typically find in other state's laws. For
23 example, just to throw out one which is in
24 the testimony, it is often the case that an
25 Attorney General has to show--well, not has

1 to show, but has to have reasonable cause to
2 believe that an antitrust violation has
3 occurred before initiating an investigation.
4 And that's important because that frames
5 then his authority to issue compulsory
6 process for all these documents that Senator
7 Farnese pointed out are a typical byproduct
8 of these types of investigations. There
9 are--there's simply no similar sort of
10 ~~investigation~~ investigation under this bill. And once the
11 Attorney General decides to open an
12 investigation for any reason, the bill
13 provides the Attorney General with
14 significant flexibility--virtually--virtual
15 discretion to seek documents including very
16 sensitive documents that are from any person
17 who may have--who the Attorney General
18 believes may have information that may be
19 relevant to that investigation. In
20 addition, the bill exposes sensitive trade
21 secret proprietary, confidential, commercial
22 and privileged information to disclosure.
23 There's nothing in the bill that
24 acknowledges the ability or the right of a
25 target of a subpoena to assert any privilege

1 . . . or to withhold any trade secret information.
2 There's nothing in the bill that provides
3 any mechanism for challenging a subpoena as
4 being beyond the authority of the Attorney
5 General or as violating privilege or as
6 requiring disclosure of trade secrets or
7 whatnot. In fact, Section 908 of the bill
8 appears to contemplate that trade secrets
9 would be disclosed and may be disclosed by
10 the Attorney General in open court. That in
11 itself raises potential takings issues that
12 may require compensation to the owner of the
13 trade secret if trade secret is destroyed by
14 disclosure in open court. There are a
15 couple of protections in the bill, but
16 they're minor. For certain confidential
17 information, I've described the limitations
18 on those protections in the written
19 testimony. My final point is the point that
20 one of the Senators made with respect to the
21 elimination of the statute of limitations
22 with respect to actions brought on behalf of
23 the Commonwealth. And I have to take off my
24 glasses to read this. The explanation for
25 this is that, as I understand it from the

1 Office of the Attorney General, that time
2 doesn't run against the King. Which reminds
3 me of Mel Brooks' statements that it's good
4 to be the King, at least in Pennsylvania.
5 Because the King in federal law doesn't
6 enjoy that protection. The statute of
7 limitations I believe does--correct me if
8 I'm wrong--but I believe the statute of
9 limitations does apply under federal law
10 against the Department of Justice on federal
11 antitrust claims. This provision--and it
12 sounds like you may have made some headway
13 on this one today and found some flexibility
14 in the Attorney General's Office on this.
15 But this provision if left intact would
16 allow claims on behalf of the Commonwealth
17 to survive claims on--with respect to the
18 same conduct under federal law. Claims
19 against any other entity or person in the
20 Commonwealth. And to survive well beyond
21 any period of time that evidence may
22 continue to be available for a fair trial of
23 these claims. So that in a nutshell--and I
24 apologize, I went on a little bit longer
25 than I had intended to.

1 SENATOR GREENLEAF: That's okay. We
2 want you to have your say and Senator
3 Farnese I believe has some questions.

4 SENATOR FARNESE: Very quickly and I
5 have to run somewhere else. Two issues.
6 First--and I'll go backwards--the ambiguity
7 with the indirect purchaser language in the
8 statute in allowing the potential defenses
9 that are not available under the federal
10 law. Do you feel that with some additional
11 work on the statute at this phase, that
12 could be remedied to be more clear so that
13 it mostly mirrors what is in the federal
14 law? And number two is, the investigation
15 power of the Attorney General. And I think
16 some of your concerns were subjecting
17 businesses or manufacturers to coercion or,
18 you know, increased use of subpoenas to get
19 information. In Pennsylvania, we have
20 something called a rule to file a complaint.
21 Which basically, you know, there is
22 sometimes there's discovery in anticipation
23 of litigation. But at some point, if you're
24 the defendant, you can file a rule and
25 basically force the defendant--the moving

1 party to file a complaint within a certain
2 time or it's--the claim is thrown out.
3 They're barred. Would not that apply here
4 to sort of protection? I mean, those
5 consumers, if you're going to be in state
6 court, would you not have that protection?
7 And why wouldn't you?

8 MR. DUPREE: Well, let me start with
9 the first question which was about the pass
10 on--

11 SENATOR FARNESE: I have to roll, so
12 you have to--

13 MR. DUPREE: Okay, I'll be very
14 brief. I have actually addressed or tried
15 to address the pass on issue in the written
16 testimony. I don't think, respectfully, the
17 bill can be massaged to address that because
18 you end up with situations, for example,
19 where say a Pennsylvania distributor passes
20 along the full amount of the overcharge to a
21 consumer in another state. Well, then, what
22 happens there in terms of calculating
23 whether or not there's been any damage? How
24 do you account for that in determining
25 whether someone was harmed in Pennsylvania?

1 And the amount of the overcharge. With
2 respect to the second issue, you're not
3 going to like this answer, I'm just not
4 familiar enough with Pennsylvania Law to be
5 able to say. And I apologize for that. I
6 just don't know enough about Pennsylvania
7 procedure to be--

8 SENATOR FARNESE: We do have a
9 procedure in Pennsylvania that allows a
10 defendant to basically start the clock
11 running. You file a rule to file a
12 complaint which is some of the protections
13 that are afforded under state law. So we
14 can look at that further, but if you want
15 to, since you don't know about it's--

16 MR. DUPREE: I apologize for that.
17 But it does occur to me that the flip side
18 of that is, well, with respect to access to
19 information, the Attorney General's Office
20 has already conceded that they do have some
21 abilities under some other state laws to
22 obtain access to information. And then, in
23 addition, in multi-state actions, of course,
24 in my experience any way being on the other
25 side of those when the National Association

1 of Attorneys General put together cases, I
2 know there's extensive information sharing
3 and basically they tend to go with--it
4 seems--with the state law's, discovery under
5 the state laws that are the most aggressive.
6 And so, they simply go ahead and provide
7 that information to one another. So I'm not
8 convinced that that's a limiting issue.

9 SENATOR FARNESE: Thank you, very
10 much. Thank you, Mr. Chairman.

11 MR. DUPREE: Thank you.

12 SENATOR GREENLEAF: With regard to
13 the issue that Pennsylvania could bring
14 antitrust claims under the federal antitrust
15 statute which they do now.

16 MR. DUPREE: Yes, sir.

17 SENATOR GREENLEAF: But, there's
18 some limitations, you would admit, to doing
19 that. For example, the subpoena power and
20 other issues that are associated with them
21 hindering them to pursuing the claim fully.

22 MR. DUPREE: Well, I'm not sure I
23 fully agree with that position. I don't
24 think that there are any limitations with
25 respect to, well, let me back up. That's

1 too broad a statement. There are some
2 limitations on bringing actions under
3 federal law. If, in a very rare instance,
4 you had conduct and persons, all of which
5 occurred exclusively in Pennsylvania, then
6 you might have an antitrust claim that fell
7 outside the very broad reach of the commerce
8 clause. And that might fall out of--outside
9 of the federal antitrust laws. I'm not sure
10 that that's a limitation. Because I didn't
11 hear that as being a problem in anything
12 that the Attorney General's Office said.
13 Secondly, the limitation that we've
14 discussed at length here admittedly,
15 indirect purchaser claims. But there's a
16 reason for that limitation. And the
17 reasons, I've already discussed with respect
18 to the Illinois-Brick case. The third is
19 with respect to the issue that you raise
20 with respect to obtaining information. And,
21 you know, I guess the limitation there is
22 the same limitation that--on one level it's
23 the same limitation that any litigant faces
24 in any court case. You file a lawsuit and
25 you seek discovery. Then, you know, you

1 couple of the states that--I'm not sure, I
2 think Wyoming has a law that it's very
3 rudimentary. And I'm not sure--it's
4 definitely not a comprehensive state
5 antitrust law. I think South Carolina has
6 an antiquated trust law. I'm not sure if
7 they've enacted something more current. So
8 for purposes of discussion, I'm willing to
9 concede the point, but I'm not sure that
10 that's entirely accurate.

11 SENATOR GREENLEAF: But at least the
12 vast majority of them.

13 MR. DUPREE: Yes, that's true.
14 That's true.

15 SENATOR GREENLEAF: Okay and in
16 Kansas, the State of Kansas has antitrust
17 law?

18 MR. DUPREE: Yep, you bet, uh-huh.

19 SENATOR GREENLEAF: And in those,
20 the States of Kansas or some other states,
21 I'm sure you don't know the aspects of every
22 state statute. But maybe Kansas, they have
23 a subpoena power?

24 MR. DUPREE: They do. It's limited
25 to situations where the Attorney General has

1 reason to believe that an antitrust
2 violation has occurred. And then, once that
3 reason to believe has been established, then
4 there are--there's the opportunity to seek
5 information that's relevant to the scope of
6 that investigation. I don't remember the
7 exact language.

8 SENATOR GREENLEAF: But they do have
9 the right to have the subpoena power.

10 MR. DUPREE: They have the right to
11 subpoena power. They also have pretty
12 significant protections to try to protect
13 the targets of that subpoena power.

14 SENATOR GREENLEAF: That gets to
15 another question, but before--well,
16 let's--okay, let me ask you this one then
17 we'll go back to the other one.

18 MR. DUPREE: Fair enough.

19 SENATOR GREENLEAF: The protection,
20 is there, there's a procedure to suppress or
21 quash a subpoena? Isn't that a normal
22 proceedings that you can bring to quash a
23 subpoena?

24 MR. DUPREE: That's a good question
25 and I don't know the status of that under

1 Pennsylvania Law and I apologize. I do know
2 that one basis that is often asserted for
3 quashing an investigative subpoena is that
4 it exceeds the authority of the Attorney
5 General to issue that subpoena. ~~The problem~~
6 ~~with this legislation~~ is that there are no
7 ~~limitations~~ on that authority. So, there's
8 virtually no basis for trying to quash a
9 subpoena. At least on that basis. And I'm
10 not clear based on the way the statute is
11 worded whether there would be a basis for
12 quashing a subpoena that sought trade
13 secrets or privileged information. Because
14 it's very broad in terms of, I believe it's
15 908 B in terms of the Attorney General's
16 ability to use trade secrets or other highly
17 confidential information.

18 SENATOR GREENLEAF: Well, in the
19 procedures to quash, you can raise those
20 issues and set forth what your grounds are
21 for quashing it. And if they've exceeded
22 their authority. Or they've done some other
23 activity or been vexatious in their pursuit
24 of their cause or numerous other things a
25 genius attorney such as yourself could come

1 up with. Maybe you've even done that. Have
2 you ever filed a petition to quash the
3 subpoena?

4 MR. DUPREE: You bet. You bet. And
5 I can tell you it's very difficult to quash
6 investigative subpoenas.

7 SENATOR GREENLEAF: Have you been
8 successful?

9 MR. DUPREE: Trying to think. I've
10 been successful in limiting the scope, but I
11 don't recall a situation where I've
12 successfully outright quashed an
13 investigative subpoena.

14 SENATOR GREENLEAF: Well, that's an
15 extreme victory, I guess, or accomplishment
16 I guess to quash a subpoena.

17 MR. DUPREE: Well, it is. And I
18 keep in mind in those instances again the
19 Attorney General or the Federal Trade
20 Commission which also has civil and
21 investigative power, civil and investigative
22 demand power, they're--the scope of their
23 authority is limited by statute. In other
24 words, they have to establish a reason to
25 believe or they have to find a reason to

1 believe that an antitrust violation has
2 occurred. And so you actually--in taking
3 the hypothetical that you've presented in
4 bringing a motion to quash a subpoena based
5 on exceeding one's authority, well, you have
6 to say what that authority is in the first
7 instance. There's nothing in this bill that
8 does so. So you'd be left without even a
9 fig leaf in the garden of Eden, I'm afraid.

10 SENATOR GREENLEAF: Well, you could
11 argue that then opens the door even more by
12 saying they're not authorized then too.

13 MR. DUPREE: Well, but isn't it the
14 function--wouldn't it be better to provide
15 guidance to the Commonwealth Courts with
16 their very limited resources as Senator
17 Farnese pointed out to let them know what is
18 authorized here. I mean, it seems to me
19 that if I'm a Judge in a Commonwealth Court
20 and I get this investigative subpoena and a
21 motion to quash an investigative subpoena,
22 well, if I don't find anything in the
23 legislation, I'm not going to want to deal
24 at length with it because my resources are
25 limited anyway. And I'm sure not going to

1 want to parse a room full of documents or
2 come up with some sort of in camera review
3 process to decide what's in and what's out.
4 So the natural inclination--and it's the
5 human response to that kind of a situation .
6 would be to simply let the thing go. In
7 other words, to have standardless or
8 essentially standardless subpoena power.

9 SENATOR GREENLEAF: I don't disagree
10 with you on that, I'm just questioning you
11 about the general principle of it.

12 MR. DUPREE: Sure.

13 SENATOR GREENLEAF: And, in fact, of
14 all parties here, we do intend to follow up
15 after this hearing and to review all the
16 comments and then to reach out to the
17 parties to see what we can do to develop
18 issues that are valid concerns and to
19 address them through the legislation and
20 amendment process. (Inaudible 76:00) things
21 I suppose that could also limit the--going
22 back to the issue about the Pennsylvania can
23 enforce their antitrust laws under federal
24 antitrust statues, that the U.S. Attorney
25 would have--they would have the right to

1 decide not to bring a case for a variety of
2 reasons. Such as, let's say it doesn't meet
3 their threshold as far as a breadth. And
4 they're looking--or all types of things that
5 they could determine not to bring it,
6 although there may a very valid question or
7 case that the State Attorney General's
8 Office would like to pursue because they
9 have a particular interest in this.

10 MR. DUPREE: And under those
11 circumstances, I believe the State Attorney
12 General could simply bring its own lawsuit
13 under the federal antitrust laws.

14 SENATOR GREENLEAF: Under the
15 federal--

16 MR. DUPREE: Under the federal
17 antitrust laws.

18 SENATOR GREENLEAF: But then, they
19 have the same problems they have before
20 about subpoenas and all the rest of the--

21 MR. DUPREE: Once they file suit,
22 they've got all the other subpoena powers of
23 any other litigant.

24 SENATOR GREENLEAF: But the issue
25 was--

1 MR. DUPREE: I'm sorry.

2 SENATOR GREENLEAF: I guess what I'm
3 asking is the fact that there are times when
4 they may want to bring an action themselves
5 under their own statute that--and the
6 Federal Attorney General opts out to do it
7 and they would have some difficulty there.
8 Senator Vulakovich?

9 SENATOR VULAKOVICH: Thank you, Mr.
10 Chairman. In line with the questioning on a
11 subpoena.

12 MR. DUPREE: Yes, sir.

13 SENATOR VULAKOVICH: I guess it's
14 kind of broad, you're suggesting as far as
15 it's almost like you could subpoena anybody.
16 Is it a question like as far as whatever
17 legal terms would fit in here, like a mere
18 suspicion? As opposed to a reasonable
19 suspicion that there's something that may be
20 you know going wrong here? I mean, should
21 subpoena be more defined as to the quality
22 of why you suspect that they have something
23 that you should need--

24 MR. DUPREE: I believe so. I
25 believe that's the minimum--really, the

1 minimum protection that any of these
2 investigative state statutes provides. And
3 everything the protections then tend to be
4 layered on top of that in my experience.

5 SENATOR VULAKOVICH: And as far as
6 Kansas City, the State of Kansas goes with
7 their antitrust law, do you have an opinion
8 on that as far as, is that too far? Or?

9 MR. DUPREE: Well, I mean, just like
10 the Attorney General's Office would like to
11 have a law that favors it in Pennsylvania, I
12 guess when I defend cases on behalf of
13 antitrust defendants, I'd rather have one
14 less statute to defend under. But I think
15 that they've done--I'd have to give that
16 some thought. But you know, I don't
17 have--the statute was recently amended to
18 make it--to improve it. Under the statute
19 that existed--so, I guess the short answer
20 is that every one of these statutes has
21 issues with them that we'd do well to take a
22 close look at. But, I know that the statute
23 was recently amended just this year to deal
24 with some issues under it. And it is
25 improved. It isn't perfect, but it's

1 probably a little bit better in terms of
2 providing a more level playing field than
3 what this bill would provide. I don't know
4 if that--that's probably not a very good
5 answer and I apologize.

6 SENATOR VULAKOVICH: Okay, thank
7 you.

8 MR. DUPREE: You bet.

9 SENATOR GREENLEAF: Thank you so
10 much for being here today and for your
11 information and we look forward to working
12 with you in the future. Thank you.

13 MR. DUPREE: Thank you, I appreciate
14 the warm reception.

15 SENATOR GREENLEAF: The next witness
16 is Charles Beckley, II, Board Counsel,
17 Pennsylvania Manufacturers Association. I
18 don't want to curtail anybody's comments,
19 but we are supposed to be in session in 20
20 minutes. We'll stay, but because we do want
21 to hear what you have to say too. Do you
22 have written comments?

23 MR. BECKLEY: Yes, first of all, my
24 name is Charlie Beckley. I'm a lawyer with
25 Beckley and Madden here in Harrisburg and we

1 act as general counsel to the Pennsylvania
2 Manufacturers Association. I'm here today
3 to express PMA's opposition to this bill.
4 To echo comments of Mr. Dupree, we think
5 that this is, in effect, a solution
6 searching for a problem. And I'm just going
7 to hit two points. And then, if you have
8 questions, I'll try to address those. The
9 two points--three points. The first point
10 is; ~~the Attorney General has antitrust~~
11 ~~powers already under the parens patriae~~
12 ~~provision of the Hart Rodino Act.~~ So, the
13 Attorney General can get involved in
14 investigating mergers. The Attorney General
15 can bring suits in Federal Court under the
16 ~~federal antitrust law.~~ The other two points
17 I want to make is; I want to talk about this
18 subpoena power. Because in our view,
19 that's--you have to understand from a
20 business's perspective, an antitrust suit is
21 a bet the company type litigation. It's
22 wildly expensive. And it really can--it can
23 mean the difference of staying in business
24 and going out of business. And so,
25 businesses take antitrust suits very

1 seriously because of the cost of it. This
2 subpoena power that's set up, in our view,
3 is just an invitation to an unbridled
4 exercise of investigative power in the
5 context of what can be simply a fishing
6 expedition. Now, I want to address, Mr.
7 Senator Farnese's question about
8 Pennsylvania procedure: Couldn't a business
9 who gets targeted use--file a rule against
10 the Attorney General's Office to file a
11 complaint and get the case moving? Well,
12 the answer to that is no. And the reason
13 it's no is, in order for you to be able to
14 rule someone to file a complaint, you have
15 to actually be in court. And the problem
16 is, with this investigative subpoena power,
17 nobody's going to court yet. And so,
18 there's no way to compel this case to get
19 off the dime. So that, the business that is
20 a target of the subpoena could be just the
21 subject of sort of endless requests for
22 documents. But it goes beyond request for
23 documents. Because witnesses can be
24 subpoenaed. So it's really full scale
25 discovery. I think Mr. Donahue referred to

1 it as pre-complaint discovery. In the
2 rules, in the Pennsylvania rules, it might
3 be referred to as discovery in aid of
4 pleading. But it's really general discovery
5 is allowed before any lawsuit has been
6 filed. And that's a big change in the way
7 commercial litigation is practiced in the
8 Pennsylvania. And I don't think it's a
9 positive change. And Senator Greenleaf, in
10 response to your questions about the motions
11 to quash and so forth, the bill does provide
12 that the subpoena process is going to be
13 subject to the Pennsylvania Rules of Civil
14 Procedure. Rule 234.4 is the rule that
15 gives a defendant or someone with whom--upon
16 whom a subpoena has been served the right to
17 go into court and say, hey, this subpoena's
18 too broad. It's requesting material that is
19 privileged. It either needs to be quashed
20 or there needs to be a protective order or
21 something like that. The problem here is
22 that what court am I going to go to? Okay,
23 because the rules contemplate that when a
24 subpoena is issued, it's because there's
25 already an action pending. So consequently,

1 there's a court in which the action is.
2 There's a docket number. I know where to go
3 with my subpoena to try to get the court to
4 say don't issue it. Here, the act provides
5 or the bill provides that the Commonwealth
6 Court would have original jurisdiction of
7 these matters. So, I guess that means if
8 I'm, you know, in Chambersburg or Lancaster
9 or someplace in, you know, in the north
10 central part of the state, Scranton, now I
11 have to go to Harrisburg or I have to go to
12 Philadelphia or to Pittsburgh to go to an
13 original jurisdiction Commonwealth Court
14 proceeding to get my subpoena heard. The
15 other problem is, in a motion to quash
16 context, is when you have an action pending,
17 you have a context. You have a context for
18 what the subpoena can ask for. Generally,
19 in litigation, you can't ask for something
20 that isn't related to the issues that have
21 been laid out in the complaint. And as
22 the--Mr. Dupree said, there's no context in
23 this statute for the Attorney General's
24 investigative power. There appear to be no
25 limits to it. So, I can tell you from

1 experience, if I were a Commonwealth Court
2 Judge or a Common Pleas Judge sitting there
3 looking at this statute, I'm sitting there,
4 saying, well, the statute gives the Attorney
5 General pretty broad investigative powers,
6 so I'm going to allow this material to be
7 produced. So, I think there is no effective
8 ~~limitation~~ on that investigative power. And
9 there's nothing in there that would cause a
10 court to--really to quash a subpoena under
11 maybe the most outlandish--except under
12 maybe the most outlandish circumstances.
13 So, that's a huge concern to the business
14 community, to our members. Another concern
15 is the risk of inconsistent enforcement. ~~As~~ As
16 you heard Mr. Donahue testify, this bill ~~w~~
17 would change federal law. So that means
18 that if I'm a manufacturer of a product
19 that's sold in Pennsylvania, under federal
20 law it's not a per se violation if I tell a
21 retailer what that product has to be sold
22 for. Under state law, now it would be. So
23 what is the law in Pennsylvania? What am I
24 to do as a manufacturer of a product to be
25 sold in Pennsylvania? The same is true for

1 the indirect purchaser change. That's a
2 change from federal law. The Supreme Court
3 has said, no, we're not going to allow that
4 in the Illinois-Brick case. Now, the law
5 would be different in Pennsylvania. Again,
6 this is not--the business community does not
7 like uncertainty or inconsistency in the
8 enforcement of state and federal law. And
9 that's what this is going to lead to. I'm
10 going to make one more point before I pause.
11 And that is this, is the Commonwealth Court
12 the right court to have jurisdiction of
13 these matters? These are complex commercial
14 cases. It seems to me that that is not the
15 mission or function of the Commonwealth
16 Court to hear cases like this. Even the
17 commercial cases that are brought against
18 the Commonwealth, breach of contract cases
19 and the like, by and large go to the Board
20 of Claims first. These cases in--at the
21 federal level are heard in courts of general
22 jurisdiction, the district courts. There's
23 really--if there's going to be jurisdiction
24 for this kind of thing, in our judgment,
25 there's no reason why it can't be in the

1 Common Pleas Court which is often more
2 convenient to the litigant and bears
3 directly on the cost of the litigation to
4 the litigant. Again, to repeat, in our
5 view, given the ~~patronage~~ powers, given
6 the risks inherent and the investigatory
7 powers being conveyed here, this is just not
8 good for business. You don't hear anybody
9 in the business community clamoring for it.
10 And we're certainly opposed to it. And I'll
11 stop now and try to address any questions
12 you might have.

13 SENATOR GREENLEAF: Well, thank you
14 for summarizing your comments, and we'd like
15 to have your written comments as well.

16 MR. BECKLEY: My understanding is
17 they've been turned in.

18 SENATOR GREENLEAF: So we'll have
19 those of record, the full comments. And
20 also, we should look forward to discussing
21 those issues. I think there's support for
22 the bill that we pointed out, but that's not
23 how we're going to proceed. We're going to
24 proceed with taking everyone's concerns to
25 heart and serious consideration. And then,

1 if you have some proposals that you can put
2 in writing or written--I mean, you do have
3 it in your testimony, if there's anything
4 else that you want to bring forward and we
5 can see if we can come up with some
6 consensus on those issues that would address
7 some of your concerns and still be an
8 effective bill. So thank you for being here
9 today. Is there any questions? No, thank
10 you, very much. Last witness is Samuel
11 Marshall, President of Pennsylvania
12 Insurance Federation. Mr. Marshall, thank
13 you for being here.

14 MR. MARSHALL: I'll be even briefer.
15 Sam Marshall with the Insurance Federation.
16 And what we want is a carve out because we
17 are already subject to the standards in this
18 bill under the Unfair Insurance Practices
19 Act and the Insurance Holding Company Law.
20 And I appreciate the Attorney General
21 mentioned that they seem to think that
22 Section 910 of the bill gives us that. It
23 doesn't. The better language would be going
24 back 23 years to a bill that Senator
25 Greenleaf had sponsored that had a specific.

1 exemption for the business of insurance.
2 Our concern is that we not be subject to two
3 different regulators applying identical but
4 two different statutes. Thank you.

5 MR. GREENLEAF: Thank you, so much,
6 for being here today and for considering our
7 time constraints. Thank you, very much.
8 And also, we have the Pittsburgh Business
9 Group on Health has submitted written
10 testimony that will be made part of the
11 record. And the NFIB has submitted
12 testimony, written testimony which will be
13 part of these proceedings. Thank you all
14 for being here today. Thank you to all the
15 witnesses for your time and we look forward
16 to working with you in the future. The
17 committee is in recess.

18 (WHEREUPON, the proceedings
19 concluded.)
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COMMONWEALTH OF PENNSYLVANIA

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I, Elizabeth V Kedrick, Notary Public, in and for the County of Wayne, Commonwealth of Pennsylvania, do hereby certify:

That an online video was transcribed by me into typewriting, and I hereby certify the foregoing testimony is a full, true and correct transcription of the audio recording.

I further certify that I am neither counsel for nor related to any party to said action, nor in anyway interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this _____ day of _____, 2018.

Elizabeth V Kedrick,
Notary Public,
Commonwealth of Pennsylvania,
Honesdale Borough, Wayne County
My commission expires 11/14/19

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Exhibit C

Differences with Comparable Statutory Text - Additions are Underlined, Changes are notated in a footnote and [Bracketed], Subtractions are marked with ~~Strikethrough~~ and [Bracketed]

73 P.S. §§201-1 - 201-9.2

PENNSYLVANIA UNFAIR TRADE PRACTICES
AND CONSUMER PROTECTION LAW

§201-1. Short title

This act shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

§201-2. Definitions (Compared to Proposed 37 Pa. Code § 311.2)

As used in this act.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

1. Act—Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1-201-9.3).
2. Advertising—As used in Section 311.2(24), means any marketing communication which conveys an impression of a purported fact whether expressed, implied, omitted or otherwise concealed, which has a capacity or tendency to deceive or mislead any person or person in interest.
3. Article of trade or commerce—any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate.
4. As a result of—Cause-in-fact or but-for theory of causation, excluding any requirement under any reliance theory under common law fraud.
5. Ascertainable loss—Any loss which is quantifiable but not speculative.
6. Communication—Every manner or means of disclosure, transfer or exchange, and every disclosure, transfer or exchange of ideas or information, whether orally, by document, or electronically, or whether face to face, by telephone, mail, personal delivery, electronic transmission or otherwise.
7. Deceptive conduct—A method, act or practice which has a capacity or tendency to deceive.

8. Documentary material—means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording, wherever situate.

9. Fraudulent conduct—means unfair conduct or any other conduct which has a tendency or capacity to defraud.

10. Internet service provider—means a person who furnishes a service that enables users to access content, information, electronic mail or other services offered over the Internet, and access to proprietary content, information and other services as part of a package of services offered to consumers.

11. Market structure—Of or relating to the interrelationship of sellers and buyers at all levels of distribution of an article of trade or commerce including, but not limited to, manufacturers, suppliers, distributors, wholesalers, retailers and end users.

12. Marketing communication—Any communication which includes any promoting, selling or distributing of an article of trade or commerce.

13. Moneys or property, real or personal—means something of value including, but not limited to, restitution, disgorgement, attorneys' fees, expert fees, investigation and litigation costs, and court costs.

14. Person—means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.

15. Person in interest—means a person, the Commonwealth, a Commonwealth agency, municipal authority or political subdivision whose right, claim, title or legal share in something was affected by conduct enjoined under the act.

16. Rebate—Partial refund of the cost of an article of trade or commerce to incentivize the sale of that article of trade or commerce.

17. Representing—As used in Section 311.2(24), means any communication which conveys an impression of a purported fact whether expressed, implied, omitted or otherwise concealed, which has a capacity or tendency to deceive or mislead any person or person in interest.

18. Sale—means a transaction that includes selling, buying or engaging in any other similar activity involving any article of trade or commerce.

19. Tangible document or recording—The original or any copy of any designated documents, including, but not limited to, writings, drawings, graphs, charts, photographs, electronically created data and other compilations of data.

20. Trade and commerce—mean the advertising, offering for sale, sale or distribution, which are classes of transactions without regard to any further limitation or specification as to a person, of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth, including any transaction proposed, initiated or engaged by any person regardless of privity within the market structure.

21. Transaction—Exchange or transfer of any article of trade or commerce.

22. Unfair conduct—A method, act or practice, without necessarily having been previously considered unlawful, which violates public policy as established by any statute, the common law or otherwise within at least the penumbra of any common law, statutory or other established concept of unfairness; which is unscrupulous, oppressive or unconscionable; or which causes substantial injury to a victim.

23. Unfair market trade practices—means any one or more of the following:

- (i) A contract, combination or conspiracy between two or more persons at different levels of market structure to fix minimum prices for any article of trade or commerce at one or more levels of market structure;
- (ii) A contract, combination or conspiracy between two or more persons at the same level of market structure to fix or otherwise stabilize prices for any article of trade or commerce;
- (iii) A contract, combination or conspiracy between two or more persons at the same level of market structure to allocate marketing territories, to reduce output of any article of trade or commerce or to allocate customers to whom any article of trade or commerce is, has been or will be marketed;
- (iv) A contract, combination or conspiracy between two or more persons to condition or to have the effect of conditioning the sale of one article of trade or commerce upon the purchase of another article of trade or commerce;
- (v) A contract, combination or conspiracy between two or more persons where the sale of an article of trade or commerce is conditioned upon the seller's purchase of any other article of trade or commerce produced or performed by the buyer;
- (vi) A contract, combination or conspiracy between two or more persons at the same or different level of market structure to persuade or to coerce suppliers or customers to refuse to deal with another person;

- (vii) Actual monopolization, in which a person acquires or retains actual monopoly power through competitively unreasonable practices;
- (viii) Attempted monopolization, in which a person not yet in possession of actual monopoly power, purposefully engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved;
- (ix) Joint monopolization, in which two or more persons conspire to jointly retain or acquire monopoly power, where actual monopoly power is achieved through competitively unreasonable practices; and
- (x) Incipient conspiracies to monopolize, in which two or more persons not yet in possession of monopoly power, conspire to seize monopoly control of a market but where monopoly power has not yet actually been achieved.

2A. *Unfair methods of competition and unfair or deceptive acts or practices—mean any one or more of the following:*

- (xi) Passing off goods or services as those of another;
- (xii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
- (xiii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;
- (iv) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (vi) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;
- (vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;
- (viii) Disparaging the goods, services or business of another by false or misleading representation of fact;
- (ix) Advertising goods or services with intent not to sell them as

advertised;

- (x) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (xi) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- (xii) Promising or offering prior to time of sale to pay, credit or allow to any buyer, any compensation or reward for the procurement of a contract for purchase of goods or services with another or others, or for the referral of the name or names of another or others for the purpose of attempting to procure or procuring such a contract of purchase with such other person or persons when such payment, credit, compensation or reward is contingent upon the occurrence of an event subsequent to the time of the signing of a contract to purchase;
- (xiii) Promoting or engaging in any plan by which goods or services are sold to a person for a consideration and upon the further consideration that the purchaser secure or attempt to secure one or more persons likewise to join the said plan; each purchaser to be given the right to secure money, goods or services depending upon the number of persons joining the plan. In addition, promoting or engaging in any plan, commonly known as or similar to the so-called "Chain-Letter Plan" or "Pyramid Club." The terms "Chain-Letter Plan" or "Pyramid Club" mean any scheme for the disposal or distribution of property, services or anything of value whereby a participant pays valuable consideration, in whole or in part, for an opportunity to receive compensation for introducing or attempting to introduce one or more additional persons to participate in the scheme or for the opportunity to receive compensation when a person introduced by the participant introduces a new participant. As used in this subclause the term "consideration" means an investment of cash or the purchase of goods, other property, training or services, but does not include payments made for sales demonstration equipment and materials for use in making sales and not for resale furnished at no profit to any person in the program or to the company or corporation, nor does the term apply to a minimal initial payment of twenty-five dollars (\$25) or less;
- (xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made;
- (xv) Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;

- (xvi) Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing;
- (xvii) Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:
 - (A) the identity of the seller;
 - (B) that the purpose of the call is to sell goods or services;
 - (C) the nature of the goods or services; and
 - (D) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion;
- (xviii) Using a contract, form or any other document related to a consumer transaction which contains a confessed judgment clause that waives the consumer's right to assert a legal defense to an action;
- (xix) Soliciting any order for the sale of goods to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:
 - (A) within that time clearly and conspicuously stated in any such solicitation; or
 - (B) if no time is clearly and conspicuously stated, within thirty days after receipt of a properly completed order from the buyer, provided, however, where, at the time the merchandise is ordered, the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty days, rather than thirty days, to perform the actions required by this subclause;
- (xx) Failing to inform the purchaser of a new motor vehicle offered for sale at retail by a motor vehicle dealer of the following:
 - (A) that any rustproofing of the new motor vehicle offered by the motor vehicle dealer is optional;
 - (B) that the new motor vehicle has been rustproofed by the

manufacturer and the nature and extent, if any, of the manufacturer's warranty which is applicable to that rustproofing;

The requirements of this subclause shall not be applicable and a motor vehicle dealer shall have no duty to inform if the motor vehicle dealer rustproofed a new motor vehicle before offering it for sale to that purchaser, provided that the dealer shall inform the purchaser whenever dealer rustproofing has an effect on any manufacturer's warranty applicable to the vehicle. This subclause shall not apply to any new motor vehicle which has been rustproofed by a motor vehicle dealer prior to the effective date of this subclause.

(u) Unfair market trade practices;

(v) Unfair conduct;

(w) Deceptive conduct; and

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

§201-3. Unlawful acts or practices: exclusions (Compared to Proposed 37 Pa. Code § 311.3)

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce [~~as defined by subclauses (i) through (iii) of clause (4) of section 2 of this act and regulations promulgated under section 2.1 of this act~~] are hereby declared unlawful. The provisions of this act shall not apply to any owner, agent or employee of any radio or television station, or to any owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, who, in good faith and without knowledge of the falsity or deceptive character thereof, publishes, causes to be published or takes part in the publication of such advertisement.

§201-3.1. Regulations

The Attorney General may adopt, after public hearing, such rules and regulations as may be necessary for the enforcement and administration of this act. Such rules and regulations when promulgated pursuant to the act of July 31, 1968 (P.L. 769, No. 240), known as the "Commonwealth Document Law," shall have the force and effect of law.

§201-4. Restraining prohibited acts (Compared to Proposed 37 Pa. Code § 311.4)

Whenever the Attorney General or a District Attorney has reason to believe that any person is using or is about to use any method, act or practice declared by [section 3 of this

act]¹ to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice. The payment of a rebate by any person to a person in interest does not act as a bar to the imposition of a temporary or permanent injunction or the award of any form of monetary relief under this chapter.

§201-4.1. Payment of costs and restitution (Compared to Proposed 37 Pa. Code § 311.5)

Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in [section 4 above]², the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.

§201-5. Assurance of voluntary compliance (Compared to Proposed 37 Pa. Code § 311.6)

In the administration of this act, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the act from any person who has engaged or was about to engage in such method, act or practice. [Such]³ assurance may include a stipulation for voluntary payment by the alleged violator providing for the restitution by the alleged violator to consumers, of money, property or other things received from them in connection with a violation of this act. Any [such] assurance shall be in writing and be filed with the court. [Such]⁴ assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interest [pursuant to section 4]⁵.

§201-6. Deleted by amendment. 1976. Nov. 24 P.L. 1166. NO. 260, §1, imd. effective

§201-7. Contracts: effect of rescission

(a) Where goods or services having a sale price of twenty-five dollars (\$25) or more are sold or contracted to be sold to a buyer, as a result of, or in connection with, a contract

¹ § 311.3 (relating to unlawful acts or practices; exclusions)

² § 311.4 (relating to restraining prohibited acts)

³ This

⁴ This

⁵ under § 311.4 (relating to restraining prohibited acts)

with or call on the buyer or resident at his residence either in person or by telephone, that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale. Such notice of rescission shall be effective upon depositing the same in the United States mail or upon other service which gives the seller notice of rescission.

(b) At the time of the sale or contract the buyer shall be provided with:

- (1) A fully completed receipt or copy of any contract pertaining to such sale, which is in the same language (Spanish, English, etc.) as that principally used in the oral sales presentation, and also in English, and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of ten points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

- (2) A completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point bold face type the following information and statements in the same language (Spanish, English, etc.) as that used in the contract:

Notice of Cancellation

(Enter Date of Transaction)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or

dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to (name of seller), at (address of seller's place of business) not later than midnight of (date).

I hereby cancel this transaction.

(Date)

Buyer's Signature

- (o) Before furnishing copies of the "Notice of Cancellation" to the buyer, both copies shall be completed by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.
- (d) Each buyer shall be informed at the time he signs the contract or purchases the goods or services, of his right to cancel.
- (e) The cancellation period provided for in this section shall not begin to run until buyer has been informed of his right to cancel and has been provided with copies of the "Notice of Cancellation."
- (f) Seller shall not misrepresent in any manner the buyer's right to cancel.
- (g) Any valid notice of cancellation by a buyer shall be honored and within ten business days after the receipt of such notice, sellers shall (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.
- (h) No note or other evidence of indebtedness shall be negotiated, transferred, sold or assigned by the seller to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.
- (i) Seller, shall, within ten business days of receipt of the buyer's notice of cancellation, notify him whether the seller intends to repossess or to abandon any shipped or delivered goods. If seller elects to repossess, he must so within twenty days of the date of buyer's notice of cancellation or forfeit all rights to the delivered goods.

- (j.1) (1) Rights afforded under this section may be waived only through the execution of an emergency authorization form:
- (i) where goods or services have a sale price of twenty-five dollars (\$25) or more;
 - (ii) are contracted to be sold to a buyer as a result of, or in connection with, a contact made by the buyer to the seller; and
 - (iii) the goods or services contracted for are needed to remedy a bona fide emergency on the buyer's residential real property. Nothing in this subsection shall prohibit a seller contacted by a buyer as a result of a bona fide emergency from taking any immediate preliminary steps necessary to remedy a clear and immediate danger that may cause death or serious bodily injury to the buyer, the seller or other persons without having to obtain the emergency authorization form.
- (2) To obtain a waiver under this section, the seller must furnish the buyer with an emergency work authorization form, as well as a written estimate of the goods or the performance of services. This authorization will allow the seller to immediately proceed with the delivery of the goods or the performance of the services necessary to remedy the bona fide emergency.
- (3) The emergency work authorization form provided for in this section shall be:
- (i) on a preprinted card at least four inches by six inches in size; and
 - (ii) the writing thereon must be in at least ten-point bold face type in the following form:

Emergency Work Authorization

(Enter date of Transaction)

You, the buyer, having initiated the contract for the goods and services of (enter the name of the seller), the seller, for the remediation of a bona fide emergency hereby authorize the seller to immediately proceed with the delivery of goods or the performance of services necessary to remedy the bona fide emergency. By providing the seller with this authorization, you agree to make full payment for the goods or services provided. You agree not to exercise the rights afforded you by the Unfair Trade Practices and Consumer Protection Law to cancel the contract within three business days from the above date.

You, the buyer, attest that the attached estimate is an accurate description of the goods

and services which will be provided by the seller for the correction of the bona fide emergency:

(date)

(Buyer's signature)

- (j.2) Prior to the buyer signing the emergency authorization form, the seller shall provide the buyer with a written estimate of the total cost of the goods or services, including any fee for the service call. The estimate shall be provided ~~prior to the delivery of~~ the goods or the performance of the services necessary to remedy a bona fide emergency. If the cost of the goods or services actually provided exceeds the estimate provided, the seller must obtain further written authorization from the buyer to perform the additional work or service. Nothing in this subsection shall be construed to prohibit the seller from charging the buyer a fee for a service call for the purpose of determining the cause of and the appropriate remedy of the bona fide emergency, regardless of whether further goods or services are provided. The seller shall immediately disclose to the buyer whether a service call fee shall be charged upon initiation by the buyer of a contract for goods or services for the remediation of a bona fide emergency. The seller may also charge a fee for immediate preliminary steps without having to obtain a written emergency authorization
- (k) As used in this section, merchandise shall not be construed to mean real property.
- (l) The provisions of this section shall not apply to the sale or contract for the sale of goods or services having a sale price of less than twenty-five dollars (\$25).
- (1.1) This section shall not apply, however, to the sale of precious metals, bonds or foreign currency when the value of the items can fluctuate daily.
- (m) A "Notice of Cancellation" which contains the form and content required by rule or regulation of the Federal Trade Commission shall be deemed to be in compliance with the requirements of this section.
- (n) As used in this section, "bona fide emergency" means any condition existing on the buyer's residential real property which renders, or has the capability to render, the residential real property uninhabitable. The term includes, but shall not be limited to, conditions significantly affecting the heating system, electrical system, plumbing system, ventilation system, roof or outer walls of the residential real property.
- (o) As used in this section, "immediate preliminary steps" means only those steps

necessary to eliminate a clear and immediate danger that may cause death or serious bodily injury to the buyer, the seller or other persons. The term includes, but shall not be limited to, termination of the carrying of gas, oil or oil product, sewage or water through an underground pipe or the carrying of electric or communication service through an underground conductor, pipe or structure. The term shall not be construed as including any other steps necessary to repair and remedy the bona fide emergency.

§201-8 Civil penalties (Compared to 37 Pa. Code § 311.7)

- (a) Any person who violates the terms of an injunction issued under [section 4 of this act]⁶ or any of the terms of an assurance of voluntary compliance duly filed in court under [section 5 of this act]⁷ shall forfeit and pay to the Commonwealth a civil penalty of not more than [~~five thousand dollars~~] (\$5,000) for each violation. For the purposes of this section the court issuing an injunction or in which an assurance of voluntary compliance is filed shall retain jurisdiction, and the cause [shall]⁸ be continued; and, in [such]⁹ cases, the Attorney General, or the appropriate District Attorney, acting in the name of the Commonwealth [~~of Pennsylvania~~], may petition for recovery of civil penalties and any other equitable relief deemed needed or proper.
- (b) In any action brought under [section 4 of this act]¹⁰, if the court finds that a person, firm or corporation is willfully using or has willfully used a method, act or practice declared unlawful by [section 3 of this act]¹¹, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth [~~of Pennsylvania~~], may recover, on behalf of the Commonwealth [~~of Pennsylvania~~], a civil penalty of not exceeding [~~one thousand dollars~~] (\$1000) per violation, which civil penalty shall be in addition to other relief which may be granted under [sections 4 and 4.1 of this act]¹². Where the victim of the willful use of a method, act or practice declared unlawful by [section 3 of this act]¹³ is [sixty]¹⁴ years of age or older, the civil penalty shall not exceed [~~three thousand dollars~~] (\$3000) per violation, which penalty [shall]¹⁵ be in addition to other relief which may be granted

⁶ § 311.4 (relating to restraining prohibited acts)

⁷ § 311.6 (relating to assurances of voluntary

⁸ must

⁹ these

¹⁰ § 311.4

¹¹ § 311.3 (relating to unlawful acts or practices; exclusions)

¹² under this Chapter

¹³ § 311.3

¹⁴ 60

¹⁵ will

under [sections 2 and 4.1 of this act]¹⁶. A payment of a rebate to a victim of the willful use of a method, act or practice declared unlawful by § 311.3 does not bar an award of a civil penalty.

§201-9 Forfeiture of franchise or right to do business; appointment of receiver (Compared to 37 Pa. Code § 311.8)

Upon petition by the Attorney General, the court having jurisdiction, may, in its discretion, order the dissolution, suspension or forfeiture of the franchise or right to do business of any person, firm or corporation which violates the terms of an injunction issued under [section 4 of this act]¹⁷. In addition, the court may appoint a receiver of the assets of the company.

§201-9.1. Powers of receiver

When a receiver is appointed by the court pursuant to this act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys, and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description of the person or persons for whom the receiver is appointed, received by means of any practice declared to be illegal and prohibited by this act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of assets to the extent he has sustained provable losses. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

§201-9.2. Private actions (Compared to 37 Pa. Code § 311.9)

- (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a

¹⁶ this Chapter

¹⁷ under § 311.4 (relating to restraining prohibited acts)

method, act or practice declared unlawful by [section 3 of this act]¹⁸, may bring a private action to recover actual damages or [~~one hundred dollars~~] (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than [~~one hundred dollars~~] (\$100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

- (b) Any permanent injunction, judgment or order of the court made under [section 4 of this act]¹⁹ shall be prima facie evidence in an action brought under [section 9.2]²⁰ of this act that the defendant used or employed acts or practices declared unlawful by [section 3 of this act]²¹.
- (c) A person may not settle and release any claim under the act as part of a class action in any court of competent jurisdiction without first providing notice to and receiving written consent from the Office of Attorney General.
- (d) Except as provided by section 103 of the Commonwealth Attorneys Act (71 P.S. § 732-103), no person has standing to question the authority of the legal representation of the Commonwealth and its citizens where the Office of Attorney General has not granted consent or has transmitted a written revocation of this consent under subsection (c).

§ 311.10. Subpoena power.

(a) The Attorney General shall be authorized to require the attendance and testimony of witnesses and the production of any books, accounts, papers, records, documents and files relating to any commercial and trade practices to the extent authorized by section 918 of The Administrative Code of 1929 (71 P.S. § 307-2) as amended by section 204(d) of the Commonwealth Attorneys Act (71 P.S. § 732-204(d)) and conduct private or public hearings; and, for this purpose, the Attorney General or his representative may sign subpoenas, administer oaths or affirmations, examine witnesses and receive evidence during any investigation or public or private hearing. In case of disobedience of any subpoena or the contumacy of any witness appearing before the Attorney General or his representative, the Attorney General or his representative may invoke the aid of the Commonwealth Court or any court of record of the Commonwealth, and this court may thereupon issue an order requiring the person subpoenaed to obey the subpoena or to give evidence or to produce books, accounts, papers, records, documents and files relative to the matter in question. Any failure to obey this order of the court may be punished by the court as a contempt thereof

¹⁸ § 311.3 (relating to unlawful acts or practices; exclusions)

¹⁹ § 311.4 (relating to restraining prohibited acts)

²⁰ this section

²¹ § 311.3

(b) No documentary material produced pursuant to a demand under this section will, unless otherwise ordered by a court for good cause shown, be produced for inspection or copying by, nor will the contents thereof be disclosed to any person other than the authorized employee of the Attorney General without the consent of the person who produced the material: provided, that under these reasonable terms and conditions as the Attorney General shall prescribe, this documentary material will be available for inspection and copying by the person who produced the material or any duly authorized representative of this person. The Attorney General or any attorney designated by him may use this documentary material or copies thereof as he determines necessary in the enforcement of this act, including presentation before any court: provided, that any material which contains trade secrets or other highly confidential matter will not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing this material

§ 311.11. Interpretation.

(a) This Chapter will be liberally construed to effectuate its objective of protecting the public of this Commonwealth from fraud and unfair or deceptive business practices.

(b) The catchall provision contained in § 3112(x) (relating to definitions) of the definition of "Unfair methods of competition and unfair or deceptive acts or practices" will not be restricted by the subsections enumerated before it. Instead, it will be construed as designed to generally cover all unfair or deceptive acts or practices in the conduct of trade or commerce.

§ 311.12. Waiver of rights.

A waiver of this Chapter by any person prior to or at the time of a commission of a violation of § 311.3 (relating to unlawful acts or practices; exclusions) or any other section of this Chapter is contrary to public policy and is void. An attempt by any person to have another waive his rights under this Chapter shall be deemed to be a violation of the act.

§201-9.3. Dog Purchaser Protection

- (a) (1) A seller shall provide a purchaser of a dog with a health record for a dog at the time sale. In addition, the seller shall provide to the purchaser a health certificate issued by a veterinarian within twenty-one days prior to the date of sale for the dog or a guarantee of good health issued and signed by the seller. The health record supplied by the seller shall set for the following:
- (i) The dog's breed. If the breed is unknown or mixed, the health record shall so indicate. If the dog is advertised or represented as registerable, the name and address of the pedigree registry organization where the dam and sire are registered shall be indicated.
 - (ii) The dog's date of birth. If the dog is not advertised as or sold as purebred, registered or registerable, the date of birth may be approximated, if not known by the seller.

- (iii) The dog's sex.
 - (iv) The dog's color and markings.
 - (v) A list of all vaccinations, if known, administered to the dog, the date and type of vaccinations and the name of the person who administered them; if known, up to the date of sale; a record of any known disease, illness or condition with which the dog is or has been afflicted at the time of sale; and a record of any veterinary treatment or medication received by the dog while in possession of the seller to treat any disease, illness or condition.
 - (vi) The date, dosage and type of any parasitological medicine, if known, that was administered to the dog.
 - (vii) The name, address and signature of the seller, along with a statement affirming all of the information provided in this subsection is true to the best of the seller's knowledge and belief.
- (2) (i) A health certificate issued by a veterinarian shall certify the dog sold by the seller to be apparently free of any contagious or infectious illness and apparently free from any defect which is congenital or hereditary and diagnosable with reasonable accuracy and does not appear to be clinically ill from parasitic infestation at the time of the physical examination. The health certificate shall include the name, address and signature of the veterinarian and the date the dog was examined.
- (ii) A guarantee of good health issued by the seller, and dated and signed by the seller and the purchaser on the date of the sale, warranting that the dog being sold is apparently free of and does not exhibit any signs of any contagious or infectious disease, is apparently free from and does not exhibit any signs of any defect which is congenital or hereditary; and does not exhibit any signs of being clinically ill or exhibit any signs of a parasitic infestation on the date of the sale.

The guarantee of good health shall clearly state in bold type:

This guarantee does not warrant that this dog has been examined by a veterinarian. The Purchaser is encouraged to have this dog examined by a veterinarian as soon after purchase as is feasible.

The seller shall also verbally state these facts to the purchaser.

- (b) If, within ten days after the date of purchase, a dog purchased from a seller is determined through physical examination, diagnostic tests or necropsy by a veterinarian, to be clinically ill or dies from any contagious or infectious illness or any parasitic illness which renders it unfit for purchase or results in its death, the purchaser may exercise one of the following options:

- (1) Return the dog to the seller for a complete refund of the purchase price, not including the sales tax.
- (2) Return the dog to the seller for a replacement dog of equal value, of the purchaser's choice, providing a replacement dog is available.
- (3) Retain the dog and be entitled to receive reimbursement from the seller for reasonable veterinary fees incurred in curing or attempting to cure the affected dog, subject to the limitation that the seller's liability for reimbursement shall not exceed the purchase price, not including sales tax, of the dog. This clause shall apply only if the purchaser's veterinarian determines the dog's illness can be treated and corrected by procedures that are appropriate and customary. The value of these services is considered reasonable if comparable to the value of similar services rendered by other licensed veterinarians in reasonable proximity to the treating veterinarian. Reimbursement shall not include the costs of the initial examination fee and diagnostic or treatment fees not directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section. If, however, the purchaser's veterinarian determines the dog's illness is incurable, only the options in clauses (1) and (2) of this subsection shall apply. For the purposes of this subsection, veterinary finding of intestinal and external parasites shall not be grounds for declaring the dog unfit for purchase unless the dog is clinically ill or dies due to that condition. A dog shall not be found unfit for purchase on account of injury sustained or illness most likely contracted subsequent to the date of sale. If, within thirty days after the date of purchase, a dog purchased from a seller is certified through physical examination, diagnostic tests or necropsy by a veterinarian that the dog has, or died from a defect which is congenital or hereditary and which adversely affects or affected the health of the animal, the purchaser may exercise one of the options as provided in clauses (1), (2) and (3) of this subsection. Remedies available under clauses (1), (2) and (3) of this subsection shall also apply to replacement dogs.

- (c) A veterinarian's certification of illness, congenital or hereditary defects or death shall be necessary for a refund or replacement or to receive reimbursement for veterinary costs if the dog is retained by the Purchaser and treated for illness or congenital or hereditary defect as provided in this section. The veterinarian's certification shall be supplied at the purchaser's expense. The veterinarian's certification shall state the following information:
- (1) The purchaser's name and address.
 - (2) The date the dog was examined.
 - (3) The breed and age of the dog.
 - (4)
 - (i) That the veterinarian examined the dog.
 - (ii) That the dog has or had an illness as described in subsection (b) of this section, or a defect as described in subsection (b) of this section, which renders it unfit for purchase or which resulted in its death.
 - (iii) The precise findings of the examination, diagnostic tests or necropsy.
 - (5) The treatment recommended, if any, and an estimate or the actual cost of the treatment should the purchaser choose to retain the dog and seek

- reimbursement for veterinary fees to cure or attempt to cure the dog.
- (6) The veterinarian's name, address, telephone number and signature.

Within two business days of a veterinary examination which certifies illness, defect or death the purchaser shall notify the seller of the name, address and telephone number of the examining veterinarian. Failure to notify the seller or to carry out the recommended treatment prescribed by the examining veterinarian who made the initial diagnosis until a remedy as provided for in subsection (b) of this section is agreed upon shall result in the purchaser's forfeiture of rights under this section. Subsection (b) of this section shall not apply where a seller who has provided a health certificate issued by a veterinarian, discloses in writing at the time of sale the health problem for which the buyer later seeks to return the dog. Such disclosures shall be signed by both the seller and the purchaser. Where the seller has provided a guarantee of good health, subsection (b) of this section shall apply regardless of whether the seller disclosed the health problem at the time of sale.

- (d) The refund or reimbursement required by this section shall be made by the seller not later than fourteen days following receipt of the veterinarian's certification that the dog is unfit for purchase or has died from a condition defined as unfit for purchase in this section. The certification shall be presented to the seller not later than five days following receipt thereof by the purchaser.
- (e) In the event that the seller wishes to contest a demand for refund, replacement or reimbursement made by purchaser pursuant to this section, the seller shall have the right, within two business days of notification by purchaser of a condition which renders the dog unfit for purchase as required in subsection (b) of this section, to require the purchaser to produce the dog for examination by a licensed veterinarian designated by the seller. The veterinarian's fee for this examination, including any diagnostic test or necropsy shall be paid by the seller. If the dog is incapable of being transported because of being hospitalized, the purchaser's attending veterinarian shall provide all relevant information regarding the case as requested by the seller's veterinarian. Unless the dog is hospitalized, failure to produce the dog within two business days from examination by the purchaser will nullify any obligation to replace, refund or reimburse by the seller. Upon examination, if the purchaser and the seller are unable to reach an agreement which constitutes one of the options set forth in this section within fourteen days following receipt of the dog for the examination, either party may initiate an action in a court of competent jurisdiction.
- (f) (1) Any seller who advertises or otherwise represents that a dog is registered or registerable shall provide the purchaser of the dog with the following information at the time of sale:
- (i) The breeder's name and address.
 - (ii) The name and registration number of the dam and sire of the purchased dog's litter.
 - (iii) The name and address of the pedigree registry organization where

the dam and sire are registered.

- (2) All documentation necessary to effect the registration of the dog shall be provided by the seller to the owner within one hundred twenty days of the date of sale. The one hundred-twenty-day period may be extended by the seller if the dog is being imported from outside the United States by notifying the purchaser in writing of the reason for the extension and a reasonable estimate of the arrival date of the registration documents.
 - (3) If the seller fails to provide this documentation within one hundred twenty days of the date of sale or fails to notify the purchaser of an extension under clause (2) of this subsection, the purchaser may elect one of the following remedies:
 - (i) Return the dog and receive a full refund of the purchase price, not including sales tax.
 - (ii) Retain the dog and receive a refund from the seller in an amount equal to fifty per cent of the purchase price.
 - (4) The seller may withhold the dog's registration application until the purchaser supplies the seller with a signed veterinarian's certificate stating that the dog has been spayed or neutered, provided that withholding of the application was agreed to in writing by the purchaser at the time of sale. The seller shall provide the registration application within ten days of receiving the veterinarian's certificate if the certificate is supplied beyond the one-hundred-twenty-day period provided for in clause (2) of this subsection.
- (g)
- (1) A summary of the provisions of this section shall be conspicuously posted in the place of business of persons subject to this section. The Office of Attorney General shall promulgate regulations specifying the contents of the summary which must be posted. In addition, the posted notice shall state that the health record information is available on request.
 - (2) At the time of the sale, the seller shall provide the purchaser with a written notice setting forth the rights provided under this section. The notice shall include the following statement:

This disclosure of rights is a summary of Pennsylvania Law. The actual provisions of the law are in Section 9.3 of the Unfair Trade Practices and Consumer Protection Law.
- (h)
- (1) The Office of Attorney General shall enforce the provisions of this section.
 - (2) In addition to any other penalty under this act, a civil penalty of up to one thousand dollars (\$1,000) on any current licensee shall be levied against any person who violates any provision of this section or any person who

conducts business under this section without proper license to do so. A penalty shall be levied for each violation.

- (3) A purchaser shall file a complaint pursuant to this section by reporting it to the Bureau of Consumer Protection of the Office of Attorney General.

- (i) As used in this section:

"Seller" means a kennel, pet shop operator or other individual who sells dogs to the public and who owns or operates a kennel or pet shop licensed by the Pennsylvania Department of Agriculture or the United State Department of Agriculture. The term shall not include nonprofit kennels as defined under the Act of December 7, 1982 (Pl. 784, No. 225), known as the "Dog Law."

"Unfit for Purchase" means any disease, deformity, injury, physical condition, illness or any defect which is congenital or hereditary and which severely affects the health of the animal or which was manifest, capable of diagnosis or likely to have been contracted on or before the sale and the delivery of the animal to the consumer.

"Veterinarian" means an individual licensed under the laws of this Commonwealth or any other state to practice veterinary medicine and surgery.