

STATEMENT SUBMITTED  
BY THE  
HONORABLE LES AuCOIN  
BEFORE THE  
HOUSE JUDICIARY SUBCOMMITTEE ON  
MONOPOLIES AND COMMERCIAL LAW  
SEPTEMBER 9, 1982

Mr. Chairman, I greatly appreciate the opportunity to submit testimony on this critically important piece of legislation.

I do not need to repeat the history of why the question of retroactivity is before the Congress. I do believe, however, that I can offer a unique perspective on this subject.

As you know, I represent a state that is dependent on the timber industry. Fully 45 percent of Oregon's economy is related to the forest products industry. Added to that equation is the fact that Oregon's timber firms depend heavily for timber supply from lands managed by the federal government.

Take the basic infrastructure of Oregon's economy and stir in "voodoo economics" and the result is a depression. Unemployment in Oregon stands at close to 11 percent. Tillamook County, in my district, has an unemployment rate of over 13 percent. Some counties in Oregon have an unemployment rate of over 20 percent.

For the last week of August, over 40 percent of all the sawmill workers in Oregon were either unemployed or working short or curtailed shifts. Nearly half of Oregon's mills were either closed or operating on a curtailed schedule. This has been the case for well over a year.

Almost one year ago, I introduced legislation authorizing the Secretary of Agriculture to terminate existing timber sales contracts. I, along with Senator Hatfield and Congressman Weaver, have recently introduced a bill that would accomplish basically the same thing as my original bill.

Some have mistakenly characterized our efforts as a "bailout" of the timber industry. Nothing could be further from the truth.

The economic policies of this Administration, the lack of any kind of policy with respect to housing and past, inadequate levels of timber supply, have brought about a crisis in my state and in the Northwest which requires the immediate enactment of some form of timber relief.

It is with this background and understanding that I offer my views with respect to the retroactivity provisions of the Antitrust Equal Enforcement Act. Because the major parties involved in this fight are timber companies which have extensive operations in the State of Oregon and the Northwest, I feel compelled to give you my views.

Simply put, if there is any "bailout" for timber companies floating around in Congress it is this legislation. It is categorically and fundamentally wrong and, therefore, I must oppose it.

In this case, the Congress is being asked to come to the rescue of a few defendants who elected to go to trial knowing the present rules, were convicted of price-fixing, and are now seeking a second bite at the apple. This jeopardizes the agreements of plaintiffs and defendants who settled in good faith, and prolongs and delays litigation for everyone. In the case in question, 36 defendants have entered into settlements paying out \$321 million -- relying upon present law. A court has already approved 22 of those settlements.

As you know, the Senate Judiciary Committee has reported out its version of the bill, which includes retroactivity. Not all on the Committee favored that provision. Let me quote from the Separate Views of Senators Max Baucus, Jeremiah Denton and Robert Dole attached to the Senate Report accompanying S. 995:

In pending antitrust cases, plaintiffs and defendants have based their decision about whether to settle or litigate on the existing law which provides for full recovery in the event of settlements. Judges and juries have similarly relied on this rule in approving settlements and reaching verdicts. To change the rules in the middle of the game, as the retroactivity amendment to S. 995 would do, would be unfair and unjust to all of these parties. To do so solely to enable convicted price-fixers to reduce the damages which they would otherwise have to pay to the innocent businesses which have been injured by their misconduct is unconscionable.

Not only is it unconscionable, it is unbelievable. These companies have hired the highest priced lawyers and lobbyists in Washington to conduct a raid on our judicial system.

The courts and Congress have always considered the notion of retroactivity as unsound. James Madison called retroactive laws "contrary to the first principle of the social compact and to every principle of social legislation."

What Mr. Madison meant was that you can't change the rules in the middle of the game.

A number of noted jurists have indicated their strong opposition to this legislation.

Hubert L. Will, Senior U.S. District Court Judge, summarized the matter at hand well in a letter sent to Senator Jeremiah Denton:

Price-fixing is not a crime of necessity or passion; it is a contemplative commercial crime done knowingly to enjoy supracompetitive prices and profits by avoiding the rigors of competition. It is a serious distortion of our free enterprise system.

Judge Will commented specifically on retroactivity in the conclusion of his letter to Senator Denton:

First, it is basically unfair for litigants to try to use Congress to upset results fairly reached in lawsuits tried under the existing rules when these rules were known to all the parties before they made their litigation or settlement decisions. But more importantly, the dispute over retroactivity works to obscure the basic truth that the pending contribution and claims reduction legislation is fundamentally seriously flawed and should not be passed. Legislation of this kind most certainly should not be made retroactive.

Noted constitutional expert Charles Alan Wright, of the University of Texas, has addressed the critical constitutional questions involved:

There are three plausible constitutional objections to retroactive application of this legislation. It can be contended that it violates the separation of powers, that it impairs the obligations of contract, and that it is a denial of due process of law. The objection based on due process seems to me to raise a complex and uncertain issue. Adoption of this legislation with a retroactivity amendment would be a certain invitation to litigation raising due process claims, which litigation could hardly be authoritatively resolved short of the Supreme Court.

There is no question as to the importance of the timber firms involved in this matter to the economy of the State of Oregon. But that fact cannot absolve them from paying damages to the parties they injured. The question involved here is of constitutional proportions. These companies should not be bailed out over the corpse of one of our most important judicial and legislative tenets.

Page Four  
Les AuCoin Testimony

The outcry over the issue of retroactivity has been loud and far-reaching. Besides the opposition I noted earlier of Mr. Wright and Judge Will, the National Association of Attorneys General also oppose retroactivity.

The New York Times, The Chicago Sun-Times, The Philadelphia Inquirer, The San Francisco Chronicle, The Miami Herald, The Sacramento Bee, and The Oregonian of Portland, Oregon have all editorialized against retroactivity.

Retroactivity has been described by various newspapers around the country as "a rip-off", "unfair", "bailout", "shabby", "unjust", "dirty", "Price-fixer's delight", and likened to pigs struggling at the trough.

I believe most in my home state and in the Northwest feel as I do and would agree with The Oregonian editorial of August 12th:

If deterrence is important in criminal cases, it also is vital in efforts to enforce the antitrust laws. Enforcement is a costly and time-consuming business. If the Congress is to short-circuit the process every time large corporations lose, then the law will become a charade, applying only to those who cannot afford to lobby their cases through the Congress.

Mr. Chairman, we agreed to uphold the Constitution when we took our oath of office. We are responsible for representing all the people -- not narrow special interests. Retroactivity is a dangerous precedent and should not be accepted by this Committee or the Congress.

Mr. Chairman, thank you again for the opportunity to present this testimony.