BILL	DATE	PAGE(S)
S. 598	May 15, 1980	5409-38

ACTION

Soft drink products: By 89 yeas to 3 nays, Senate passed S. 598, preserving the manufacture, bottling, and distribution of trademarked soft drink products by local companies operating under territorial licenses, after rejecting the following additional amendments proposed thereto:

(1) Metzenbaum amendment No. 1767, eliminating damage immunity for antitrust violations. (Motion to table agreed to by 88 yeas to 3 nays.) Page S5416

(2) Metzenbaum amendment No. 1761, preserving territorial restrictions for small soft drink bottling companies. (Motion to table agreed to by 89 yeas to 4 nays.) Page S5417

By 86 yeas to 6 nays, Senate agreed to a motion to table the appeal on the ruling of the Chair that the Metzenbaum amendment No. 1759, exempting licensees from suits by indirect purchasers was not germane. Page S5430

Prior to this action by 86 yeas to 6 nays, three-fifths of those Senators duly chosen and sworn having voted in the affirmative, Senate agreed to a motion to close further debate on this bill. After cloture was invoked the Chair ruled Bayh amendment No. 1756, assuring that the bill is not in any way interpreted to authorize enforcement of the territorial restrictions used in the industry by means which would otherwise be illegal under the antitrust laws, was not germane, and therefore not in order. Thurmond amendment No. 1757, of a perfecting nature, therefore fell. Page S5414

Pages S5409–S5438

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SOFT DRINK INTERBRAND COMPETITION ACT

The ACTING PRESIDENT pro tempore. The Senate will resume consideration of the pending business, which the clerk will state by title.

The legislative clerk read as follows:

A bill (S. 598) to clarify the circumstances under which territorial provisions and licenses to manufacture, distribute, and sell trade-marked soft drink products are lawful under the antitrust laws.

The Senate resumed the consideration of the bill.

Mr. ROBERT C. BYRD. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. METZENBAUM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, for 2 days now we have been debating the superb amendments offered by the Senator from Mississippi (Mr. COCHRAN) and the Senator from Indiana (Mr. BAYH). They are good amendments. They have been called up in the first degree and second degree in order to facilitate and make possible a filibuster against the Senator from Ohio, a reverse of the usual procedure. Cloture is about to be invoked but will be invoked only for one reason, and that is to cut off the rights of the Senator from Ohio to call up a nongermane amendment.

Mr. President, this procedure, this tactic, this operation is going to be successful. But in being successful I want to point out that today's loss for the Senator from Ohio will be also today's loss for the U.S. Senate.

There are Senators who are involved in this tactic who have been known as champions of the right to filibuster, one of whom I think holds either the all-time record for remaining on the floor or, if not the all-time record, he comes close to it. Cloture has been used over a period of years, I guess since the Senate's inception, to cut off debate when some Senator or some group of Senators was attempting to keep a matter from being brought to a vote.

The Senator from Ohio has no desire to do that. The Senator from Ohio, in his first speech on this issue 2 days ago, said: "Let's accept the Cochran amendment and the Bayh amendment. They are good amendments."

The Senator from Ohio repeated that suggestion yesterday. The Senator from Ohio now repeats the same suggestion. Since the amendments have been debated for 2 days, since they are so meritorious, since the authors have been so persuasive in their arguments, the Senator from Ohio again suggests to the managers of the bill that the Cochran amendment and the Bayh amendment be accepted, either without debate by voice vote or by rollcall. And I make that request again of my good friend from Indiana.

Mr. BAYH. Mr. President——

Mr. METZENBAUM. Without my losing my right to the floor, I would like to ask the Senator from Indiana if he is ready to accept the Cochran amendment and the Bayh amendment, and accept both of them either by acceptance by the managers of the bill or by rollcall vote so that we might get on to other amendments prior to the cloture vote.

Mr. BAYH. May I ask a question of my colleague in response to his question so that I do not unnecessarily take part of his time this morning in expressing the position of those of us on the opposite side of the issue?

Would my good friend from Ohio want me now to explain why I am unwilling to accept his gracious offer or would he prefer just a one-word answer, "no," right now?

Mr. METZENBAUM. A one-word answer will suffice.

Mr. BAYH. With all due respect, no. I think the Senator from Ohio is very gracious, but I hope to be able to explain to the Senate and to those who are concerned with this legislation that what we are talking about here is really not a substantive difference, but we are talking about a parliamentary tactic that is being used by both sides, which will have dramatic consequences on the substance. Although the Senator from Ohio in his usually persuasive and articulate manner has described the issue as he sees it, I think an equally reasonable if not as well articulated argument can be made on the other side of this issue. So in all respect to my friend from Ohio, I have to say no.

Mr. METZENBAUM. Let me say for the record I believe I asked the Senator whether he would accept the amendments or have a rollcall vote on the amendments prior to the vote on cloture. He pointed out to me that the amendments would not be accepted by the managers, nor would there be a vote prior to the cloture vote. I would like to elaborate on that point.

I now ask unanimous consent that, notwithstanding the fact that there is pending an amendment in the first degree and an amendment in the second degree, the Senator from Ohio be permitted to call up an amendment at the desk.

Mr. COCHRAN. Reserving the right to object.

Mr. BAYH. Objection.

The ACTING PRESIDENT pro tempore. Objection is heard.

Mr. METZENBAUM. Mr. President, I am not surprised. Of course, I anticipated that reaction. But I wanted to make it clear to my fellow Senators that really what has transpired here is not an abuse of the rules, but a use of the rules to deprive a Member of this body of his legitimate right to amend a piece of legislation.

I wonder whether those who will vote for cloture today and who have been parties to this particular procedure would act the same way if labor law reform legislation was on the floor. I now address myself to my friends on the opposite side of the aisle. Or if there were some consumer protection legislation on the floor.

Of course, it should be pointed out that there is an effort to bring up a consumer protection amendment, and I am being denied the right to do that in order to pass this lobbyist supported, well-organized effort by a group of business persons who do not want to comply with the antitrust laws, who think that they have some God given right, and if it is not God given that it will be a congressionally given right, to be exempt from those laws.

It is sad. Why should bottlers be exempt from antitrust laws and everybody else be expected to comply? As a matter of fact, when we get done today, things will change. Others will say, "We should not have to comply with the antitrust laws either."

They will say that automobile dealers ought to be protected in their territorial rights.

They will say that television manufacturers or refrigerator makers, or any one of a host of other manufacturers of products that are on the market, need protection, need territorial restrictions, and that the antitrust laws should not be applicable.

And if they hire the best lobbyists, and if they organize back home, get enough people to call, they will again prevail upon the Congress to provide that exemption once the pattern has been set.

They need not worry that the consumers will be concerned. The people of the country do not understand that what we

have before us today is a way to keep prices up in the soft drink industry. They understand that prices are up. They go to their supermarkets and they know what they are paying. They know how the companies who are involved in this business have raised the prices day in and day out, and that a bottle of Coca-Cola today, even in these Senate Halls, has continued to rise. Competition does not work.

There is not any question. We talk about the poor little soft drink bottlers, about these poor independent businessmen.

But take a look at the figures. Not all of the operations are public as far as earnings are concerned, but there is not any question about it that those that are public, and there are a great many that are, have been making extraordinary profits.

One week we come to the floor and we talk about the extraordinary profits of the oil companies and how they have gouged the American people. They do it not by an exemption from the antitrust laws, in all fairness, but by other procedures that this Government has made available to them.

The bottlers do it by territorial restrictions, territorial restrictions so that there will be no competition. The free enterprise system does not mean anything any more to the bottlers.

There has been no real hue and cry that there has been cutthroat competition. I sat through the hearings. Nobody really was getting hurt. Even those who came forth from my own State, and who said how important this legislation is, also indicated how high their profits have been.

What is so terrible about competition? Why is it the Business Roundtable and the business lobbyists are opposed to Illinois Brick and have joined together in connection with the bottlers' bill to keep Illinois Brick off it?

Illinois Brick cannot be brought to the floor because we do not have enough votes for cloture, I am told. Well, why do we not bring it to the floor and see whether we have enough votes for cloture? No. Today I am going to be effectively deprived from bringing up Illinois Brick regardless of the impact upon the consumers of this country, regardless of the impact upon the small school districts and the local governments that will get the short end of the deal. Who cares about them? They are good for speechmaking but they are not good for the legislative process because their lobbyists are not that strong.

I submitted for the RECORD yesterday a list of school districts across the country. I did not examine it closely, but I do not think that one State in the entire Union failed to have school districts that were benefited by the award in the Master Key decision or, to put it another way, if our failure to pass Illinois Brick legislation would make it impossible for that award to have been made.

It is sad, it is tearful, if you have any concern for the American people, that while the rules can be worked for the benefit of a special group of businessmen—and not all small businessmen; some of the largest conglomerates in this country and the large syrup makers—the rules are worked to keep the Illinois Brick amendment from coming to the floor. I cannot wait for that day to arrive in the not far distant future when some of those who were so enthusiastic about keeping Illinois Brick from coming to the floor by this particular procedure will have the same procedure worked against them and they, too, will be deprived of an opportunity to bring up a nongermane amendment as provided for under the rules of the Senate.

What is going on is inequitable, it is contrary to most of the precedents, although there may have been some occasion in the past, many years ago, when it was done in the same manner. But it is just not right.

The Senator from Ohio will have a full life whether or not the bottlers bill passes, and undoubtedly it will, and whether or not Illinois Brick is attached as an amendment. But there are a lot of people out there in America whose lives will not be quite as full. There are a lot of little children who will not be able to buy a bottle of pop because it costs more.

You might say, well what do you mean, they can afford 35 cents but they cannot afford 45 cents for a bottle? I do not know what they can afford. I do not know how much that amount is. But I do know that the bottlers bill means that competitive forces will not work and we shall have more inflation.

I do know that, by the failure to permit Illinois Brick to come to the floor, those who have conspired, who have sat down and worked together to price-fix, to increase prices, will, under the law as it presently is, for all practical purposes, be exempt from litigation.

I put into the RECORD yesterday a whole host of organizations that believe Illinois Brick ought to be enacted—Municipal League of Cities, National Association of Attorneys General—a group across the board; some business groups who recognize how they get hurt in this process.

Mr. President, I am, indeed, saddened, disheartened, disturbed that the rules of the Senate are being used to keep 1 Senator from calling up an amendment that has, I think, 22 cosponsors; that is, indeed, a proconsumer amendment, an amendment that, under the law at the moment, keeps consumers from being able to recover unlawful profits, keeps consumers from being able to recover unlawful profits from willful price fixing on the part of certain businesses.

Is it right? I am aware of the fact that the Senator from Indiana is a cosponsor of the Illinois Brick legislation and a strong advocate. I am aware of the magnificent record of my good friend from Indiana, who has been a true advocate of antitrust legislation and enforcement. As a matter of fact, it is probably fair to say that the Senator from Ohio would not be standing in his position on the floor today as chairman of the Antitrust Committee were it not for the support and efforts of my good friend from Indiana.

So this is not a personal matter with me. He is my friend. He is a Senator whom I believe in. The mere fact that he happens to be wrong on this particular subject, on the wrong side of the issue, does not make my affection for him any the less, nor my respect for him any the less. It only proves that even great men have a right to err on occasion. In this instance, he is on the wrong side of the issue.

As a matter of fact, Mr. President, it is bad enough that he is on the wrong side of the issue on the bottlers bill; he is on the right side of the issue as far as being for the Illinois Brick amendment, but on the wrong side as far as permitting it to come up. I know he would say, and he has said, that he favors the Illinois Brick amendment, but he is concerned that if it is adopted, the bottlers bill will lose its chances of being passed. I guess the only way that would happen is if there were a filibuster against it. So, instead of having a filibuster against it by those who are its opponents, the Senator from Indiana and others have opted to have a filibuster against the Senator from Ohio having an opportunity to call the amendment up.

In all fairness, the Senator from Ohio is not the only one who would be prepared to call up Illinois Brick at this point as an amendment. There are other Senators who would like the opportunity to do so. But, realizing the lay of the land, they have not seen fit to do so.

Mr. President, equity in the situation, the fact that we have a vote at 10 o'clock, gives me the opportunity either to hold the floor until that time or to yield it to the Senator from Indiana, the Senator from Mississippi, or such other Senators as want it. But I should like to ask unanimous consent that, upon yielding the floor, I not be held to the one-speech-a-day rule and that I be given permission to have 5 minutes just prior to 10 o'clock. Does the Senator from Indiana have any difficulty with that?

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

Mr. METZENBAUM. On that basis, I yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I appreciate the traditional courtesy of my colleague and good friend from Ohio in not taking advantage of the opportunity he has to foreclose any opposition discussion of the issue between now and the cloture vote. That is vintage Metzenbaum and I am grateful to the Senator from Ohio.

Let us look at the whole environment of where we are right now from the perspective of those of us who are strong supporters of the Soft Drink Interbrand Competition Act, S. 598. In the finest tradition of the Senate, it is possible for individual Members to feel very strongly about the merits of the issue, deeply, sincerely, and not be in any way compromised as far as our motivations are concerned. So what the Senator from Indiana is about to say in no way goes to depreciation of the Senator from Ohio.

We are just plain looking at different sides of this elephant.

I recall an elderly senior Member of the House of Representatives, whom I had the good fortune of serving with in the Indiana General Assembly. He had been there a good number of years and, every year, I had the good fortune to serve with him, he told the same story about one bill that came down the pike. Whatever it might be, it usually applied to one bill or another that came through the session. The story was about a blind man who was asked to describe an elephant, and what he said depended upon whether he touched the side, the tusks, the front, or the tail. And the Senator from Ohio is grasping the tail of this beast and the Senator from Indiana is feeling the ears, and we are coming to different conclusions as to what S. 598, or, indeed, what the broader issue is right here.

The Senator from Ohio has very patiently suggested that, as one Member of the Senate, he is being denied his legitimate rights, where the rules of the Senate are being used so that he does not have the right to bring up two amendments, one, Illinois Brick, and the other, oil merger, both of which are pro-consumer by his definition and by the definition of the Senator from Indiana.

He has been very kind in suggesting that traditionally, and to this moment and into the future, the Senator from Indiana has been an ally of his in our efforts to try to defend consumer rights and get action on the two amendments. Others on different sides of these issues are joined in concert with the Senator from Indiana, not because they follow the interpretation of the Senator from Ohio and the Senator from Indiana on the merits of Illinois Brick and oil merger, but because they share the concerns of the Senator from Indiana on whether we should have a chance to vote up or down on the issue of Senate bill 598, the soft drink bill on its own merits alone.

That is the issue. Should we have a chance to vote up or down on the soft drink bill, S. 598, or should we not?

We have heard the Senator from Ohio talk rather patiently about this bill being lobbyist supported, and some huge conglomerate operation reaching its tentacles into the decisionmaking process of the U.S. Senate.

I have seen lobbyists and I have been a lobbyist, and in the finest tradition of the democratic process—with a small "d," I say to my colleagues on the Republican side here—we are talking about thousands of lobbyists, the great bulk of which are small business interests in this country.

One can look at my home State, or at the so-called lobbyists in the Senator from Ohio's home State, or at the situation in the State of our distinguished Presiding Officer, the Senator from Oklahoma, at the situation faced by our allies here from Mississippi or South Carolina. If we look at the situation in Indiana, we are talking about—give or take, one or two, depending on whether or not they are going bankrupt yet—about 50 small businesses, 35 of which employ less than 100 people, and none of which employ over 1,000.

In fact, I think if one looked, none would employ more than 500—maybe 1 or 2, but none of them over 1,000.

Now, this is the insidious type of group that is invading the decision process in the U.S. Senate, representatives of operations that employ less than 100 people.

It seems to me that somebody has to stand up when we see a segment of our economy that is about to be destroyed by an act of the Federal Trade Commission, not to establish a precedent, but to destroy an acceptable contractual relationship that has been in existence for 75 years. That is what we are saying.

If this thing has worked for 75 years, if the administrative law judge who heard the evidence says that there is ample competition, if the FTC ignores the evidence and makes an arbitrary decision on its own that will wipe out the majority of these small businesses, somebody ought to stand up and say, "Wait a minute, wait a minute, that is an excessive use of the power of the Federal Trade Commission."

I say that as one who has not had the record of being out to gut the FTC.

What we are talking about here is a procedural question: how under the rules of the Senate can 100 Members of the United States Senate have a chance to vote up or down on the soft drink bill? How can we get a vote on it?

The rules of the Senate are being used by my good friend and distinguished colleague from Ohio to prevent us from having a vote on this bill which he feels is anticonsumer. He feels very strongly it is anticonsumer. He has made no bones about the fact that he thinks it is a bad bill.

He has done everything he can legitimately under the rules. He is the most honest man in this Senate. He tells us what he will do—he will use the rules of the Senate to try to keep this bill from passing because he thinks it is a bad bill, and he has done a very effective job.

We have had hearings. We have had an effort to get this brought up. The only way we have been able to bring it up is to bring it up with the guarantee to the leader that we have enough votes to shut off a filibuster on it.

I would like nothing better than to have the opportunity to vote on Illinois Brick and to have an opportunity to vote on oil merger.

I would hope the Senator from Ohio and the Senator from Indiana and the rest of us who feel these amendments are important could devote as much time and energy to trying to get the number of votes for cloture, so that we can tell the oil companies to stay out of the circus business, so we can tell the oil companies to stop buying Montgomery Ward, so we can tell them to stop buying Anaconda Aluminum, and stick to the energy business, so that we could deal with the question of consumer protection and Illinois Brick.

Let us spend time trying to get a cloture vote on this and stop trying to kill the bottling bill. That is the question now.

We know there is no question in the mind of anybody here who has counted noses that once these two amendments, any one of them, is added to the bottling bill, the whole shebang is dead. The soft drink bill is dead, and we do not have the votes necessary to invoke cloture and get a vote on Illinois Brick.

So the issue, it seems to me, is whether the Senate is going to have a chance to vote on the bottling bill unfettered by some of these other issues which, if they are accepted, kill the bottling bill.

Let us look at the bottling bill. There has been a good deal of talk about it being anticonsumer.

I want to go back into the record and see what actually has been said, both by those of us who are in favor of the bottling bill and those of us who are opposed to the bottling bill.

The soft drink territorial arrangement has been on the books for 75 years. What we are trying to stop from happening is a Federal Trade Commission decision which totally ignores the conclusions reached by their own Administrative Law Judge.

I have not seen a Commission ruling that totally ignores the record in the field, a record which conclusively suggests that there is ample competition within the brands of soft drinks so that the consumer is protected.

If the position of the Senator from Ohio is accepted, by his admission what is going to happen is that a lot of these small businesses are going to go defunct. A handful of major bottlers will control the whole bottling business.

Those of us who are really concerned about competition in small business are trying to keep the big, powerful interests out of the industry. To let the Federal Trade Commission ruling stand, would result in greater concentration in the industry, not less concentration in the industry. Once there is more concentration, the consumer is going to get it in the seat of the pants. A few large bottlers will determine what is going to happen. There will be less service to the small grocer, to the filling station. The vending machines will disappear to a great extent because the large bottlers are not concerned about serving; they are concerned about getting a maximum return on the dollar.

I will conclude by showing the absolute unwillingness of the so-called experts who are behind this, on whom my good friend from Ohio is relying, to show what the issue is here.

I ask that we turn to page 97 of the hearings of the Soft Drink Interbrand Competition Act. The Senator from Ohio was thoughtful enough to let us hold some hearings. We have here Mr. Comanor, who was one of the experts on whom the FTC relied as to the kind of competition that existed and the evidence used by the FTC to rule against the franchise.

The issue was, is the return on the investment too high? Is that evidence of lack of competition? Are the bottlers of America making too much money? The FTC concluded, based on Mr. Comanor's study, that they were.

Senator BAYH asked Mr. Comanor on page 97:

I don't want to get semantical here, but I would like a clarification. In your statement,

you continue to refer to bottlers. Now, could you tell us, on table 3 where we talk about the rates of return of the leading soft drink concentrate manufacturers, is it concentrate manufacturers, or is it the return of bottlers which you refer to in your oral testimony?

Mr. COMANOR. The rate of return refers to concentrate manufacturer, as does table 1. I see no reason why these would—I should have used the word "concentrate manufacturer" in table 1 and throughout the statement, when I was talking about competition at the manufacturers stage, I was referring to the soft drink concentrate manufacturers.

So here we have a decision that is based on the rate of return of the concentrate manufacturers, the large concentrate manufacturers, not the rate of return on those small bottlers.

Now let us look further:

Mr. COMANOR. . . . One could look at bottlers, I suspect, but I do not know what they are.

Yet, we are about to put all these bottlers out of business:

Senator BAYH. Did the FTC when they made this decision, did they have a chance to study the profitability of the bottling part of the soft drink industry?

Mr. COMANOR. I really didn't get into that.

Here is the architect of the decision admitting that his study did not even explore the profitability of a lot of those small drink people, employing 35, 40, or 45 people. He is about to put them out of business on the basis of an entirely different premise—that the syrup manufacturers are making too much money; and he is going to put my bottler in Portland, Indiana, out of business. I am not going to sit still and let him do that. He says:

These firms I would expect to see turn very low profits.

So let us look at what we are really trying to do here. We who are supporting this act are trying to keep in business a relatively large number—a couple of thousand—of small businesses, most of whom employ less than 50 people, businesses that are now existing in many hometowns in America, which are providing good service for small businesses that want access to soft drinks. The profit ratio, by Mr. Comanor's admission, is very low. We are trying to keep these folks in business, so that we do not have a handful of large bottlers move in and take over the whole distribution of soft drinks.

With all respect to my friend from Ohio—and it is rare that we disagree—I think we will have less competition, we will have less service, and we will have higher prices.

I respectfully suggest that it is painful to have to resort to this strategy to get a vote on an issue. But the Senator from Ohio has very effectively given us no alternative. He knows how much I have explored alternatives to get a vote up or down on the issue. He has been a valiant champion of his position—namely, he is against the soft drink bill.

Mr. STEVENS. Mr. President, will the Senator yield me 1 minute?

Mr. BAYH. I yield the floor.

Mr. STEVENS. Mr. President, at this time I should like to express my support of S. 598, the Soft Drink Interbrand Competition Act. This legislation, which is cosponsored by 78 Senators, is designed to clarify the circumstances under which territorial license provisions are lawful. It is intended to preserve a unique and necessary industry practice: the manufacture, bottling, and distribution of trademarked soft drinks by local companies operating under a territorial contract.

To understand why this legislation is needed, it is important to understand the soft drink industry. The bottling industry is very capital intensive. A bottler must invest a tremendous amount of time and money to develop a viable business in any given geographic territory for their specific product. In any given area, they face competition on the shelf from several hundred other beverages. The consumer, should he decide that the price of Coke or Pepsi is too high, may choose such things as the store brand, powdered drinks, juices, and any number of other trademarked beverages.

Yet, the opponents of this legislation argue that, despite the tremendous competition on the grocery store shelf, the bottler should also face competition from other bottlers of the same product. Unfortunately, such competition could only result in increased concentration in the soft drink industry. The smaller bottlers who serve a limited geographical territory and who have, through their efforts over the years, worked up a good market for the product will be faced with a larger dealer "dumping" excess product. Obviously, the larger bottler will not want to sell excess product in his market because that would ruin his price structure. However, the larger bottler could and would successfully sell his excess in another area at a lower price, undercutting the smaller bottler and eventually putting him out of business, thereby decreasing the competition in the market.

This is not a problem in just a few areas. Of the 2,000 bottlers in 1979, over 1,500 employed less than 50 employees. In most cases, these are small, family-owned businesses which have worked over many, many years to develop their markets. Unless Congress passes this bill, these small enterprises may simply disappear in the face of competition from large, interbrand conglomerates. Such a result would not only be unjust, it would be unwise. In the long-run it would decrease competition, not increase it.

I strongly urge all my colleagues to consider this legislation carefully and support passage, as it drastically affects and justly accommodates the many small soft drink bottlers in each State.

While I strongly support the legislation, I do not feel that I can vote for cloture before this issue has been seriously debated. Over the past few years, I have become increasingly aware of the importance of the rights of the minority on any issue. As a Senator from a State with a relatively small population which, nonetheles, has a strong interest in complicated and unique legislation, I feel very strongly that those who wish to speak at length on any particular bill, even if they are in the minority, should be afforded that right. Therefore, while I will vote against cloture until the bill has been thoroughly debated, my vote is in no way connected to the merits of S. 598, which I believe is an excellent piece of legislation.

Mr. HATCH. Mr. President, the Soft Drink Interbrand Competition Act will preserve a unique system of enterprise, which for the past 75 years has encouraged initiative, promoted competition, and established one of the most successful examples of small business development in this country. Failure to give this legislation our support will result in: First, Government interference with a successful business structure; second, granting a hunting permit to larger businesses to poach upon the areas carefully cultivated by smaller independent bottlers; third, myriads of other difficulties which we are not capable of completely assessing.

The independent soft drink bottling business is one of the finest examples of unfettered competitive development. The entire independent bottling system is an imaginative response to a peculiar demand created by the invention of a formula for soft drink syrup. Though there are many examples within the industry, perhaps one of the most successful is that of the Coca-Cola Co. In 1886, Mr. John S. Pemberton invented a soft drink syrup and was the first to prepare and sell a soft drink under the Coca-Cola trademark. Five years later, in 1891, Mr. Asa G. Chandler acquired the rights to the secret formula and a year later in 1892, the Coca-Cola Co. was formed. In 1899, Coca-Cola granted the exclusive right to Joseph Whitehead and B. F. Thomas to bottle and to sell Coca-Cola in bottles throughout the United States.

In response to insufficient capital and to create consumer demand, the two divided their territory between them. The two branched out, forming other related companies to whom the right to act as licensor with respect to certain territories was conveyed. In 1900, Thomas and Whitehead initiated a program aimed at granting exclusive licenses to local bottling companies, throughout their respective territories. By 1920, they had licensed over 880 local bottling companies to produce and sell Coca-Cola in bottles. Other bottling companies, such as Dr. Pepper, Pepsi-Cola, Hires, Vernor's, et cetera, have all expanded and responded to the demand for bottled soft drinks in a similar way. All have granted exclusive territorial rights to independent bottlers to sell and market soft drinks. All of these "acorn" companies, competing with each other, have grown and expanded until today they compete for one of the major beverage markets in the country, second only to coffee. In 1977, the soft drink industry had sales of $11,526.8 million, employing 114,347 persons, with a payroll of $1,267.2 million, distributed among 2,174 soft drink plants most of which are owned by small businesses, many of them family owned and operated.

Territorial restrictions placed on the independent bottlers under the franchise contracts continue to promote

competition and growth just as they did in the 1880's.

Each bottler, while in keen competition with other brands, has sole responsibility over his territory. This encourages greater marketing and distribution efforts. Accuracy in calculating demand is facilitated and duplication of services, advertising, and other efforts is avoided. Exclusive territories encourage independent businessmen to make the required substantial investments in plant, equipment, packaging, and warehouse space, which they otherwise would be reluctant to make. This stewardship concept promotes frequent local store-door service, store-door delivery, and the use of returnable bottles at a variety of outlets. The independent bottling system has resulted in wide product availability, keen brand competition, nationwide service on a local level, and the perpetuation of small businesses.

After nearly three quarters of a century of successfully promoting free enterprise and independent growth and development, the bottler's system was challenged. In 1971, the Federal Trade Commission brought a series of cases challenging the territoral provisions in trademark licenses as unfair methods of competition in violation of section 5 of the Federal Trade Commission Act. Not satisfied by the findings of an administrative law judge, who concluded that the Coca-Cola franchise system was lawful and in fact fostered competition, the FTC overruled, and held that the exclusive territorial provisions were violative of the act.

The FTC overlooked an abundance of evidence and favored legal intervention over the continuance of a working model of business ingenuity. The FTC ignored a recent Supreme Court decision in Continental T.V. against GTE Sylvania, Inc., which held that vertical nonprice restrictions are to be tested under the rule of reason. The rule requires that the extent of industry competition be weighed against the effects of the challenged restraint upon competition. Had the FTC followed the Court's holding in the Sylvania case, it would not have ruled against the Coca-Cola franchise system. Neither would the Court have overruled the administrative law judge who found that competition was stimulated and not stifled.

During the past 8 years since the FTC ruling, uncertainty as to what touchstones constitute "unfair methods of competition" has torn the industry. Are bottlers to violate the FTC ruling in order to honor their contract obligations, or should they obey the FTC order and subject themselves to a price war with chain store customers?

This legislation would settle the issue in favor of the independent bottler, as it rightly should. Yet, it would also insure that the objectives of antitrust law are implemented. The bill would require that a rule of reason approach be taken in deciding whether or not exclusive territory franchises are anticompetitive.

Section 2 of the bill pin points what considerations the rule of reason requires. Exclusive territorial arrangements used in the soft drink industry shall not be held unlawful under the antitrust laws if the soft drink products are in substantial and effective competition with other products of the same general class. The bill would require that the FTC not only give lip service to the rule of reason, as they did in the Coca-Cola decision, but would require then to decide all such cases on its touchstones.

If this legislation is not enacted and the FTC holding goes unchecked, franchise territories will no longer be legally enforceable. Supermarket chains will drive independent bottlers out of business with temporary price wars. Chain store control would mean an end to returnable bottles, store-to-door delivery, and multiple outlets. Large stores would ultimately dominate the distribution of soft drinks. This would result in monopolistic distribution and higher prices More important, this centralization would mean fewer local bottlers and less opportunity for local employment.

I pledge my entire support for this bill. The successful development of the exclusive soft drink franchise convinces me that any Government regulation of this industry, though well intended, would not make the industry any more competitive or productive. We should applaud the soft drink industry for its positive utilization of the franchise. It would be more appropriate to recognize than to regulate.

● Mr. LEVIN. Mr. President, with mixed emotions I have concluded that I am unable to support this cloture petition. Since I have consistently said that I would support cloture whenever I felt that the issues before the Senate had been fully debated, I want to take just a moment to explain this vote for the RECORD.

The development of this debate makes it clear that in this particular case, cloture is being invoked in order to prevent debate from taking place on a number of amendments—in fact cloture is being invoked in an attempt to prevent those amendments from ever being offered.

Thus, in this case a vote for cloture is a vote against debate and a vote for cloture is a vote for a filibuster.

Given these unique set of circumstances, I find myself unable to support an attempt to prevent debate from even beginning on some significant policy questions. Thus, reluctantly, I am compelled to oppose this petition.●

Mr. THURMOND. Mr. President, I strongly favor the passage of this bill as it was introduced. The small bottlers of America will be put out of business unless this bill is passed.

It is the little fellow I am trying to help, and I do not think we should amend the bill in any way that will affect it, because little businesses are having a very difficult time existing, even now.

I hope the Senate will pass the bill as it is written.

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Ohio is recognized.

Mr. METZENBAUM. Mr. President, let us not kid ourselves. This is not really a special project of small businessmen. I am going to offer an amendment which will try to separate the small business people from the large business people, and we will find that it will be voted down, because this is the baby of the syrup companies and the large conglomerates, not the baby of small businessmen, whom we talk about protecting.

I recall when my good friend RUSSELL LONG spoke on the floor of the Senate about the little gasoline station operator, when we had some bills having to do with the major oil companies of the country. He is very persuasive.

This is not a special bill for small business. This is a bill that hurts small business because you fail to permit the Illinois Brick amendment to come up and that, indeed, helps the small businessman.

We talk about whether the FTC decision would destroy a segment of business. What has happened to the great concept of free enterprise in this country? Small business people in Martinsville, in Galion, and in Mansfield cannot compete against other companies, even though they may be a bit larger.

I will tell the Senate what the real truth is: The big boys are afraid that the little fellows are going to start undercutting them where they have their territorial privileges and rights. That is what is involved in this bill.

It has been said that if we let the Illinois Brick matter come up, the whole shebank is dead, that we cannot invoke cloture. How do we know that? We never got the bill to the floor so that we could attempt to invoke cloture.

The fact is that I am not sure but that we may have 60 votes. I know we have in excess of 50 votes for it. More than a majority of the Senate want to vote for Illinois Brick, and they are not being given an opportunity to do so.

Mr. President, this whole issue should not revolve only around whether Senators are for or against the bottlers bill. This issue has to do with whether or not a Member of the Senate can be precluded by cloture and by a filibuster from bringing up a nongermane amendment.

I say to Members of this body who have been known to want to take the floor to fight for their positions that today this will be used in opposition to Illinois Brick, in opposition to the oil company antimerger bill, but tomorrow, figuratively speaking, I predict it will become a procedure in the Senate.

I am willing to change the rules. I am willing to come up with a new procedure. I am only sorry that the distinguished Senator from Alabama, Jim Allen, who used to sit in this Chamber is not here today, because if he were here he would be standing shoulder to shoulder with me against this abuse of the procedure under the rules of the Senate.

Has my time expired?

The ACTING PRESIDENT pro tempore. Time has expired.

Mr. METZENBAUM. I thank the Presiding Officer and I thank the cooperation and consideration of the managers of the bill.

CLOTURE MOTION

The ACTING PRESIDENT pro tempore. Under the previous order and pursuant to rule XXII, 1 hour having passed since the Senate convened, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We, the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, hereby move to bring to a close debate on S. 598, a bill to clarify the circumstances under which territorial provisions in licenses to manufacture, distribute, and sell trademarked soft drink products are lawful under the antitrust laws.

Henry M. Jackson, J. James Exon, Strom Thurmond, Lawton Chiles, Jennings Randolph, Richard (Dick) Stone, Howell Heflin, Frank Church, Charles McC. Mathias, Jr., Edward Zorinsky, Donald W. Stewart, George McGovern, James A. McClure, Russell B. Long, Birch Bayh, David L. Boren, Max Baucus, Robert Morgan, David Pryor, Dale Bumpers, Robert C. Byrd.

CALL OF THE ROLL

The ACTING PRESIDENT pro tempore. Pursuant to rule XXII, the Chair now directs the clerk to call the roll to ascertain the presence of a quorum.

The assistant legislative clerk called the roll and the following Senators answered to their names:

[Quorum No. 5 Leg.]

Armstrong	Goldwater	Moynihan
Baker	Gravel	Nelson
Baucus	Hart	Nunn
Bayh	Hatch	Packwood
Bellmon	Hatfield	Percy
Bentsen	Hayakawa	Pressler
Biden	Heflin	Proxmire
Boren	Heinz	Pryor
Boschwitz	Helms	Randolph
Bradley	Hollings	Ribicoff
Bumpers	Huddleston	Riegle
Burdick	Humphrey	Roth
Byrd, Harry, F., Jr.	Inouye	Sarbanes
	Jackson	Sasser
Byrd, Robert C.	Javits	Schmitt
Chafee	Jepsen	Schweiker
Chiles	Johnston	Stafford
Church	Kassebaum	Stennis
Cochran	Laxalt	Stevens
Cohen	Leahy	Stevenson
Culver	Levin	Stewart
DeConcini	Long	Stone
Dole	Lugar	Talmadge
Domenici	Magnuson	Thurmond
Durenberger	Mathias	Tower
Durkin	Matsunaga	Tsongas
Eagleton	McClure	Wallop
Exon	McGovern	Warner
Ford	Melcher	Williams
Garn	Metzenbaum	Young
Glenn	Morgan	Zorinsky

The PRESIDING OFFICER (Mr. HEFLIN). A quorum is present.

VOTE

The PRESIDING OFFICER. The question is, Is it the sense of the Senate that debate on S. 598, the bill to clarify the circumstances under which territorial provisions in licenses to manufacture, distribute, and sell trademarked soft drink products are lawful under the antitrust laws, shall be brought to a close?

The yeas and nays are automatic under the rules. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Nevada (Mr. CANNON), the Senator from California (Mr. CRANSTON), and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

I further announce that, if present and voting, the Senator from Rhode Island (Mr. PELL) would vote "yea."

Mr. STEVENS. I announce that the Senator from Missouri (Mr. DANFORTH), the Senator from Wyoming (Mr. SIMPSON), and the Senator from Connecticut (Mr. WEICKER) are necessarily absent.

The PRESIDING OFFICER. Is there any Senator in the Chamber who wishes to vote?

The yeas and nays resulted—yeas 86, nays 6, as follows:

[Rollcall Vote No. 143 Leg.]

YEAS—86

Armstrong	Gravel	Nunn
Baker	Hart	Packwood
Baucus	Hatch	Percy
Bayh	Hatfield	Pressler
Bellmon	Hayakawa	Proxmire
Bentsen	Heflin	Pryor
Biden	Heinz	Randolph
Boren	Hollings	Ribicoff
Boschwitz	Huddleston	Riegle
Bradley	Humphrey	Roth
Bumpers	Inouye	Sarbanes
Burdick	Jackson	Sasser
Byrd, Robert C.	Javits	Schmitt
Chafee	Jepsen	Schweiker
Chiles	Johnston	Stafford
Church	Kassebaum	Stennis
Cochran	Laxalt	Stevenson
Cohen	Leahy	Stewart
Culver	Long	Stone
DeConcini	Lugar	Talmadge
Dole	Magnuson	Thurmond
Domenici	Mathias	Tower
Durenberger	Matsunaga	Tsongas
Durkin	McClure	Wallop
Eagleton	McGovern	Warner
Exon	Melcher	Williams
Ford	Morgan	Young
Garn	Moynihan	Zorinsky
Glenn	Nelson	

NAYS—6

Byrd, Harry F., Jr.	Helms	Stevens
	Levin	
Goldwater	Metzenbaum	

NOT VOTING—7

Cannon	Kennedy	Weicker
Cranston	Pell	
Danforth	Simpson	

The PRESIDING OFFICER. On this vote, the yeas are 86, the nays are 6. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Cloture having been invoked, amendments must be germane. The pending first-degree amendment being not germane, the Chair declares it out of order; therefore, the second-degree amendment falls with it.

SOFT DRINK INTERBRAND COMPETITION ACT

Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. Mr. President, I should like to pose a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. For the edification of the Senator from Indiana and for others who are interested in this legislation, does the ruling of the Chair now say that the effect of the recent ruling that I just heard the Chair make result in S. 598 being the pending business, in its unamended form.

The PRESIDING OFFICER. The Senator is correct. There are no pending amendments to the bill.

Mr. BAYH. I appreciate that, Mr. President.

Would the Senator from Ohio—I notice he is trying to get access to the floor and I am perfectly happy to have him have that in just a moment. We have several of our colleagues here who have asked the Senator from Indiana what the disposition of the Senator from Ohio is so they can plan their schedules. Is this a good time to ask that question?

Mr. METZENBAUM. The Senator from Ohio has not hesitated to indicate to his fellow Senators that he has no desire to delay the issue or hold the floor unnecessarily. The Senator from Ohio does intend to call up a number of amendments, but is not, to a tremendous extent, talking about more than four or six or seven amendments. The Senator from Ohio anticipates that there will be rollcalls on appeals from the decision of the Chair in connection with certain of those amendments which I anticipate the Chair may see fit to rule nongermane.

There may also be rollcalls in connection with certain amendments which I believe are germane and that depends on whether or not those amendments are or are not acceptable to the managers of the bill.

The Senator from Ohio has no desire to keep his fellow Senators from getting back and doing their thing in their own communities. I expect that we should be on this matter for no more than a couple of hours.

Mr. BAYH. I appreciate the openness of the Senator from Ohio. In other words, to those who have to make this decision, it is fair to say there probably will be several rollcall votes as soon as we can get to them? Is that correct?

Mr. METZENBAUM. I think that is correct.

Mr. THURMOND. Will the Senator from Ohio yield for just a minute?

Mr. METZENBAUM. The Senator from Indiana has the floor.

Mr. BAYH. I am glad to yield without losing my right to the floor.

Mr. THURMOND. Mr. President, since cloture has now been voted, the rule is that each Senator now has 1 hour and he is limited to 1 hour. Will the Chair rule on that?

The PRESIDING OFFICER. Is that a parliamentary inquiry?

Mr. THURMOND. It is a parliamentary inquiry.

The PRESIDING OFFICER. Will the Senator repeat it?

Mr. THURMOND. Since cloture has been voted, how long now does each Senator have to speak, in total time?

The PRESIDING OFFICER. Under the rule, each Senator has 1 hour for debate, but there is a 100-hour limitation of total time involved.

Mr. THURMOND. I understand, but

each Senator is limited to 1 hour. Does that 1 hour include time consumed in rollcalls?

The PRESIDING OFFICER. The 1 hour does not, but the 100 hours does.

Mr. THURMOND. I thank the Chair.

Mr. BAYH. Mr. President, I ask unanimous consent that I may be permitted to yield to the Senator from Virginia for 2 minutes without losing my right to the floor.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Virginia is recognized.

Mr. HARRY F. BYRD, JR. Mr. President, I want to state for the record that I favor the pending legislation, which is to say that I favor the legislation which is being managed by the distinguished Senator from Indiana and the distinguished Senator from South Carolina. I do not support the amendment, the key amendment, which was to have been offered and may still be offered by the Senator from Ohio (Mr. METZENBAUM). However, I voted against cloture because I do not want to vote for cloture at this stage in the proceedings. I want the record to show that I favor the pending legislation and I shall vote for it when it comes to a vote.

Mr. BUMPERS. Will the Senator from Indiana yield for a couple of minutes?

Mr. BAYH. I shall be glad to, if I may first express my appreciation to the Senator from Virginia for the position he was in. I appreciate his support on the bill.

I yield to the Senator from Arkansas.

Mr. BUMPERS. I shall take it out of my time so it will not come out of the time of the Senator from Indiana.

Mr. President, I just want to say that I would not have the majority leader's job in the U.S. Senate regardless of what it might pay. After what has happened here in the last 3 days, I hope the American people really never find out what is going on here.

We have, literally, wasted 3 days. I am not blame-placing. I am not talking about any Senator who has been involved in what has occurred in the last 3 days here.

I am blaming every Member of the U.S. Senate, because of the rules. It does not permit just the minority, but that of one person—one person can tie this place in knots, put holes in the bills.

What does a hold mean when the majority leader goes to the Policy Committee and says, I want to bring up a certain bill? There is a hold on that bill. And who has that hold? Senator so-and-so.

Well, the lay public does not understand that this means one thing, that that one Senator is going to filibuster that bill until he gets what he wants, either a rule to allow him to offer nongermane amendments to it, or talk until he talks it to death, hopefully, and keeps 60 Senators from voting for cloture.

Here we are in one of the most devastating political and economic times in the history of this country and we have wasted this whole week. We have wasted it.

I am for the bill. I am ready to vote on Illinois Brick, up or down, I do not care. I think most of my colleagues feel the same way.

But I have heard many times in the last year that the thing the American people are most upset about is that we cannot get anything done. But most everybody points to the bureaucracy, the regulators. We cannot get a decision from the regulatory agencies. Well, we cannot get one out of the U.S. Senate, either.

Mr. METZENBAUM. Will the Senator from Arkansas yield?

Mr. BUMPERS. I am happy to yield.

Mr. METZENBAUM. I would like to point out to the Senator from Arkansas that on three separate occasions, or maybe four, I stood on the floor and said I was prepared to vote immediately with respect to the amendments of the Senator from Mississippi and the Senator from Indiana, and to bring up my amendment and vote on it immediately without any debate.

I have not held the floor. I have been the victim of a filibuster, not one who participated in it. I have been trying to bring debate to a close so that an amendment could be offered under the rules.

Mr. BUMPERS. I reiterate, as long as the rules of the Senate are as they are, this Senator on occasion is going to take advantage of them.

I have a parochial interest in protecting the people of my State. Sometimes legislation is offered here which might appear on the face of it to be in the national interest, but it penalizes my State, and I intend to put holds on them, and do all the other things everybody else does.

I say that this institution cannot function efficiently and effectively as long as we have that germaneness rule and as long as we have the filibuster rule.

I say now that I am willing to do away with both of them and start putting a little political courage here, vote up or down, I do not care how controversial it is.

That is what we were sent here for. I am not blaming the Senator from Ohio or the Senator from Indiana. Everybody knows what has happened. I am not blaming either one.

As I say, I intend to do it, and have in the past done it myself, and will continue in the future.

But I say that I, certainly, and this is not just a bouquet to the majority leader, but I would not have his job for all the tea in China.

We sat here the other night trying to decide at 2 o'clock in the morning, are we going to continue this thing all day tomorrow, go on through the night, or wait until Monday.

One Senator said, "My plane leaves at 4 o'clock, I want the vote at 3 o'clock." Another said, "My plane does not get in until 4, I do not want it taken until 4."

I had prepared two of my best speeches in my life for Monday and I canceled them both. Either make them and miss 13 rollcalls, or cancel, but not hold 99 Senators hostage to a couple of speeches in my State.

I had that surge coming on this morning, Mr. President. I had to get it out of my system. I said it, and I yield the floor.

Mr. BAYH. Mr. President, I do not call that a surge. I call it an exposition of wisdom.

There is not a person in this body that has not felt compelled, for reasons that are good to each of us, to take advantage of the rules, to protect our States, to further interests we feel are important to the country.

I think the Senator from Arkansas is absolutely right.

I would like to see things change. I think the majority leader may have been operating in a vat of molasses, in which he is trying to create miracles, in an environment that almost defies even normal conditions of business, let alone miracles.

If there is anybody who is a miracle maker, it is the Senator from West Virgina.

Let me reiterate, I do not want to make a Supreme Court case out of this, but I cannot let my good friend from Ohio stand up and piously talk about the fact that he has been ready to vote. The fact is he has been ready to vote, but the reason is that if we permitted him to vote, he would kill the bill he is opposed to, and which 80 Members have been supporting for a couple of years.

He has a right to do that under the rules, as the Senator from Arkansas points out. I think his position is well taken and I want to support him in any effort he might take in this regard.

The Senator from Indiana is prepared to yield the floor. I am glad to yield to the Senator from West Virginia without losing my right to the floor.

Mr. RANDOLPH. Mr. President, the Chair has explained correctly that each Senator has 1 hour, in responding to an inquiry from the able Senator from South Carolina (Mr. THURMOND).

In connection with that 1 hour I add that one Senator cannot transfer any part of that 1 hour to another Senator, except as stated in rule 22.

It is not a pleasantry, but a truism, to emphasize that the present majority leader, the Senator from West Virginia (Mr. ROBERT C. BYRD) is a skilled master of legislative legerdomain. His job is, as the effective Senator from Arkansas has well said, a difficult responsibility.

The leader has compassion, commitment, and courage. He also has the attribute of fairness to all his colleagues.

I salute him, as I have often done, not only for myself, but all Members of this body.

We are fortunate that Senator ROBERT C. BYRD is the leader of this Senate.

Mr. ROBERT C. BYRD. Mr. President, will the Chair recognize the Senator, and then I would like him to yield to me.

Mr. METZENBAUM. I yield to the Senator, but not on my own time.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that he may do that.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, while the distinguished Senator from Ohio, by unanimous consent, has yielded to me on my own time, I state a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. ROBERT C. BYRD. Is it not true that debate, once cloture has been invoked, must also be germane?

The PRESIDING OFFICER. The Senator is correct.

Mr. ROBERT C. BYRD. I thank the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, I also have a parliamentary inquiry.

I have heard some comment that no Senator may yield his time of 1 hour. As a matter of fact, is it not correct that a Senator may yield his time to the majority leader or the minority leader, but not to exceed 2 hours?

The PRESIDING OFFICER. That is correct.

Mr. METZENBAUM. I thank the Chair.

AMENDMENT NO. 1767

(Purpose: To eliminate damage immunity for antitrust violations)

Mr. METZENBAUM. Mr. President, I call up amendment No. 1767.

Mr. BAYH. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Ohio (Mr. METZENBAUM) proposes an amendment numbered 1767:

On pages 2 and 3, strike section 3 and renumber the following section to conform to this amendment.

Mr. BAYH. Mr. President, a parliamentary inquiry.

Is the amendment proposed by the Senator from Ohio germane to the measure that is now before the Senate?

The PRESIDING OFFICER (Mr. SARBANES). The Chair informs the Senator from Indiana that the amendment is germane. It simply strikes a section of the bill and renumbers the following sections to conform with the amendment. This is amendment No. 1767.

The Senator from Ohio.

Mr. METZENBAUM. Mr. President, this amendment has to do with the damage section of the proposed legislation. What this amendment would do would be to take out a section of the bill that goes far further than anything having to do with small bottlers. It provides something brand new in the whole area of antitrust law. As a matter of fact, it provides a retroactive forgiveness of any antitrust violations.

Why should there be a retroactive forgiveness? If you violated the law, why should we, in one fell swoop, enact a piece of legislation that says that even though you violated the law, you do not have to pay any damages?

It does something beyond that. It has a prospective aspect. It says that if there are any future violations, under this law, under the amendment—not a future violation under law but a future violation under the laws as amended by the pending measure—you are not to be held responsible for violating the very law we are passing, until such time as some court comes along and tells you, "Don't, do it"; and only from that time forward would you be responsible.

Mr. President, that is an absurdity that just does not make any sense. We have not gone totally berserk. There is no other law in the country that says that you may violate a law until such time as some court tells you that you are violating the law. When you violate the law, whatever the law is—antitrust, criminal law, traffic law, any kind of law—if you violate the law, you pay the penalty. But this would provide something brand new.

In our enthusiasm and in our excitement to pass the bottling bill, my guess is that we will reject this amendment. But I hope that the manager of the bill, in his wisdom, will recognize how correct the Senator from Ohio is in pointing out that there is no logic whatsoever to exempting a future violation from the very act we are about to pass, saying that you are not violating the law until some court comes along and says, "See here, you are viblating the law."

Mr. President, I ask for the yeas and nays in connection with the amendment, and I reserve the remainder of my time.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. BAYH. Mr. President, I invite the attention of the Senate to the relevant provision in the bill and would relate that to how the law presently exists and what has been the tradition governing the soft drink industry.

The bill now says that soft drink bottlers will not be subject to treble damages unless it can be proved that after the date of enactment of this legislation, substantial and effective interbrand competition does not exist. The bill provides no exemption for treble damages due to violations of the antitrust laws not involving territories.

The situation confronting any bottler in America is that for 75 years it has been the law of the land that these territorial agreements are legal. Suddenly, out of the clear blue, contrary to the evidence compiled and the decision of the administrative law judge to the contrary, the FTC strikes down this 75-year precedent.

There are 1,000 or so—almost 2,000—small businessmen out there, operating on the basis of a 75-year precedent. What we are saying is that none of those small businesses should be subjected to being dragged into court for treble damages as violating the antitrust laws on the basis just of this territorial franchise provision, as a result of an FTC decision which runs contrary to 75 years of law and of previous court decisions from 1920 to date; that they should be held culpable only after a court has made this decision and should not be held culpable in the interim.

If any of these folks are involved in price fixing or some other violations of the antitrust laws that are not based solely on their territorial contracts, they are guilty and can be prosecuted. But in this area, until the law is resolved, let us not drag some small businessman in and accuse him of violating antitrust laws because the FTC decides that 75 years of precedent no longer makes any sense.

I hope we can vote down the provision of the Senator from Ohio. I do not know whether he wants to debate it extensively. I do not want to preclude his right to do so. But at a time convenient, I shall move to table the amendment.

Mr. METZENBAUM. I yield myself 1 minute.

Mr. President I point out that I am talking about prospective violations. I am talking about violations under this law that are prospective as well as retrospective.

Prior to the Schwinn decision in 1967, the legality of the soft drink industry's territorial restrictions was doubtful. But after the Schwinn decision until the 1977 Sylvania decision, the restrictions clearly were illegal under the Supreme Court's per se test.

I am talking about that part of the retrospective aspect of antitrust violations, but I also am talking about the prospective question. I am saying that there is no basis to say that you are not responsible if you violate the law as drafted and as introduced in this amendment.

It is as if we were to say to a fellow who drives an automobile and has an accident and hits somebody "You're not responsible for that, but you are responsible if you do it a second time."

Mr. President I do not think that the Senator from Indiana truly intends, and that is what the language of the bill provides.

So I think that in the excitement and enthusiasm for the soft drink bottlers, we will be going a step too far, even for those who want the bottlers' bill.

Mr. BAYH. Mr. President, I point out that there is a significant distinction between Schwinn and the case of bottlers. In Schwinn, we are talking about a distributor involved only in distribution, not in manufacturing. With respect to small bottlers, we are talking about manufacturing. We are talking about a plethora of bottlers in the soft drink business. We are talking about very few distributors of bicycles.

Also, I point out that most of the cases that have been litigated after the Schwinn decision backed up the position of the bottlers, as the judges consistently ruled that similar contracts were not per se violations, based on the court's analysis of Schwinn.

So despite the concerns expressed by the Senator from Ohio, I must suggest that in the judgment of the Senator from Indiana, what we are talking about is that we should see what the rule of law really is and not drag a bunch of small bottlers into court on the basis of what the FTC says the law is. Let us let the court say what the law is and then we will abide by it.

Mr. HATCH. Mr. President, will the Senator from Indiana yield for a question?

Mr. BAYH. The Senator has his own time. I am glad to yield to him on his own time.

Mr. HATCH. I am happy to do that.

The PRESIDING OFFICER. The Senator from Utah is recognized on his own time.

Mr. HATCH. I appreciate that.

Mr. President, as I view the Senator's amendment, this particular amendment would gut this bill and basically it is the remedial program that we are trying to

pass here in the Chamber. It has a tremendous number of sponsors.

Will the Senator from Indiana agree that that would be the effect of the amendment of the Senator from Ohio?

Mr. BAYH. I think the amendment of the Senator from Ohio really guts what we are trying to do.

We are trying to protect small businesses from being arbitrarily subjected to treble damages during a period of hiatus in the law. Once the court has decided or once the Senate and the House of Representatives have decided, then there is no question; anyone who goes out and violates what the law is and what the court says is guilty of treble damages and he or she is also guilty of treble damages if he or she gets involved in violation of antitrust laws in the interim, if those are not violations of territorial franchise questions.

Mr. HATCH. I thank the Senator from Indiana. He has covered this very well. I appreciate the Senator's good remarks.

All I say, in addition, is if we adopt the amendment of the Senator from Ohio, we will in effect, void the last 3 days in the fight that really has gone on.

I thank the Chair.

Mr. BAYH. Mr. President, I move to table the amendment of my distinguished colleague from Ohio and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. No further debate is in order.

The question is on agreeing to the motion to lay on the table the amendment of the Senator from Ohio. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Nevada (Mr. CANNON), the Senator from California (Mr. CRANSTON), and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

Mr. STEVENS. I announce that the Senator from Missouri (Mr. DANFORTH), the Senator from Indiana (Mr. LUGAR), the Senator from South Dakota (Mr. PRESSLER), and the Senator from Wyoming (Mr. SIMPSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Wyoming (Mr. SIMPSON), would vote "yea."

The PRESIDING OFFICER. Is there any other Member in the Chamber who desires to vote who has not voted?

The result was announced—yeas 88, nays 3, as follows:

[Rollcall Vote No. 144 Leg.]

YEAS—88

Armstrong	Bumpers	Culver
Baker	Burdick	DeConcini
Baucus	Byrd,	Dole
Bayh	Harry F., Jr.	Domenici
Bellmon	Byrd, Robert C.	Durenberger
Bentsen	Chafee	Durkin
Biden	Chiles	Eagleton
Boren	Church	Exon
Boschwitz	Cochran	Ford
Bradley	Cohen	Garn
Glenn	Levin	Sarbanes
Goldwater	Long	Sasser
Gravel	Magnuson	Schmitt
Hart	Mathias	Schweiker
Hatch	Matsunaga	Stafford
Hatfield	McClure	Stennis
Hayakawa	McGovern	Stevens
Heflin	Melcher	Stewart
Heinz	Morgan	Stone
Helms	Moynihan	Talmadge
Hollings	Nelson	Thurmond
Huddleston	Nunn	Tower
Humphrey	Packwood	Tsongas
Inouye	Percy	Wallop
Jackson	Proxmire	Warner
Jepsen	Pryor	Weicker
Johnston	Randolph	Williams
Kassebaum	Ribicoff	Young
Laxalt	Riegle	Zorinsky
Leahy	Roth	

NAYS—3

Javits	Metzenbaum	Stevenson

NOT VOTING—8

Cannon	Kennedy	Pressler
Cranston	Lugar	Simpson
Danforth	Pell	

So the motion to lay on the table Mr. METZENBAUM's amendment (No. 1767) was agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. BENTSEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Texas.

Mr. BENTSEN. Mr. President, this indicates that when something is working, we all try to fix it. This system has been working for over 70 years. You have had great competition in quality and you have had it in price.

Anyone who goes to a supermarket these days sees all kinds of colas—uncolas, real colas, bi-colas. And as you are checking out of the supermarkets you see them again.

I thought I used to know the names of all of the soft drinks. But I do not think anyone today could name half of them.

So this system has worked in giving you a greater variety of soft drinks. It has given you good service. Customers have supported it in the marketplace and they have benefited from that kind of competition—the strong and effective competition that is existing today.

New products have emerged to compete with existing choices. In small businesses, jobs have been created and the economy has been strengthened. I believe our Nation has been well served.

Mr. President, the Federal Trade Commission made a mistake in finding that territorial licensing arrangements are unlawful. That decision will not improve this industry; it will harm it. It will not reduce concentration; it will increase it.

It will be particularly harmful to small bottlers, who could well find themselves out of business by larger firms.

It is going to be harmful to the workers, because some of them are going to be out of work. They are going to lose their jobs. And I think consumers would also lose under this kind of decision.

The FTC decision, if upheld, would restructure an industry that does not need restructuring, creating harm instead of benefit.

I believe its action could be far reaching. It is not the kind of news that makes page 1 of the New York Times. It will get no prime time special on the 7 o'clock news on TV.

But, Mr. President, I think it is going to be far reaching, far reaching to those who spend their lives in the industry, and far reaching to those who are well served by the current system.

Congress ought to pass this bill. They ought to say no to the FTC decision. Congress should allow the existing system to continue, so long as there is "substantial and effective competition" among different products. And the way they try to push each other off the shelves in the supermarkets these days, you sure have enough competition taking place.

Mr. President, this FTC action is an excellent example of the kind of overregulation that angers so many of my constituents. It is neither needed nor wanted nor helpful. It would endanger, not improve, the soft drink industry.

I believe Congress ought to pass this bill and uphold the current system that will protect firms, workers, and consumers alike.

Mr. THURMOND. The question, Mr. President.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. THURMOND. We are ready to vote on the bill as soon as the Senator is ready.

The PRESIDING OFFICER. The Senator from Ohio.

AMENDMENT NO. 1761

(Purpose: To preserve territorial restrictions for small soft drink bottling companies)

Mr. METZENBAUM. Mr. President, I call up my amendment No. 1761.

The PRESIDING OFFICER. The clerk will report the amendment.

Mr. BAYH. Mr. President, a parliamentary inquiry. Is the proper time to make a point of order on germaneness and ask the Chair's advice on germaneness now or after the clerk reports the amendment?

The PRESIDING OFFICER. If the amendment is nongermane on its face, the Chair has the responsibility to so state. This is not such an amendment. The Senator, if he chooses to make a point of order concerning the germaneness of the amendment, may do so after it has been reported.

Mr. BAYH. I thank the Chair.

The legislative clerk read as follows:

The Senator from Ohio (Mr. METZENBAUM) proposes an amendment numbered 1761:

On page 2, lines 7 and 8, strike "the licensee" and insert in lieu thereof "any licensee whose sales do not exceed $100,000,000 and whose assets do not exceed $50,000,000".

Mr. BAYH. Mr. President, I ask the Chair's advice on the germaneness of this amendment.

The PRESIDING OFFICER. The cloture rule requires that an amendment be germane. One of the tests of germaneness is whether the amendments limits or restricts the provisions contained in the bill. Such a restrictive amendment is per se germane. This amendment is clearly restrictive. The Chair rules the amendment is germane.

Mr. BAYH. I thank the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, I yield myself 10 minutes.

Mr. President, this is the amendment that will separate the men from the boys. This will separate the talkers from the actors. This is the amendment that, in essence, says if you are here thinking you are protecting the small bottlers, then you can still do that and vote for this amendment.

This amendment says that any licensee whose sales do not exceed $100 million and whose assets do not exceed $50 million. Now, who among us would say that the bottlers whose sales exceed $100 million are small bottlers; whose assets exceed $50 million are small bottlers?

This amendment really says, in so many words, that if honestly what you want to do is protect the small bottlers, then pass this amendment and let the big boys fend for themselves. If you are selling more than $100 million of soft drinks or other products, you ought to be able to compete in the free enterprise system.

What is there about us that says that the free enterprise system should be so twisted, so modified, that we do not want competition to prevail any more?

OK, I hear the arguments, "Protect those little bottlers. Protect the small bottlers. They are in the small communities."

We are saying, do not provide protection to companies whose sales exceed $100 million or which have assets in excess of $50 million.

Those companies do not need any protection. Those companies ought to stand on their own two feet and slug it out in the competitive world.

No, they want a special antitrust exemption with a territorial restriction.

If we adopt this amendment we help the small bottler because the small bottler will be able to compete with the big bottler. We will make it possible for the bottler in some small community in my State to come into the Cleveland market, the Columbus market, or the Cincinnati market. We will make it possible for a small bottler in downstate Illinois to move into the Chicago market and discount the price.

What is so terrible about that? Is that not American? Is it not un-American to restrict free competitive forces from working?

I have heard those arguments about the competition and all the different cola companies. I think you ought to check and see who owns those cola companies and other bottling companies that operate under a different name, Mr. President.

This bill would protect from competition little companies like Beatrice Foods, IC Industries, General Cinema, Warner Communications—every one of them, those little companies, being on the Fortune 500 list. They need protection? That is laughable.

Some of the independent bottling companies themselves are absolute giants. For example, Coca-Cola Bottling Co. of New York, one of the so-called independents, ranks in the Fortune 500 and owns bottling companies in Maine, Kentucky, Kansas, Nebraska, and Colorado as well as in New York. As a matter of fact, that giant spent over $85 million in a period of 11 months to acquire bottling companies in Maine, Kentucky, Kansas, Nebraska, and Colorado.

And Coca-Cola Bottling Co. of Los Angeles purchased more than 98 percent of Coca-Cola Mid-America.

These are giants of American industry we are talking about.

Coca-Cola and the Pepsi Co., the two giant sirup companies, are also the Nation's two largest bottlers.

It is fair to point out, Mr. President, that at various points in the proceedings connected with this piece of legislation, the Senator from Ohio indicated a willingness to compromise the issue. The Senator from Ohio said let us separate the small bottlers from the big bottlers. Let us put on an amendment that would say that the parent company, in other words, the sirup manufacturers, cannot have the protection of this law. They do not need that protection.

Let us also say that the conglomerates who do offer a certain amount of business do not need this protection.

But that was rejected. That, I was told, would not work because the big conglomerates and the big bottling companies in some instances own little bottlers operating in smaller communities.

I do not think that makes a whole lot of difference. I think if you are going to provide an exemption from the antitrust laws, Mr. President, you ought to limit it. I do not think you ought to provide the exemption. Obviously, the overwhelming majority of the Senate thinks so, but that does not make it right. That does not make this legislation anything other than anticonsumer. That does not change the nature of this legislation from being proinflation or more inflation. And that does not make the legislation right.

All it proves is that if you really put on a strong enough lobbying effort, you can get something through the U.S. Senate.

But the fact is that the whole argument has been made to do it for the little guys, do it for the mom-and-pop bottlers. They need some protection against those big goliaths, those giants.

OK, let me, for the purposes of this amendment, accept that argument.

I want to say, "God bless you" to the Senator from South Carolina, who just sneezed twice.

There is an old saying or superstitution that if somebody sneezes at the time you are saying something, it proves the truth of what you are saying.

[Laughter.]

Since the Senator from South Carolina sneezed not once but twice, I feel particularly pleased that he has indicated by his sneezes if not by his oratory and his votes his agreement with the validity of the point being made by the Senator from Ohio.

Mr. President, this amendment is simple. This one is not complicated. This one is germane. This one says let us not provide an exemption from the antitrust laws for the giant conglomerates and the giant sirup companies. That is all that this amendment is about.

Mr. President, I reserve the remainder of my time.

Mr. BAYH addressed the Chair.

The PRESIDING OFFICER. The Senator from Indiana.

Mr. BAYH. Mr. President, without in any way attributing a motivation that is less than pure as the driven snow to the Senator from Ohio, because I think he is sincere about his concern for competition as the Senator from Indiana is concerned about competition, the Senator from Indiana thinks it makes absolutely no sense to have two sets of rules which make the territorial franchise system in the country one that is sort of a Rube Goldberg operation.

There are some independent bottling companies that are larger companies than some of the hometown operations that the Senator from Indiana referred to. But in an effort to try to provide the kind of protection my small bottlers need in Indiana, I am not going to be a part of an amendment that is going to penalize the larger bottlers that may exist in New York or California, where largeness is a relative thing when one looks at the size of the population.

In all respect to my friend from Ohio I move to table the amendment.

The PRESIDING OFFICER. The question is on the motion to table the amendment of the Senator from Ohio.

Mr. METZENBAUM. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the motion to table the amendment of the Senator from Ohio. The yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Nevada (Mr. CANNON), the Senator from California (Mr. CRANSTON), and the Senator from Massachusetts (Mr. KENNEDY) are necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

Mr. STEVENS. I announce that the Senator from Indiana (Mr. LUGAR) and the Senator from Wyoming (Mr. SIMPSON) are necessarily absent.

I further announce that, if present and voting, the Senator from Wyoming (Mr. SIMPSON) would vote "yea."

The PRESIDING OFFICER (Mr. RIEGLE). Is there any other Senator in the Chamber desiring to vote?

The result was announced—yeas 89, nays 4, as follows:

[Rollcall Vote No. 145 Leg.]

YEAS—89

Armstrong	Church	Hart
Baker	Cochran	Hatch
Baucus	Cohen	Hatfield
Bayh	Culver	Hayakawa
Bellmon	Danforth	Heflin
Bentsen	DeConcini	Heinz
Biden	Dole	Helms
Boren	Domenici	Hollings
Boschwitz	Durenberger	Huddleston
Bradley	Durkin	Humphrey
Bumpers	Eagleton	Inouye
Burdick	Exon	Jackson
Byrd,	Ford	Jepsen
Harry F., Jr.	Garn	Johnston
Byrd, Robert C.	Glenn	Kassebaum
Chafee	Goldwater	Laxalt
Chiles	Gravel	Leahy

Levin	Pressler	Stevenson
Long	Pryor	Stewart
Magnuson	Randolph	Stone
Mathias	Ribicoff	Talmadge
Matsunaga	Riegle	Thurmond
McClure	Roth	Tower
McGovern	Sarbanes	Tsongas
Melcher	Sasser	Wallop
Moynihan	Schmitt	Warner
Nelson	Schweiker	Weicker
Nunn	Stafford	Williams
Packwood	Stennis	Young
Percy	Stevens	Zorinsky

NAYS—4

Javits	Morgan	Proxmire
Metzenbaum		

NOT VOTING—6

Cannon	Kennedy	Pell
Cranston	Lugar	Simpson

So the motion to lay Mr. METZENBAUM's amendment (UP No. 1761) on the table was agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the motion to table was agreed to.

Mr. BAYH. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. METZENBAUM. Mr. President, the picture is clear now; it is unequivocally clear. This bill is supposed to be for those little guys, those small businessmen. The fact is that it is for the big boys. It is for the conglomerates, and it is for the sirup manufacturers.

It is pretty obvious that procedure has worked well to keep other amendments from being offered to this bill which would be proconsumer amendments. The forces of anticonsumerism in the Senate are having a heyday today; and they cannot even say any more that it is just for the little businessmen, because the last vote made it clear that it is not just for little businessmen; it is for everybody—big and small alike.

As a matter of fact, my guess is that matter never would have been lobbied as effectively as it has been and never would be in the position it is in if it had not been for the efforts and money of the syrup manufacturers and the conglomerates.

Mr. President, look at what has happened. Any effort to offer an amendment having to do with consumers, having to do with the rights of the small business people or the rights of consumers, has been prevented from coming to a vote on the floor by a parliamentary procedure. Man bites dog. Cloture and a filibuster have been used to cutoff proconsumer amendments while this anticonsumer bill is passed—proconsumer amendments that have been supported by newspapers throughout the country in editorials.

Mr. President, I ask unanimous consent to have a number of such editorials printed in the RECORD.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

FAVORABLE ILLINOIS BRICK EDITORIALS

New York Times, New York, N.Y., October 28, 1977.

Washington Post, Washington, D.C., October 31, 1977.

New York Times, New York, N.Y., April 6, 1978.

Louisville Courier Journal, Louisville, Kentucky, June 20, 1978.

Minneapolis Star, Minneapolis, Minnesota, June 20, 1978.

Des Moines Register, Des Moines, Iowa, June 29, 1978.

Waukesha Freeman, Waukesha, Wisconsin, August 18, 1978.

Boston Sunday Globe, Boston, Massachusetts, August 27, 1978.

St. Petersburg Times, St. Petersburg, Florida, September 25, 1978.

Tallahassee Democrat, Tallahassee, Florida, September 25, 1978.

Rocky Mountain News, Denver, Colorado, October 5, 1978.

Columbus Citizen Journal, Columbus Ohio, October 6, 1978.

Salt Lake Tribune, Salt Lake City, Utah, October 8, 1978.

Deseret News, Salt Lake City, Utah, October 9, 1978.

KLUB Radio, Salt Lake City, Utah, October 12, 1978.

Billings Gazette, Billings, Montana, December 3, 1978.

New York Times, New York, N.Y., April 23, 1979.

Baltimore Sun, Baltimore, Maryland, April 25, 1979.

Hartford Courant, Hartford, Connecticut, April 29, 1979.

Minneapolis Tribune, Minneapolis, Minnesota, May 6, 1979.

Kansas City Star, Kansas City, Missouri, May 11, 1979.

Evening Sun, Baltimore, Maryland, May 19, 1979.

Washington Post, Washington, D.C., May 21, 1979.

Las Vegas Sun, Las Vegas, Nevada, June 5, 1979.

Orlando Sentinel Star, Orlando, Florida, June 9, 1979.

County News, National Association of Counties, June 11, 1979.

St. Louis Post Dispatch, St. Louis, Mo., June 14, 1979.

Tallahassee Democrat, Tallahassee, Florida, June 15, 1979.

Des Moines Register, Des Moines, Iowa, June 18, 1979.

Louisville Courier Journal, Louisville, Kentucky, June 26, 1979.

St. Petersburg Times, St. Petersburg, Florida, July 9, 1979.

Charleston Gazette, Charleston, West Virginia, August 7, 1979.

Sacramento Bee, Sacramento, California, August 24, 1979.

Oregon Journal, Portland, Oregon, October 1, 1979.

The Ledger, Lakeland, Fla., March 26, 1980.

[From the Columbus Citizen-Journal Friday, Oct. 6, 1978]

PRICE FIXING

Backroom price fixing by manufacturers is just as pernicious as labor union featherbedding or wasteful government spending. It subverts the much heralded "market mechanism" by protecting the lazy and the inefficient producer. It is inflationary. And it is illegal.

Government has a vital but difficult role in protecting the public interest in this area. The penalties against illegally rigging prices should be made prohibitive.

This brings us to a 1977 Supreme Court ruling which undercuts a 1976 law designed to give state governments and consumers the right to go to court and seek triple damages from producers accused of getting together and setting inflated prices.

The court held the rather narrow view that only the middlemen in the economic system, those who bought goods directly from manufacturers, were entitled to triple-damage relief under the antitrust laws.

But these middlemen have little incentive to tackle the problem. In the first place, they can simply mark up the already rigged price and pass the goods along. And in the second place, out in the real world, few wholesalers are going to take their suppliers to court and risk losing their sources of supply.

A bill now before Congress which would overturn the Supereme Court's ruling is being bottled up by a single senator who threatens to disrupt the Senate schedule by a filibuster if the measure is brought up.

The bill in question is being supported by alf 50 state governors and state attorneys general and the Carter administration, but it is being opposed, inevitably, by manufacturing interests that claim it would invite a blizzard of spurious lawsuits and accomplish little beyond enriching lawyers.

These are legitimate concerns, but they do not justify ignoring the problem. An important public policy question is at stake here, and it ought to be addressed by Congress.

It is probably too late in the congressional session to take action on this complicated issue this year. But it ought to receive high priority on Capital Hill next year.

[From the New York Times, Apr. 6, 1978]

EASING THE CURBS ON PRICE-FIXING SUITS

(By Edward Cowan)

WASHINGTON.—Glenn Freie is a 44-year-old farmer who raises 200 head of cattle and 2,000 hogs on a Latimer, Iowa, farm his grandfather bought 70 years ago. The spirit of populism ran strong on the prairies in those days, with farmers and urban reformers challenging the prices and policies of the banks, railroads, grain elevator companies and meat packers.

Some of that spirit courses through the husky frame of Mr. Freie. A cattleman who buys more feedgrain than he grows, Mr. Freie sees himself as a little guy being buffeted by economic forces that are manipulated by big corporations.

He and 500 other cattlemen, mostly from the Plains States, have formed the Meat Price Investigators Association, based in Des Moines. The association brought what Mr. Freie calls "a limited class-action suit" against 18 food chains, charging them with conspiring to depress prices paid to farmers for live cattle. The chains have denied the charge.

Under a June 1977 Supreme Court ruling, a Federal District Court in Dallas dismissed the suit. The association has appealed the dismissal to the United States Court of Appeals for the Fifth Circuit.

Incensed, Mr. Freie put on his conservative brown suit and gleaming slipon shoes and came to Washington to lobby Congress and anyone else who would listen. He was here, he said, to get Congress to overrule the Supreme Court. In his quest, he asserted, he was making common cause with consumers all over the country, even if they usually think the cattleman's pursuit of higher livestock prices is contrary to their interests as the ultimate purchasers of steak.

Mr. Freie explained that his group's suit, which was brought in 1975, was dismissed last December because the Supreme Court had held in the Illinois Brick case last June that only those who dealt directly with alleged price-fixers could sue. In that 6–3 decision, the Supreme Court said the state of Illinois could not bring a suit against the Illinois Brick Company, even if the state had the evidence it claimed to have an alleged price fixing of bricks because the state had bought the bricks through a middleman.

Under this holding, Mr. Freie said, the Dallas court reasoned that because the farmers sold their animals to meat packers, who in turn sold to food chains, the farmers could not sue the chains.

The more usual case concerns not sellers but buyers, particularly consumers. Illinois Brick means that unless the ultimate consumer buys directly from the alleged price fixer, the consumer has no standing to sue. This also means that the right Congress

gave state governments in 1976 to bring class-action suits on behalf of consumers is largely nullified.

According to Congressional staff specialists, Illinois Brick already has led to the dismissal of suits that allege price fixing of plywood, sugar, cement, toilet seats, fertilizer, paper and ampicillin.

Even before the Dallas court dismissed the cattlemen's suit last December, Congress had begun the slow process of enacting a bill to overturn Illinois Brick. The Senate Antimonopoly subcommittee reported a corrective bill to the Judiciary Committee in November. The House Monopolies' subcommittee approved a similar measure yesterday.

The Senate Judiciary Committee has scheduled hearings requested by Republican members for tomorrow and April 17, 21 and 24. There is an understanding that the committee will vote on the bill no later than the first week of May.

No timetable has been set by the House Committee, headed by Peter W. Rodino Jr., Democrat of New Jersey. He may want to schedule hearings on an amendment unexpectedly adopted by the subcommittee that raises a new issue. The amendment, sponsored by Representative Charles E. Wiggins, Republican of California, would deny standing to sue under the antitrust laws to foreign governments and their agencies.

Antitrust lawyers say this would weaken enforcement generally and might also undermine the efforts of the United States to dissuade the European Economic Community and Japan from sanctioning cartels or other forms of price-fixing.

But that is a side issue. The key point is that both Democrats and Republicans seem to agree that Illinois Brick should be overturned and that consumers should be allowed to sue even if they do not buy directly from the alleged price fixers. The legislation would also seek to prevent the duplicative claims and recoveries that could arise if initial buyers and ultimate consumers sued.

What now shapes up as the most controversial aspect of the legislation, certainly in the House, is the question of class-action suits like that brought by Mr. Frele's group. As approved by the House subcommittee, the bill would permit the proving of damages "on a classwide basis" without requiring proof from each member of the class but would limit payment of compensation only to individuals who make "a valid damage claim."

Representative John F. Seiberling, Democrat of Ohio," asked the subcommittee to remove that test for cases that are settled voluntarily, so that the rank and file of consumers could share in recovery, perhaps by a temporary reduction of prices. However, the subcommittee rejected his amendment. A similar effort is likely to be made in the full committee. But an opposite proposal, to limit class actions to those brought by states, is expected from Representative Walter Flowers, Democrat of Alabama.

"The problem this bill has is that there is no effective lobby for it other than the state attorneys general," said Michael W. Straight, a legislative assistant to Mr. Seiberling. Without "a natural constituency" Mr. Straight added, the bill becomes an easy target, for special interests. Mr. Straight noted that the House has rejected class-action legislation several times in recent years.

Mr. Frele is just the sort of man to take Mr. Straight's lament about no "natural constituency" as a challenge. Consumer groups in Washington criticized Illinois Brick last June and presumably will support the remedial legislation. The bill just might be the vehicle for a revival of the turn-of-the-century alliance of farmers and urban reformers.

[From the Washington Post, Oct. 31, 1977]

PURSUING THE PRICE FIXERS

The Supreme Court, in an unfortunate decision last June, suddenly created a large new obstacle to the enforcement of the antitrust laws. Even if you can prove that you are the victim of a price-fixing conspiracy, the Court said, you cannot recover damages unless you dealt directly with the fixer. In an economy as complex as this country's, with its vast networks of distributors, that is an extremely serious qualification. In many kinds of industry, it effectively eliminates any risk of damage suits over price conspiracies.

This anomaly stands out clearly in the case that the Court heard. The state of Illinois sued the Illinois Brick Co., charging that it had conspired to rig prices of concrete blocks. The state government had let construction contracts, the contractors had hired masonry subcontractors, and it was the subcontractors who actually bought the blocks from Illinois Brick. They presumably passed the price on, through the contractors, to the state.

Since it's not illegal to pass a rigged price on, the state can't sue the middlemen. Legally, the middlemen could sue the manufacturer. But these subcontractors weren't hurt by the conspiracy, if there was one, and in any case they are unlikely to undertake prolonged litigation against their supplier. For all the Court knew, it might have been the grandest conspiracy in the history of concrete blocks. But nobody, under the Court's rule, would recover anything.

How in the world did the Court arrive at that decision? Well, six of the justices got tangled up in a misconceived effort to apply the logic of an earlier, different case to this one. They were worried, for one thing, about creating multiple liabilities for price fixers if everyone down the distribution chain could sue for triple damages. But trial judges have broad authority to consolidate cases and require plaintiffs to allocate damages among themselves. That, in fact, was what happened in these cases before the Court suddenly halted them.

Fixing prices is a crime, and people who engage in it risk criminal prosecution by the Justice Department. But the Justice Department cannot monitor every price tag or pursue every complaint of conspiracy. To keep markets free and competitive, there is great public interest in encouraging a second kind of enforcement—the civil suit by the consumer. It's the consumer who has the sharpest interest in fair pricing. Consumers can be individuals or corporations or, as in the Illinois case, governments. The effect of the Court's decision, if it stands, is to make price-fixing much less dangerous to the conspirator.

Corrective legislation has been drafted under the leadership of Sen. Edward Kennedy (D-Mass.), and the Carter administration vigorously supports it. The opposition is coming, as usual, from those business organizations that celebrate free competition in theory, but find objections to every attempt at actually enforcing it. The Court's decision is an aberration, with unhappy implications for the American economy. The remedy is a simple two-page bill, and it is needed urgently.

[From the Minneapolis Star, June 20, 1978]

REBUILDING ANTITRUST LAW

President Carter yesterday strongly endorsed legislation to restore federal antitrust law to its full strength. Bills introduced in both houses of Congress would undo the damage caused by a 6-to-3 U.S. Supreme Court decision last year. Carter rightly urged passage of a curative bill without weakening amendments.

The court's decision last year drastically narrowed the number of suspected price-fixers within the reach of antitrust prosecutions. This affected especially the economic interests of the federal and of state and local governments. Here's one immediate danger: If the decision—which is based on statutory interpretation and not constitutional principle—isn't changed, $500 million in state and federal claims could go down the drain. Atty. Gen. Warren Spannaus said the loss to Minnesota could be $1 million.

Spannaus made that point at a meeting of the National Association of Attorneys General in St. Paul, where he is the host. The association has lobbied for the legislation Carter endorsed. In Washington, Carter said that if the Supreme Court's narrow ruling stands, anticompetitive practices would go unpunished. We agree with Carter, Spannaus and the association on the need for vigorous enforcement of adequate antitrust laws. Such laws stimulate price competition. That is a weapon against inflation that should not be dulled or broken, a point to which both Carter and Spannaus alluded.

Technically, what the Supreme Court did was to prohibit "indirect" purchasers from recovering antitrust suit damages. In other words, only those who purchase directly from the pricefixer can sue, even though the higher prices are passed through the economic chain to the ultimate consumer. That new technical twist provides antitrust immunity for 95 percent of the manufacturers who supply government units because their goods go through administrators. But governmental units aren't the only victims. The decision is a blow for farmer groups, trade associations, businessment (especially small businessmen) and individuals, it furthermore jeopardizes a special statute that authorizes attorneys general to sue on behalf of citizens who have been overcharged by price-fixers but who simply can't afford to start lawsuits as individual consumers.

[From the Louisville Courier-Journal, June 20, 1978]

Congressman Mazzoli's go-slow approach to a much-disputed Supreme Court ruling has put this Kentuckian in the center of a legislative battle involving millions of dollars in antitrust suits. Hanging on the outcome of the dispute, which resumes today in the House Judiciary Committee, are consumer interests tied up in proceedings against firms in the sugar, plywood, cement, fertilizer, meat-packing, paper and drug industries, to name a few.

The story goes back to a 1973 price-fixing case against 11 cement-block companies. The Illinois attorney general, speaking for the state and 700 local governments, charged that cement blocks in public buildings had cost more than they should, and sought triple damages.

Last June, the U.S. Supreme Court ruled that only direct purchasers of the cement blocks—in other words, the contractors and architects on the buildings—were eligible to sue. No matter that the governments had had the overcharges passed on to them. They were only "indirect" buyers and could not assert claims.

SOME GROUPS EXCLUDED?

The 5-3 decision sandbagged the clear intention of Congress. Recent laws had been expanding the states' ability, on behalf of consumers, to seek civil damages from corporations engaged in price-fixing. So the measure now in committee would supersede the court ruling by making the congressional meaning explicit.

This is where Representative Mazzoli comes into the picture. His amendment, offered last week, would let states file price-fixing suits on behalf of consumers cheated in the marketplace. But the amendment leaves cloudy the rights to sue of such groups as small businessmen (damaged by monopoly domination of supplies and prices in their industries) or units of government (buying the goods of price-rigging manufacturers).

This possible exclusion stirred a storm of protest from local governments, small business, cattlemen, and state attorneys general, including Kentucky's. President Carter has now thrown his support behind the bill, pretty much in unamended form. Perhaps

because of this opposition, Mr. Mazzoli plans to alter his amendment.

That's wise. He has a point in arguing that Congress should wait for recommendations from a presidential commission studying antitrust enforcement before it sets sweeping new policy. But the Mazzoli amendment would exclude cases which the courts can efficiently handle, because they involve business and governmental purchases. Meantime, it would thrust on federal judges more complex issues of consumer losses due to antitrust violations.

In the long run, the higher standard of antitrust enforcement the committee bill proposes is in a kind of partnership with efforts to free business of government regulation. It hardly behooves corporations to ask for one without accepting the other. An antitrust measure, without the Mazzoli amendment in its original form, would be a step in the right direction.

[From the Wisconsin Newspaper Association, Aug. 18, 1978]

RESTORE THE ANTITRUST LAW

Attorney General Bronson La Follette is applying what pressure he can to encourage bills pending in Congress intended to undo an unwise split decision handed down more than a year ago by the U.S. Supreme Court. Known as the Illinois Brick decision, it prevents persons who have been illegally overcharged for goods from suing the price-fixer if they didn't purchase directly from the violator. It is a monstrous decision that reflects badly on the integrity of the highest court in the land. Unfortunately, the only recourse the public has is to appeal to Congress and the President to undo this mischief by adopting a law to restore rights previously recognized as protecting purchasers from being gouged.

The high court majority held that the overcharged direct purchaser and not others in the chain of manufacture or distribution, is the injured party within the meaning of Section 4 of the Clayton Act. Since consumers usually purchase goods through retailers or other middlemen, under this decision they are now unable to recover damages for the higher prices they pay due to price-fixing and other anti-trust violations. It is estimated there are presently pending cases valued up to half a billion dollars which are jeopardized because of the Illinois Brick decision.

Bronson La Follette points out that the State of Wisconsin has collected about $5 million in antitrust cases since 1966 which would have been lost had this ruling been in effect. One of the ironies is that while the court precludes recovery by persons who ultimately pay the higher price, it does not prevent direct purchasers (usually middlemen) who pass on the higher prices, from recovering huge windfall damages even though they had not been injured at all.

In appealing for public support to influence Congress to adopt remedial legislation, La Follette states, "It has become quite common for most of us to complain about waste and the high cost of government . . . The Supreme Court ruling will have a devastating effect on all consumers, including federal, state and local governments through its ruling."

In other words, those who end up paying inflated prices because of illegal price-fixing can no longer recover the overcharges. This situation should not have been permitted to exist as long as it has but until corrective legislation is adopted there can be no relief. In June, President Carter strongly endorsed legislation to restore the federal antitrust law to its full strength but as with so much other pending legislation, Congress is dragging its heels. The President, in effect, has joined those who assert that so long as the Supreme Court's narrow ruling stands, anti-competitive practices will go unpunished. This is lamentable.

[From the Des Moines Register, June 29, 1977]

IT PAYS TO FIX PRICES?

The Supreme Court dealt a serious blow to effective antitrust enforcement when it recently ruled that victims of illegal price-fixing can't collect damages if they bought the overpriced goods from middlemen.

The case before the court involved nine manufacturers of concrete blocks, who had pleaded no contest to charges of illegally fixing prices. The plea persuaded the state of Illinois and 700 of its local governments to sue for damages. The governments contended that they had paid more than $3 million extra for buildings in which price-fixed blocks were used.

Justice Byron White, arguing for the six-man majority, used precedent and unpersuasive practical arguments to conclude that only direct purchasers of products should be allowed to collect damages for price-fixing.

The minority opinion by Justice William Brennan, Jr., argued that antitrust laws have two aims: first, to provide a penalty sufficient to deter businesses from engaging in such anticompetitive practices as price-fixing; second, to enable victims of price-fixing to recover damages.

The ruling erects no barriers against these aims if the consumer buys directly from the supplier who illegally fixed the price of a product. But, as the minority opinion correctly notes, "In many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution."

The minority concluded that in such cases the ruling may thwart both aims of antitrust law: "Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen may have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers."

Fortunately, the majority opinion holds out the hope that this ruling could be overturned by a law explicitly giving consumers who had purchased from a middleman the right to sue for antitrust damages.

The debate in Congress over the 1976 Antitrust Improvements Act made it clear that Congress intended consumers who had bought from middlemen to be able to sue. Since this message apparently has not reached a majority of the Supreme Court, Congress should pass a law that the court can comprehend.

The U.S. has gone too long without adequate antitrust enforcement. Consequently consumers have paid unnecessarily high prices and businessmen have been persuaded that it pays to fix prices. The Supreme Court ruling serves only to continue this unfortunate situation.

[From the Boston Sunday Globe, Aug. 27, 1978]

A BRICK WALL OF OBSTRUCTION

There may be no better evidence of the parliamentary swamp in which the Congress finds itself mired than the plight of a relatively unheralded piece of antitrust legislation. It has been approved by both the House and Senate judiciary committees. It has the backing of the AFL–CIO, Ralph Nader's Congress Watch, Common Cause, all 50 state attorneys general, several cattlemen's associations, groups representing 100,000 wheat farmers, the American Retired Persons Association, the Consumer Federation of America and others. Yet, as things now stand, it might not even reach the House or Senate floor for a vote.

The legislation seeks to undo a 1977 Supreme Court decision in what is known as the Illinois Brick Case. In that case the court ruled that consumers who are indirectly harmed by price fixing or other antitrust activity cannot sue for damages. Thus, a person purchasing drugs whose price has been set by the drug manufacturers in violation of antitrust laws would have no right to sue. Only the pharmacy, the direct purchaser, would have that right. Yet, in many cases, such middlemen, fearful of bad relations with suppliers and able to pass on artificially high prices to consumers, would have no incentive to sue and might, in fact, be afraid to do so.

The pending legislation would restore to indirect consumers the right to sue. Further, it would revitalize a 1976 law that allows attorneys general in the states to sue to recover treble damages for consumers in their state hurt by antitrust activities. That law was designed to cover situations in which the loss suffered by any individual consumer is too small to warrant a suit. Most such cases result, of course, from the "indirect" purchase outlawed by the Supreme Court ruling.

Safeguards have been put into the pending legislation designed to assure that no original seller would be forced to pay overlapping settlements from various consumers down the supply chain. It could lead to complex legal actions; yet antitrust cases are always difficult and the legislation seeks to assure that those who are truly harmed are those who can recover.

The breadth of consumer organization support indicates the attractiveness of the legislation. Yet it is stalled by obstruction tactics, spearheaded by Sen. Orrin Hatch (R-Utah), who is clearly doing the bidding of large business interests. He has introduced more than 130 amendments to the bill and is threatening a filibuster. As a result, because the Senate is woefully behind schedule due to earlier parliamentary delays and filibusters, Senate President Byrd is reluctant to call the bill up.

On the House side, some members are chary of voting for legislation that may not go down well with big business interests in their district if the bill is not even going to come up in the Senate and will not become law. So they are urging a go-slow on bringing the bill to the House floor.

Clearly this Alphonse and Gaston routine must be ended. Both Speaker O'Neill and Sen. Byrd must push to have the legislation brought out for a vote. It would be an affront to consumers across the nation if the Illinois Brick legislation is permitted to crash to defeat against a brick wall of obstructionism.

[From the St. Petersburg Times, Sept. 25, 1978]

NIX THE FIXERS

Congress ought not go home next month without fully restoring the rights of governments, small businesses, farmers and consumers to sue for anti-trust violations. Those rights largely were stripped away in June 1977 when the Supreme Court ruled that victims of a price-fixing conspiracy cannot recover damages unless they dealt directly with the fixer.

Rarely in today's complex economy does anyone, or any federal, state or local governmental agency, buy a product directly from the manufacturer.

Purchases mostly are made through retailers, distributors, contractors, subcontractors and other middlemen. The middlemen merely pass on the rigged costs, often profiting from them. They aren't apt to sue their suppliers. Consequently, unless corrective legislation is enacted, many big industries need not fear damage suits over price conspiracies.

At stake are upwards of $300-million in pending lawsuits by Florida and other states, another $200-million in suits filed by federal agencies and untold billions of dollars in future cases.

To make the argument, Florida Atty. Gen. Robert L. Shevin points to the state's class-action suit against Bethlehem Steel and three

other suppliers of steel for the construction of government buildings, schools and bridges in this state. The state has alleged a price conspiracy dating as far back as 1959. Based on a study of purchases from 1970 to 1974, economists figured recoverable damages at $27-million for that period alone.

However, if damages are limited to direct steel purchases, the potential recovery is reduced to $450,000.

Even larger amounts are at issue in an anti-trust suit by Florida and six other states against the major oil companies. And, according to the attorney general's anti-trust section, the 1977 Supreme Court ruling also is being cited by defendants in civil action stemming from the Florida Power Corp. "daisy chain" fuel scandal.

The court practically eliminated the consumer's right to sue price-fixers in a case brought by Illinois against Illinois Brick Co. for allegedly rigging the price of concrete blocks used in the construction of state office buildings. In a 6-3 ruling, the court seemed unduly concerned about creating multiple liabilities for price fixers if everyone down the distribution line could sue for triple damage.

Of course, price fixing is still a crime and thus subject to prosecution by the Justice Department. But consumers—whether governments, corporations or individuals—have the sharpest interest in keeping the marketplace free and competitive. They are the victims of the artifically inflated prices, directly or indirectly. It's ludicrous to deny them the right to sue.

Judiciary committees in both houses finally approved bills reasserting that right, but intense lobbying by big business interests has kept the legislation bottled up in the House Rules Committee until these waning days of the current session. Now the Rules Committee plans to take up the House version on Tuesday.

Among obstacles still ahead are a threatened filibuster in the Senate, whose version includes a vital savings clause to prevent dismissal of the pending government cases for several hundred millions of dollars in damages. At a time when concern about high taxes is sweeping the land, it's inconceivable and yet all too possible, that Congress would adjourn without giving taxpayers' representatives a chance to recover damages from unconscionable price-fixers.

We hope that the leadership of both houses, with full support from Florida's delegation, will not let that happen.

[From the Tallahassee Democrat, Sept. 25, 1978]

CONGRESS SHOULD ACT TO UPHOLD LAWSUITS

Let's say you hire a contractor to build that dream house you've always wanted. He completes the job and you pay his bill. Then you discover that the only suppliers of the bricks the contractor used had gotten together to fix prices. As a result, you paid several thousand dollars more for the house than you should have.

You'll sue the brick suppliers, right? Wrong. The courts say you can't sue, but your contractor can—and he doesn't have to give you any part of the money he collects.

Unfair? Sure it is, but, as a Florida taxpayer, you are in that very "can't sue" position today.

Unless Congress passes the corrective legislation scheduled to come before the House Rules Committee Wednesday, Florida taxpayers could lose as much as $26.5 million in a single lawsuit.

That's because taxpayers have built themselves some large "houses" (such as the state Capitol) and some expensive bridges and roads.

The state contends that the suppliers of the structural steel for many of these projects conspired to fix prices and has sued for treble damages under a provision of the Clayton Act that has been on the books since 1890.

That suit has not been settled, but another suit, Illinois Brick vs. Illinois, has. The U.S. Supreme Court ruled that Illinois could not sue for treble damages because the bricks involved had not been purchased directly by the state, but by contractors who did work for the state.

The contractors can sue. But will they? It's unlikely they'll want to irritate their suppliers and, besides, they've suffered no loss because the added cost of bricks was simply passed along to the state. It's possible, in fact, that they made some extra money simply by adding an overall profit markup to the cost of supplies and labor.

Contractors are in the same position in the Florida steel case—one of three state anti-trust cases that could be affected by the Supreme Court decision.

The Florida projects contained steel worth $30 million and the state contends that overcharges accounted for $9 million of that amount. If the state should win its treble damage suit, the payoff would be $27 million.

But, if the state can only sue for the material it purchased directly, the amount of steel involved is about a half million dollars and the payoff would be limited to about $450,000.

And that's simply the dollar impact of a single suit.

Florida officials have acted to prevent future problems by requiring contractors to assign their rights to sue to the state. But that won't help the average consumer who purchases a product from a retailer only to find its price was inflated by price fixing at the wholesale level.

Now, states and organizations can bring class action suits in behalf of cheated consumers. The court decision, if allowed to stand, could virtually end such suits.

Congress should act quickly to pass corrective legislation before the Florida case is dismissed by the courts, as a similar Texas case was earlier.

The right to sue should be given to those who are actually damaged, not to middlemen who suffer no losses.

[From the Rocky Mountain News, Oct. 5, 1978]

PRICE FIXING

Backroom price fixing by manufacturers is just as pernicious as labor union featherbedding or wasteful government spending. It subverts the much heralded "market mechanism" by protecting the lazy and the inefficient producer. It is inflationary. And it is illegal.

Government has a vital but difficult role in protecting the public interest in this area. The penalties against illegally rigging prices should be made prohibitive.

This brings us to a 1977 Supreme Court ruling which undercuts a 1976 law designed to give state governments and consumers the right to go to court and seek triple damages from producers accused of getting together and setting inflated prices.

The court held the rather narrow view that only the middlemen in the economic system, those who bought goods directly from manufacturers, were entitled to triple damage relief under the antitrust laws.

But these middlemen have little incentive to tackle the problem. In the first place, they can simply mark up the already rigged price and pass the goods along. And in the second place, out in the real world, few wholesalers are going to take their suppliers to court and risk losing their sources of supply.

A bill now before Congress which would overturn the Supreme Court's ruling is being bottled up by a single senator who threatens to disrupt the Senate schedule by a filibuster if the measure is brought up.

The bill in question is being supported by all 50 state governors and state attorneys general and the Carter administration, but it is being opposed, inevitably, by manufacturing interests who claim it would invite a blizzard of spurious lawsuits and accomplish little beyond enriching lawyers.

These are legitimate concerns, but they do not justify ignoring the problem. An important public policy question is at stake here, and it ought to be addressed by Congress.

It is probably too late in the congressional session to take action on this complicated issue this year. But it ought to receive high priority on Capitol Hill next year.

[From the Salt Lake Tribune, Oct. 8, 1978]

UTAH SEN. HATCH SHOULD EASE PRICE-FIXING BILL BARRIER

There can be no true economy in government if governments are prevented from discouraging price-fixing which costs them dollars they needn't spend. And yet, local governments are apt to be stuck in such a situation if congressional action now pending can't move ahead.

Last year, the U.S. Supreme Court startled local officials nationwide when it ruled that under current federal antitrust laws, only buyers who deal directly with manufacturers can sue in U.S. courts for recovery if those manufacturers practice illegal price-fixing. Until that decision, cities, counties, states and school districts normally filed in federal courts for damages they suffer from alleged or proven price rigging which hits them through middle-man suppliers.

In fact, during his term, former Utah Attorney General Vernon B. Romney recovered $200,000 for Utah in a successful antitrust case against pharmaceutical firms. He wouldn't have had a chance under the 1977 Supreme Court ruling. Right now, Atty. Gen. Robert B. Hansen's antitrust division is attempting to regain $2 million for the state in a suit against sellers of fine paper. Unlike Mr. Romney, however, Mr. Hansen's office is hog-tied unless the measure amending federal antitrust law gets passed.

The pending bill spells out, clearly enough for even Supreme Court judges to understand, the right of those actually hurt by illegal market-rigging to sue for and collect damages at the federal level. It acknowledges that lacking this protection at the buyer end of commercial transactions, there's precious little disincentive for price-fixing.

The bill has moved through House and Senate Judiciary Committees. But Sen. Majority Leader Robert Byrd, D-W.Va., says he won't schedule a floor vote because Utah Sen. Orrin Hatch is poised to introduce more than 100 amendments—many of them inconsequential—if the bill reaches the Senate chamber. At this late date in the congressional session, that tactic is as good as a filibuster.

Sen. Hatch frankly opposes the bill. He says the problem can be solved with state laws. Unfortunately, his solution would require, because price fixing usually involves commerce across several state lines, identical antitrust legislation in 50 states. That's obviously not possible.

Moreover, it's been common practice to consolidate antitrust actions involving several states in one federal court case. That's convenient for everyone, including defendants otherwise obliged to appear in several state courts over a prolonged period.

Ultimately, however, tax money is at issue. Unless local governments can file original antitrust suits against those who have gouged them through market division agreements or other price-conspiracy schemes, the public will be fleeced as higher noncompetitive costs are passed along to them.

The stalled bill is strongly endorsed by the National Association of Attorneys General. Also by the National League of Cities, the National Conference of State Legislatures, the National Governors Conference, the Inde-

pendent Bankers Association of America, retirement associations, consumer groups and farm organizations. It at least deserves a debate in the Senate on its merits. Sen. Hatch should help let this happen.

[From the Deseret News, Salt Lake City, Utah]

LET OVERCHARGE VICTIMS SUE

Utah government buys a lot of paper. Atty. Gen. Robert Hansen believes that some paper manufacturers may have violated antitrust laws forcing the taxpayers to pay $600,000 or so more than they should.

His office is suing to recover the overcharges and, Hansen hopes, additional damages.

But a recent decision by the United States Supreme Court could keep Utah taxpayers from ever having a day in court. In what's called the Illinois Brick case, the high court ruled that to bring an antitrust suit, a person must have dealt directly with the alleged lawbreaker.

In other words, Utah can sue to recover the taxpayers' money only if it bought paper directly from the manufacturers who violated the law.

Only a small part of the paper the government bought came directly from the manufacturer. The rest came from wholesalers. In most cases, wholesalers have passed through the costs of manufacturers' antitrust violations to their customers, Hansen points out, so wholesalers have little incentive to use.

Pending before Congress is a bill that would allow Utah taxpayers to have a day in court if they feel they've been cheated. It would allow victims of antitrust violations to sue violators even if they did not buy directly from them.

The bill has the unanimous support of the nation's governors and of state attorneys general. But it doesn't look as if it will pass. A major reason is that Utah Senator Orrin Hatch has threatened to delay the bill and hold up the Senate during its final adjournment rush.

Hatch raises some important objections to the Illinois Brick bill. He points out that the bill could result in litigation costly to innocent businesses and in harrassment of some businesses for political publicity.

These dangers could be largely avoided by careful compromise. The bill should make plaintiffs who bring unmeritorious suits pay the costs of litigation of all the parties in the suit. And the bill should limit class action suits brought under it.

But if carefully drawn, the Illinois Brick bill would allow those victimized by illegal business practices to seek justice in court.

Surely no one can reasonably object to that.

[From the Klub Radio Public Affairs Broadcast, Oct. 12, 1978]

CONTROL THE PRICE-FIXING

One of the more important items still before Congress on the eve of its adjournment involves a stalled piece of legislation greatly needed if such anti-trust violations as price-fixing and bid-rigging are to be controlled.

Since last June, when the United States Supreme Court ruled that indirect purchasers may no longer recover damages from antitrust violators, price-fixing has been a greater threat than ever to the taxpayer. And unless the bill before Congress is passed, this condition will remain, and price-fixing control will be greatly limited.

In the case in question, the high court ruled the State of Illinois had no action against Illinois Brick Company for alleged price-fixing because it purchased blocks from the firm through a middleman. This affects all states, since only a contractor who deals directly with an antitrust violator can recover damages for injuries, and the taxpayer, who hires the contractor, has no recourse through its legal entity.

Blocking action in the Senate to date is a threatened filibuster by Utah Senator Orrin Hatch in the form of over a hundred proposed amendments. This, despite heavy support for the legislation by both parties in each house, along with the backing of a long list of responsible organizations throughout the country.

We feel it would be a tremendous disservice to the people of this nation to leave the court decision as the law of the land. Congress should consider the measure and pass it before adjournment.

[From the Billings Gazette, Dec. 3, 1978]

CONSUMERS AND GOVERNMENT ARE PLACED IN THE SAME BOAT

(By Duane W. Bowler)

One of the more frequent phrases or slogans used by a number of writers to Voice of the Reader is "Wake Up America!"

It is commonly used at the opening or end of the letter. The contents in between are usually quite predictable. The writers are of a conservative persuasion. They oppose governments controls, taxes, regulations of all sorts, their version of liberals and so on: They see them as evils out to destroy America.

A number of them are the same as those who decried the "Warren Court." If you have forgotten it, that is the U.S. Supreme Court which handed down such decisions as one-man, one-vote, that public schools should offer equality opportunity regardless of color, and other findings of that stripe.

These same persons quite commonly complain about governmental waste and the high cost of government. In their thinking they seem to forget that the government really is a consumer of various goods and supplies much like everybody else. When prices go up, so does the cost of government.

What is being led up to is that they now should turn their attention to what is happening in the U.S. Supreme Court. Call it what you will, Burger or Nixon or Supreme.

Last year the Nixon-Burger court handed down a decision which will have a devastating effect on all consumers, including federal, state and local governments.

The case, known as Illinois Brick Co. vs. Illinois, tossed out about eight decades of previous law in holding that the only party entitled to recover in a suit of overcharges that result from price fixing is the person who purchases directly from the price fixer. No other person in the chain of manufacture or distribution may sue to recover damages.

The reason is that they ordinarily buy from distributors, retailers or other middlemen who made the purchase from the price fixers.

It is estimated that state and federal lawsuits valued at more than one-half billion dollars presently pending in courts are in jeopardy because of this ruling.

If remedial legislation is not enacted to overturn the Nixon-Burger court's about-face decision, groups of manufacturers can gather in board rooms and merrily fix prices for whatever the traffic will bear. The distributors aren't too concerned because they only pass along the cost.

The crunch comes at the retail level where the businessman, small or large, has to take the consumer heat and is in legal fact unable to do much more about it than the consumer.

Despite all the industrial talk of Ralph Nader, the consumer isn't well organized. Few can afford to go to court over a few dollars. The legal costs would eat them up.

This is where government, the antitrust divisions, step in. Government is usually a big enough buyer that cases can be pursued. When it has a good case and wins in such a class action, the consumer benefits.

You may ask where Montana enters into this. Jerome Cate of the antitrust division of the Montana attorney general's office reports that the state of Montana alone has recovered more than $1 million in antitrust cases in recent years. This is money that would have been lost had the Illinois Brick decision of the Nixon-Burger court been in effect at the time.

The court's action has resulted in several corrective measures being introduced in the Congress. They were temporarily sidetracked by the more volatile legislation of the session—energy, tax cuts, the Panama Canal treaty. However, they will be back in January.

Not surprisingly, when you consider the stakes, the antitrust divisions have some strange allies in their cause.

[From the Baltimore Sun, Apr. 5, 1979]

MR. SACHS SMILES

(By Peter A. Jay)

Maryland Attorney General Steve Sachs was on the telephone, talking to the office of Senator Charles McC. Mathias and seeking to do a little lobbying on behalf of what's known as the Illinois Brick bill.

The bill is one of those litmus-test issues that eternally divide consumer groups from the commercial community. If passed, it would amend the Clayton Antitrust Act to allow convicted or admitted price-fixers to be sued for damages, not only by those who had bought their goods directly, but also by those who had bought them indirectly from middlemen.

It would have the practical effect of reversing a 1977 Supreme Court decision that interpreted the law as only allowing such suits to be brought by direct purchasers, and in so doing allow a broad range of class-action damage suits to be brought by consumers.

At this particular moment, which happened to be early Monday afternoon, Mr. Sachs was on the telephone, the bill was in the Senate Judiciary Committee, and Mr. Mathias, a swing member of that committee, was on the fence.

The Maryland attorney general's call to the senator was in part a dutiful one; he had been asked by fellow attorneys general favoring the bill to give Mr. Mathias a nudge, just as the Maryland Chamber of Commerce and many large industries were trying to give him a nudge the other way. So he put in the call, left his message, and that was the end of it; no pressure was involved.

But the incident is illustrative. It shows that Mr. Sachs, who has been in office less than four months, is setting out to be the kind of attorney general he gave every indication, during his long campaign, that he would be.

His predecessor, Francis Burch, was a conservative by instinct and philosophy; if he had been making any telephone calls on the Illinois Brick bill, he would in all probability have sided with the Chamber of Commerce. Mr. Sachs, on the other hand, is a consumerist; as far as he's concerned, there's no reason why anyone who thinks he's been damaged by a price-fixer shouldn't be able to sue, if he feels like it.

Not surprisingly, many of the new people Mr. Sachs has brought to the attorney general's staff (170 lawyers serve under him, of which he has appointed perhaps 30) have a similar orientation, often combined with experience in legal aid or other forms of public interest law. His office, in the years to come, is likely to be far more active on consumer-related issues than was Mr. Burch's.

It may also be more active in other ways. He is reviewing, for example, the touchy

subject of outside counsel hired by the state, and has suggested—as he did during the election campaign—that maybe the practice ought to be curtailed or even eliminated.

Private lawyers now represent the state in a variety of matters, from special litigation to title work to the highly-specialized field of preparing state bond issues. Some of this could easily, competently, and economically be handled by the attorney general's office. Some of it, notably the bond work, very likely couldn't.

(The big New York bond-rating agencies, Moody's and Standard & Poor's, might well insist that an independent bond counsel is absolutely necessary, Mr. Sachs knows; it could reasonably be argued that a Maryland attorney general, no matter how well qualified legally, cannot be relied upon to evaluate his own state's bond offering with the requisite detachment.

(But he has the strong conviction nevertheless that the state's legal work should be done to the greatest extent possible by the state's own lawyers—which means by him and his staff. As a result, it's a good bet that a year or so from now there will be less reliance on outside counsel throughout the Maryland state government, no matter what—if anything—happens with the bond work.)

A change of attorneys general, like a change of governors, means a different pace as well as a different face. Mr. Sachs, naturally enough, is going to do things differently in the four or more years to come than did Mr. Burch in the last 12.

His approach will affect much more than his own staff; his assistants are attached to every department in the state, and policy set by Mr. Sachs will be felt throughout the government. In some ways, the imprint of the attorney general is potentially as great as that of the governor, and of this Mr. Sachs is well aware.

He leaves shortly for a two-week vacation in Italy, but he is already looking forward to his return.

"I don't know what I look like when I'm sitting in this office all by myself," he says, "but I think I probably have a smile on my face."

[From the New York Times, Apr. 23, 1979]

ANTITRUST DAMAGE, AND DAMAGES

When some communities in Illinois discovered that the price of bricks sold to private government contractors had been illegally fixed by the brick manufacturers, they sued for damages. But in 1977 the Supreme Court ruled that as "indirect" purchasers they had no right to sue. Only the middlemen—the contractors who actually bought the bricks—had any claim against the brick companies.

If left standing, the Court's decision would greatly weaken the impact of the antitrust laws, which gain deterrent effect from such civil actions. Direct purchasers often have no incentive to sue price-fixers. Like the brick contractors in Illinois, they are typically unwilling to offend major suppliers and usually suffer no damage themselves since they can pass the higher costs on to consumers.

The Justice Department can prosecute price-fixers. But it does not have enough lawyers to do an effective job. And besides, the fines meted out for criminal antitrust convictions rarely match damage awards in civil ones.

That is why the chairmen of the House and Senate Judiciary Committees, with the support of the White House, want to amend the Clayton Act to overturn the Illinois Brick decision. Last year a bill reached the Senate too late in the session for a vote. Opponents of the measure are stalling again this year. Indeed, if the Senate committee fails to complete work on a bill this week, it may be drowned by other Senate business.

Critics of the measure are counting on current popular hostility to government regulation to help their case. Permitting indirect suits, they argue, would force courts to go through the laborious process of finding out who was actually harmed and by how much.

That is true, but it is hardly an insurmountable obstacle. Before the Supreme Court intervened in 1977, the Federal courts dealt adequately with the special problems raised by indirect antitrust suits, making common-sense judgments about common-sense issues. And surely it is not good public policy to let price-fixing go unpunished just because it increases the work load of the judiciary.

The law against price-fixing does not mean very much unless the prospect of getting caught is a real deterrent. In antitrust as in other types of law, crime should not pay.

[From the Minneapolis Tribune, May 6, 1979]

"ILLINOIS BRICK" AND MINNESOTA MEDICINES

"Illinois Brick" is not a new ice-cream flavor and not the name of a rock group, either. It refers to a 1977 Supreme Court ruling on who can sue whom under federal antitrust law. That sounds technical. Nevertheless Illinois Brick could become a familiar phrase. The decision affects consumers and taxpayers in every state. President Carter, Sen. Edward Kennedy and Rep. Peter Rodino favor legislation to overthrow it. So do we. A local example will make clear why.

Five years ago Minnesota collected more than $2 million in an antitrust suit against five pharmaceutical manufacturers. The payment was compensation for alleged illegal price-fixing on antibiotics bought by public agencies and private consumers. The suit was filed by the attorney general. The settlement returned $1.5 million to hospitals and welfare departments, and $700,000 for new treatment programs and to 450 individuals.

The antibiotics case showed an alert state government using antitrust laws to protect the state's taxpayers and private consumers. The threat of such civil suits—and of similar litigation by companies or individuals—complements the threat of criminal investigation by federal authorities. Together they make a strong deterrent to price-fixing practices which curb competition and undermine free markets. Currently, for example, antitrust actions being considered by Minnesota and other states touch products as diverse as bread, tires, wheelchairs and fertilizer. It would be good to think that such cases will have a full hearing in the courts. But Illinois Brick makes it highly unlikely.

That ruling declares that only first purchasers of price-fixed goods can sue for damages from the people who fix the prices. Now, if Minnesota buys its medicines from a wholesale house instead of from the factory, and then discovers that the manufacturers have illegally priced them, it nevertheless cannot go to court against the manufacturers. Neither, of course, can private patients or the pharmacist they buy from. And neither, apparently, can the state bring suit on behalf of other consumers. No one except direct first purchasers—in this case wholesalers—can claim financial loss and demand the treble damages antitrust law calls for.

That makes sense only when first purchasers actually press their claims. But often they do not—because it's easier to pass the price along, because they'd rather not offend their major suppliers, or because even the hope of winning is not enough incentive to take on the burden of protracted lawsuits. In such situations, if no one else is allowed to sue, antitrust enforcement is automatically weakened. There is no second line of civil deterrence and no compensation for overcharged consumers. In an antibiotics case now, neither Minnesota agencies nor Minnesota citizens would get the repayments they got before.

That makes a persuasive argument for legislation to overturn Illinois Brick. Such legislation is before Congress now. It should be passed.

[From the Hartford Courant, Apr. 29, 1979]

RESTORING A CONSUMER RIGHT

The U.S. Supreme Court has made it more difficult for individual consumers and groups to successfully bring lawsuits as a class when they have been wronged.

The court in the last two years has taken away from consumers who are the victims of illegal price fixing the right to file suit and collect triple damages under the antitrust laws. Only the direct purchaser of a product, such as a store or supplier, has the right to collect damages for an illegal price fix, the court said in a case involving the Illinois Brick Company.

Ultimately, the consumer who has to pay higher prices as a result of the price fix, is harmed most. Unlike the retailer or supplier, the consumer earns no compensating profit. Retailers and suppliers also may be reluctant to go to court and impair their relationships with manufacturers.

Legislation which would have allowed consumers to collect damages for illegal price fixes died in Congress last year. Similar legislation is in danger of defeat this year in the Senate Judiciary Committee, although the chairman, Senator Edward Kennedy, has been pushing hard for it. The bill also gives state attorneys general the power to file suit on behalf of consumers in their states and collect damages from companies that illegally fix prices.

The bill should be endorsed by the committee and passed by the House and Senate. Companies that violate the antitrust laws by fixing prices should not be able to escape compensating those hurt most by higher prices—consumers.

[From the Baltimore Evening Sun, May 19, 1979]

PASSTHROUGH SCAM

What happens when a customer victimized by an anti-trust conspiracy decides to pass along the injustice, chain-letter style, to his customer? Nothing, says the Supreme Court. This is the effect of its 1977 ruling in the Illinois Brick case. Contractors bilked by price-fixing brick manufacturers simply absorbed the higher costs and passed them on to several communities which were their customers. But the communities, the ultimate victims, were declared by the court to have no standing.

In an effort to correct this obvious injustice, the Senate Judiciary Committee narrowly approved a bill to let not only the "middle men" contractors sue for triple damages, as they might have done in the Illinois Brick case but did not. The bill would extend this right to the contractors' customers as class-action plaintiffs. Committee approval by a 9-8 margin came only after Senator Mathias successfully pressed for several amendments, then supported the swing vote.

One of the amendments would deny the governments of foreign countries the right to sue American firms in such cases unless they also have laws enabling this government to file similar anti-trust actions against price-fixing companies in those countries. This is only fair. The other amendments, offered in an attempt to fine-tune the bill by balancing the interests of consumers and business, are intended to discourage the filing of frivolous or wanton suits and to empower the courts to set reasonable fees for attorneys representing class-action plaintiffs.

Even with the amendments, the bill faces an uphill fight in the Senate. A filibuster has been mentioned as a possible weapon by opponents. They unfortunately fail to recognize its potential value in protecting a true

free-enterprise system by substituting honest competition for price-fixing. The bill should be passed.

[From the Kansas City Star, May 11, 1979]

THE FIXING OF PRICES

In recent days the attorney general of Kansas mailed checks in the amount of more than $150,000 to 43 state and local units of government there as the result of a favorable antitrust action against four lock and key companies. This settlement quite likely could not have been possible under current law. A U.S. Supreme Court decision markedly weakened the antitrust rules that prevented price-fixing in restraint of competition.

This issue is important because, as the Kansas case shows, taxpayers can be gouged by antitrust violations. Kansas shared in a settlement of more than $16 million that resulted from a case filed in 1971.

In 1977 the Supreme Court held that damages in antitrust suits cannot be recovered if the goods were purchased through a middleman, rather than directly from the producer. That means only the direct buyer can, if successful in court, collect treble damages from a price-fixing manufacturer, even though the middleman who also handled the goods passed the overcharge on to subsequent buyers.

Few consumers purchase directly from producers. An estimated 80 to 95 percent of all state purchases are made through middlemen. Moreover, middlemen often are reluctant to sue producers for fear of endangering their source of supplies. Consumers, then, can be stuck with the overcharges with no means of recovery.

An attempt is being made in Congress to overturn the court decision. On Tuesday a bill was approved by the Senate Judiciary Committee by a vote of 9 to 8. Robert T. Stephan, Kansas attorney general, is attempting to build support for the measure. "When only a few large corporations control the sale and distribution of a particular product there becomes a danger of them conspiring to set prices at a higher level than open competition in our free enterprise would allow," the official asserts.

The antitrust provisions, including the threat of treble damages, is considered to be a helpful deterrent to price-fixing. Restoration of the Clayton Antitrust Act would provide states and other consumers with protection that events over the years have demonstrated are urgently needed.

[From the Washington Post, May 21, 1979]

A BUSINESS LOBBY COMES TO GRIEF

(By Rowland Evans and Robert Novak)

Just as Sen. Charles McC. (Mac) Mathias Jr. of Maryland was about to enrage business lobbyists May 8 by voting out the bill they most hotly oppose, he pulled back the curtain to permit a glimpse of the hardball still being played backstage in Washington in this post-Watergate age of reform.

In casting his vote, Mathias disclosed that a business Political Action Committee (PAC) had threatened to withhold contributions for his reelection campaign next year unless he voted against the bill in the Senate Judiciary Committee. Mathias refused then and still refuses to disclose the name, but it happened to be the PAC of Bristol-Myers Co., the famous pharmaceutical firm.

The PACs, part of the elaborate new paraphernalia of financing politics, have been widely used by lobbyists playing hardball with legislators. What was different in this instance was that the Bristol-Myers man played the game with too much zeal and too little finesse, and that Mathias, by blowing the whistle, did not play the game at all.

The incident also casts light on the feisty, aggressive attitude of lobbyists in a Capitol Hill climate where neither the president nor the congressional leaders exercise much influence. "There is a kind of mood around about everybody getting a scalp," one business lobbyist told us, "and I think that Bristol-Myers was after Mac's."

Specifically at issue was "Illinois Brick," beyond the ken of the general public but at the top of the agenda for both the business community and the Judiciary Committee's expansive new chairman, Sen. Edward M. Kennedy. Kennedy has been pushing the bill to overturn a 1977 Supreme Court decision involving Illinois Brick Co. Applicable to thousands of companies, the bill would permit parties who are not direct purchasers to collect damages from an antitrust violator.

Besides involving billions in potential antitrust penalties, the bill also is a test case of whether chairman Kennedy can convert the committee, a fortress of reaction for 23 years under now retired James O. Eastland, into a battering ram of reform.

The committee's key vote was Mathias, a liberal Republican viewed by the business lobbyists as worse than any Kennedy Democrat. Oil industry lobbyists took the lead in 1977 when Mathias was maneuvered out of the senior Republican position on the Judiciary Committee, giving way to conservative Sen. Strom Thurmond.

Illinois Brick was in the air when William Greif, Washington-based vice president for governmental affairs of Bristol-Myers, recently conversed with one of Mathias' closest political supporters: Earl Brown, who owns a Bethesda advertising agency. As Mathias later reported it to the Judiciary Committee: "You tell Mathias if he doesn't vote my way on Illinois Brick, he won't get any of my PAC money."

Nobody this side of television docudramas actually talks that way, suggesting that Mathias was exercising senatorial license. But Brown did get the unmistakable impression that Greif was threatening grief for Mathias from corporate business interests in his 1980 reelection effort. "Hell, Sen. Mathias is not the kind of candidate we support," Greif told us, adding that his vote on Illinois Brick would make no difference. But records of Bristol-Myers' contributions show that like most PACs, its endorsements are not always discriminating; beneficiaries have included such doyens of the left as former Rep. Bella Abzug of New York and Rep. Andrew Maguire of New Jersey.

Greif also told us it was Brown who asked him for a Bristol-Myers PAC contribution to Mathias. "That is absolutely untrue," Brown responded to us. Actually, the Bristol-Myers PAC is not exactly Fort Knox. Its high contribution in 1978 was $900 for Thurmond (and a mere $100 for Ms. Abzug). But a number of business PACs linked together can generate real money, and that is what bothers Mathias advisers on the eve of a possible Republican primary challenge.

Despite his protestations of innocence, Greif's name is now linked by his lobbyist colleagues to choice four-letter words for having been clumsy. But the harsher curses are reserved for Mac Mathias, whose vote provided the 9-to-8 margin by which a significantly water-down version (suggested by Mathias) of Kennedy's Illinois Brick bill passed the committee.

That raises the question of why business lobbyists so admantly resist compromises that would give senators a chance to cast a vote for the individual consumer without persecuting business. The lobbyists in this case insisted on a full loaf, as a precedent-setting spanking for Teddy Kennedy's new chairmanship. With the cash-filled sealed envelope now forbidden, such toughness is based on legal contributions by the PACs—provided, of course, they are used with a bit of finesse.

[From the Las Vegas Sun, June 5, 1976]

CONSUMERS PLIGHT

Attention, Sen. Howard Cannon:

A bill soon will come before the Senate which could help Nevada—indeed all 50 states—recapture untold millions of dollars illegally paid out to big business.

Consumers, along with local and state governments across the nation, could lose out if Congress fails to overturn a 1977 Supreme Court decision and allow indirect victims of antitrust violations, like price gouging, to sue for recovery of damage.

PROFIT-MONGERS

S. 300 narrowly survived on a 9 to 8 vote in Sen. Paul Laxalt's Senate Judiciary Committee. Your Republican counterpart cast a "no" vote on the bill.

A "yes" vote from you would help give antitrust victims a crack at regaining money paid out to profit-mongers.

More important, a "yes" vote would help curb skyrocketing costs.

And in this, the year of the "taxpayers' revolt" and unrelenting inflation, curbing skyrocketing costs is a Number 1 priority for us all.

The problem is that state and local governments, like John Q. Public, rarely make purchases directly from suppliers.

Instead we all rely on middlemen for the vast majority of transactions.

The Supreme Court, in Illinois Brick Co. vs. Illinois, handed down in 1977, held that only direct purchasers of a price-fixed item may sue the antitrust violator.

BARRED FROM SUING

All persons who bought price-fixed goods through middlemen are barred from suing to get back money.

Nationwide, states have pending lawsuits valued between $200 and $300 million. The federal government is litigating to the tune of $200 million.

"Conservative" estimates on the yearly loss to consumers were set at the $150 billion mark by Sen. Edward Kennedy.

These lawsuits are likely to be dismissed unless Congress acts—this session—to approve corrective legislation.

The nation's governors, at their annual meeting in August 1978 approved—without a dissenting vote—a resolution urging approval of legislation to overturn the court's decision.

IMPLICATIONS

Arizona Gov. Bruce Babbitt, testifying on behalf of the National Governors' Association earlier this year, said implications of the proposed legislation are particularly important as federal, state and local governments attempt to hold spending in check without drastically curtailing services.

"When we see the cost of our highways, our buildings, and other needed government services inflated by unlawful price-fixing, it is with no small measure of outrage and frustration that we hear the Supreme Court tell us we are powerless to remedy this expropriation of tax dollars unless we dealt directly with the price-fixers, the bid-riggers and the monopolists," Babbitt said.

Senator Cannon, please note.

[From the Orlando (Fla.) Sentinel Star, June 9, 1979]

FLORIDA WATCHES

The future of antitrust enforcement in this country, with a multimillion dollar impact on Florida, is now pending before the U.S. Senate. But opposition forces are trying to block its full debate on the Senate floor.

Florida Attorney General Jim Smith says those opponents represent the nation's largest business concerns which enjoy "the benefits of increasing concentration of wealth and power (who) now seek virtual immunity

from the natural policing mechanism of the free market economy."

The bill stems from a 1977 Supreme Court ruling that only persons who buy directly from an actual antitrust violator can recover damages. That means in most cases that it would be up to the middleman to sue his supplier. Since the middleman merely passes on the rigged prices—with the opportunity for more profits himself—there is little incentive for him to sue his supplier.

It is the person at the end of the line—either an individual or a consumer like state government—who gets stuck with the higher prices. It is the ultimate consumer who should be able to sue. That is the way it was before the Illinois Brick ruling, and the way it would be under SB 300.

What it means to the state is clear in a suit in which Florida has sued four steel companies, charging illegal price fixing. The state says there were $9 million in overcharges, which would allow it to collect $27 million under the treble damages provision. But under the court ruling, the state and its taxpayers would recover only $450,00 from direct purchases.

"At a time when government is under pressure to rein in excessive expenditures, to be accountable, to achieve the maximum benefit from each dollar spent, it defies reasoned explanation to allow Illinois Brick to remain the operative rule," Mr. Smith told the Senate Judiciary Committee earlier this year.

The Judiciary Committee, under intense lobbying pressure from big business to scuttle the bill, did approve the legislation—which had the blessings of both its chairman, Sen. Edward Kennedy, D-Mass., and President Carter.

Now the question is whether the full Senate has enough courage to bring the bill to a vote. Florida is watching.

JUST COMPENSATION

In recent weeks, states, counties, and other local governments received checks for their share of a $14 million settlement of antitrust litigation which was filed in 1970. For example, Minnesota counties received $12,000; Oregon counties, approximately $7,500. It is ironic that if the June 1977 Supreme Court decision in *Illinois Brick Company* v. *Illinois* had been in effect, no one would have received a penny of compensation from the manufacturers of master key lock systems.

Illinois Brick involved the State of Illinois and 700 local governments which had purchased bricks from a contractor and which sued to recover damages for price-fixing. The court held that Illinois and other forms of governments could not recover damages, since they did not purchase the bricks directly from the manufacturer.

That decision clearly invites price-fixers and other violators of the antitrust laws to gouge state and local budgets, safe from prosecution as long as the government purchases are made on an indirect basis.

Counties are major purchasers of construction materials for roads, bridges, school districts, hospitals, and so forth. Ninety percent of these items are handled indirectly through middlemen. Unless remedial legislation is enacted, counties will no longer be able to benefits from effective enforcement of the antitrust laws.

Legislation has been introduced in Congress which would reverse the Illinois Brick ruling so that all indirect purchasers, whether government, business or citizens would be allowed access to the courtroom to present evidence.

This legislation is strongly supported by NACo, the National Association of Attorneys General and a host of other government, consumer, farm and labor groups.

Right now, states have antitrust actions pending valued between $200–$300 million, including fine paper, petroleum, and ampicillin, all jeopardized by the Supreme Court ruling. Reversal of the Illinois Brick ruling is urgently needed to provide counties, states and the taxpayers with the protection that the antitrust laws were designed to provide in the first place.

[From the St. Louis Post-Dispatch, June 14, 1979]

REMEDY AGAINST PRICE-FIXERS

Largely because of big business lobbying, Congress has still not acted on a bill to offset a 1977 U.S. Supreme Court decision that effectively guts antitrust law enforcement by limiting suits for damages to those who have dealt direcly with price-fixers. In the 1977 ruling, in Illinois Brick Co. v. State of Illinois, the high court held that Illinois could not recover damages under the antitrust law from a concrete block manufacturer whose price-fixing had raised the cost of some state buildings, the rationale being that only those who buy directly from price-fixers can sue; and in this case Illinois had not bought the blocks from the manufacturer but from the contractor doing the construction.

To counteract the decision, Democratic Sen. Edward Kennedy—with Missouri's Republican Sen. John Danforth as co-sponsor—introduced a bill that, as Sen. Danforth has put it, "would restore full legal rights to all parties harmed by violations of federal antitrust laws." Actually, all the measure does is to reinstate the right that Congress obviously intended consumers to have when it provided for suits by "any person who shall be injured . . . . by reason of anything forbidden in the antitrust laws."

By its ruling, the Supreme Court virtually eliminated any remedy for injured parties. Middlemen, such as the contractor in the Illinois Brick case, would not be injured and therefore would have no reason to sue; and those who really are injured have been barred from suing. Despite the unfairness to consumers of this Catch-22 ruling, organized business—motivated, as Sen. Danforth says, by greed—is fiercely lobbying against the legislation to overturn the decision. Now that the Senate Judiciary Committee has reported out the bill, the Senate should ignore the business lobby and enact an obviously needed protection for consumers.

[From the Tallahassee (Fla.) Democrat, June 15, 1979]

CONGRESS SLOW TO ACT

Congress can act speedily enough when it comes to protecting the fringe benefits of its members—witness the dispactch with which it scrapped the limit on the amount of outside income senators may earn.

But when it comes to protecting the taxpayers interest, it is sometimes difficult to ascertain any congressional movement at all—witness the lack of dispatch in handling legislation that would again allow you to sue when suppliers defraud you by fixing prices.

Last September, we urged passage of a bill that would repair the damage done by the decision in a lawsuit called Illinois Brick vs. Illinois. That decision could cost Florida taxpayers $26.5 million in a single suit now underway. It's impossible to calculate the overall loss to consumers throughout the nation.

Congress has yet to act.

Illinois had sued the brick companies for treble damages under the provisions of the Clayton Act, which has been a federal law since 1890. But the court said it had no right to sue, because it had not purchased the bricks directly. Only the contractors, who used the bricks to construct buildings for the state, could sue.

The contractors, of course, have no real incentive to sue. They have suffered no loss; the higher brick prices were passed along to the state—and its taxpayers. Why anger the suppliers they will have to deal with in the future?

Florida is now involved in a similar case, charging that suppliers conspired to overcharge the state by $9 million for steel used in various state projects. If the state wins, the treble damages would total $27 million. But, if the state can sue only for steel purchased directly, the claim will drop to roughly $450,000.

That's an example of the impact of the Illinois suit. That impact will be multiplied many times. States and organizations now regularly bring class actions on behalf of cheated consumers. The decision virtually puts an end to such suits. Most pricefixing is at the wholesale level; most consumer purchases are made at the retail level.

Congress should stop bowing to special interest pressure and give the right to sue back to cheated consumers and taxpayers.

[From the Des Moines (Iowa) Register, June 18, 1979]

HITTING WHERE IT HURTS

The Supreme Court ruling that consumers who have been gouged by price-fixers can sue for triple damages under the Clayton Antitrust Act is an important victory for consumers and the fight against inflation. But further action will be needed by Congress if the antitrust laws are to be effective.

A Minnesota woman charged that she was forced to pay higher prices for hearing aids because of price-fixing by five hearing-aid manufacturers. In her suit, she asked for triple damages for herself and all other consumers who bought the aids.

The Eighth U.S. Circuit Court of Appeals ruled that she had no right to bring the suit as a consumer. The Clayton Act states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (such as price-fixing) may bring a suit for triple damages. The court of appeals said that only businesses or other commercial ventures can bring such suits. The Supreme Court ruled, 8–0, that the Clayton Act was meant to provide consumers with the right to sue price-fixers for damages.

But the Minnesota woman's suit might still be blocked by a 1977 Supreme Court decision known as "Illinois Brick." In "Illinois Brick," the court held that only direct purchasers of goods may sue for damages for price-fixing.

Most consumers—possibly including the Minnesota woman—are indirect purchasers. That is, they don't buy a product from the company that made it, but from a retailer who bought it from the manufacturer or a middleman.

As Senator Edward Kennedy (Dem., Mass.) has charged, the "Illinois Brick" decision "denies compensation to those who are injured and undermines deterrence of the overwhelming force of illegal price-fixing in the United States today."

Many direct purchasers—such as middleman—have no incentive to sue for damages in price-fixing cases, for they can pass the higher cost of the goods on to consumers. Without the threat of the consumer class-action suit brought by the Minnesota woman, the antitrust laws become little more than a paper tiger.

The Senate Judiciary Committee has approved a bill to overturn the "Illinois Brick" decision by authorizing consumers and other indirect purchasers to sue for triple damages for price-fixing. The bill faces strong opposition from business organizations, and a Senate filibuster is considered likely.

Price-fixing may be the single most unjustifiable cause of inflation in America today. Surely consumers should be given the chance to fight this evil.

CONGRESS SHOULDN'T CAVE IN TO BUSINESS ON ANTITRUST BILL

Almost three years ago, hardware manufacturers agreed to an out-of-court settlement with educational institutions across the nation of a suit in which they were accused of price fixing. Only last month, they began repaying millions of dollars in overcharges. Among those collecting are the Jefferson County schools ($24,000) and a dozen Kentucky universities and school boards (a total of $50,000).

That was the good news.

The bad news was a 1977 Supreme Court decision—after the hardware settlement—that pulled the rug out from under such suits. That decision (called "Illinois Brick" for the chief defendant) has plunged Congress into a bitter behind-the-scenes dispute over the best way to repair the gap in antitrust laws resulting from the court ruling.

What the court did was make it impossible for many local governments, school systems and other victims of price-fixing to take action. This was because the court, following an earlier decision, decided that someone hurt by price-fixing could only sue if in a direct buyer-seller relationship with the responsible party. Many times, this means that only middlemen can sue.

But the outlook for a law to void the Illinois Brick decision isn't promising. Lobbying against the measure by major corporations is said to be as intense as the 1975 effort to beat the consumer-protection agency bill.

While obviously based on self-protection, the lobbying also represents an effort by manufacturer members of the Business Roundtable to defeat the new Senate Judiciary chairman, Edward Kennedy, on his first major antitrust bill. Another target is the Carter administration, which supports the Kennedy measure.

The Illinois Brick case arose from an antitrust suit filed by that state and 700 local governments. They charged that 11 concrete-block manufacturers were fixing prices to create some $3 million in illegal overcharges. When the court disallowed suits by "indirect purchasers," it effectively closed off scores of complaints against other makers of products passing through a chain of distributors, wholesalers and retailers on their way to the consumer.

THINK TWICE BEFORE SUING

Worse yet, the ruling appeared to thwart a 1976 law in which Congress gave state attorneys general a go-ahead to protect consumers who eventually pay the extra costs of such price-fixing.

Recognizing the policy implications of its decision, the high court noted that Congress could easily clarify the antitrust rules by passing a new law. This is what Senator Kennedy proposes to do.

The manufacturers claim that such a law would drown them in a sea of speculative suits filed by greedy lawyers. But the proposed bill would counter this risk by encouraging federal judges to toss out frivolous suits—and to levy costs and lawyers' fees against those filing such unwarranted litigation.

The reason for Congress to pass the Kennedy bill is that it would protect one of the highest values of American business—competition. When Congress in 1914 passed the Clayton Antitrust Act, it wisely recognized there would be difficulty getting public officials to pursue the "trusts." So it attached a triple-damages provision to encourage private individuals or associations to move against price-fixing or other monopolistic violations.

This private enforcement of antitrust laws is necessary to the preservation of business competition. Over the years, Congress has made the antitrust victim's opportunity to sue unusually broad; it chose this as an alternative to any listing of specific illegal practices—which would just set up a code full of inviting loopholes. Instead, it has relied on the courts to put the broad definition of "restraint of trade" into concrete form.

Lately the courts, particularly the Supreme Court, have complained that complex antitrust cases are becoming steadily more difficult to handle. However, it's possible that the report of the recent President's Commission on Antitrust Enforcement may contain ways, which Congress should take seriously, of lightening this burden.

To allow the Illinois Brick decision to stand unchallenged would be too sharp a break with almost 90 years of private antitrust action. That action, on balance, has been helpful to consumers and businessmen alike. Congress should move to restore this tool of anti-monopoly enforcement by passing the Kennedy bill.

[From the Petersburg (Fla.) Times, July 9, 1979]

THE FRUITS OF CRIME

Steel reinforcing bars are not likely to be found on the household shopping list or in stock at the corner hardware. But that's not to say that they aren't big business. The state of Florida figures that it bought $30-million worth between 1970 and 1974, mostly for highway bridges and overpasses.

The state also contends that it paid $9 million too much because of a price-fixing conspiracy among the four major suppliers.

The state sued, relying on federal antitrust law that says that a victim who can prove price fixing is entitled to a refund of three times the ill-gotten gains.

The idea behind triple damages wasn't just to make it worthwhile for victims to sue. It was to make big business think seriously over whether breaking the law was worth the risk.

It is, sorry to say, well worth the risks. In June 1977, the U.S. Supreme Court made crime pay. It ruled that only the direct customers of a price-fixing conspiracy are entitled to sue under the antitrust law. Ultimate consumers, though they may be the actual victims, were thrown out of court.

The final consumer is usually the only party who cares to file a suit. Most often, the direct customer is a wholesaler, contractor or broker who has passed on the extra costs, has lost nothing on account of the price fixing and has no incentive to litigate.

This particular judicial outrage, known as the Illinois Brick decision, left Florida's lawyers to make bricks without straw in their steel-bar case, which was already in progress. The state calculates that it lost only $150,000 in direct purchases of price-fixed bars, for which it could—if it can prove the case—recover only $450,000 in triple damages. The rest of the $9-million in alleged overcharges were paid through contractors who had merely passed on the suppliers' prices on a cost-plus basis, and while the state is trying to keep the case alive on some ingenious technicalities, the outlook is, as they say, in doubt. If the Illinois Brick decision holds firm, the taxpayers of Florida get nothing.

The decision was so bad that the ink was scarcely dry when Congress began considering legislation to overturn it. Big business lobbies, led by the increasingly influential Business Roundtable, blocked it last year with the threat of a Senate filibuster.

This year, a compromise bill came out of the Senate Judiciary Committee. It contains some new safeguards for defendants. One would allow trial courts to set the fees for plaintiffs' lawyers. Another would permit judges to award legal fees to defendants who were sued without good reason. And another would let foreign governments recover only actual, not triple, damages from U.S. firms.

For some people, there is no compromise. The big business lobbies are still working massively against the bill, another filibuster is threatened, and the people will likely lose again unless 60 senators are willing to vote for cloture. Floridians, with $27-million immediately at stake, will be looking to Sens. Lawton Chiles and Richard Stone to vote for their interests, against corporate corruption.

NO WONDER THE PUBLIC SKEPTICAL OF BUSINESS

Two years ago the United States Supreme Court in an astonishing action ruled that indirect purchasers, persons buying from retail stores, for example, cannot sue a wholesale seller guilty of price-fixing. Placing the *nation's highest court on the side of corporate culprits*, the verdict comforted the comfortable and afflicted the afflicted.

Now consumers must look to Congress to enact a law that permits consumer ——— by their retail purchases to sue and collect from manufacturers guilty of breaking federal antitrust statutes.

When Congress returns from its August vacation not the least important matter facing it will be the Illinois Brick bill, co-sponsored by Sens. Edward Kennedy, D-Mass., and John Danforth, R-Mo. Their measure, if enacted, will correct the Supreme Court's lamentable judgment which rewards board room brigandage.

American consumers and America's big businesses have a huge stake in how Congress handles the bill. The bill's defeat would save companies hundreds of millions of dollars—illegal dollars acquired by violating antitrust law.

Currently 10 states are suing 45 cement and cement product manufacturers. Damages could exceed $180 million. In the absence of an Illinois Brick Act on federal statute books, however, many complaints against these manufacturers would be dismissed.

The same state of affairs pertains for antitrust violations brought by 30 states against three large ethical drug firms for the sale of ampicillin, by 12 states against 11 sugar companies, by several states against eight lumber companies, and by six states against major oil companies which overcharged buyers hundreds of millions of dollars.

West Virginia is interested in this legislation, as Attorney General Chauncey Browning, one of the nation's leading antitrust sappers, pointed out in an article two-and-a-half weeks ago on the page across from this one. (Rebuttal to Browning from the West Virginia Chamber of Commerce and the West Virginia Manufacturers Association is published today on the same page.) Browning on occasion has collected antitrust awards for state and for some political subdivisions, but he collected before the Supreme Court allied itself with lawbreakers.

The key question congressional members should ask themselves is: Why shouldn't businesses which defy antitrust laws be liable to redress from their victims?

Indeed, we're amazed responsible businesses are fighting the Kennedy-Danforth legislation. Such fights, we're convinced, is one reason a majority of the American people holds American business in low esteem. The campaign against Illinois Brick is a plea by business to be allowed to break the law and for the most part get away with it. Despite that, business is fighting the bill—all-out.

[From the Portland (Oreg.) Journal, Oct. 1, 1979]

OVERTURN THE BRICK

Congress seems to be making progress on legislation that would overturn the U.S. Supreme Court's anti-consumer "Illinois Brick" decision.

The court ruled in 1977 that consumers can't sue price fixers unless they manufactured the product. Seldom do consumers buy

directly from manufacturers. Consumers buy from middlemen, and they should be able to sue distributors if that is who is involved in anti-trust activities.

The court decision barred the door for a lot of consumer suits under the Clayton Act, which for years has permitted price fixers to be sued for triple damages.

The state of Oregon has an antitrust division which actively pursues price fixing cases on the behalf of consumers. Attorney General Jim Redden has said that the Illinois Brick decision is preventing legal action on at least $54 million in suits pending by his office.

Last week the U.S. House Monopolies and Commercial Law Subcommittee approved a strong Brick bill overturning the decision and permitting class action suits. But the committee is holding on to the bill awaiting action on a Senate Judiciary Committee compromise backed by Sen. John C. Danforth, R-Mo.

The Danforth compromise doesn't permit class action suits. Yet it is backed by the Consumer Federation of America, which says it is a significant piece of legislation and apparently the best that can be passed. The U.S. Chamber of Commerce disagrees, and says it isn't enough of a compromise.

The National Association of Attorneys General unanimously backs the Danforth compromise, which is supported by Senate Judiciary Committee Chairman Edward Kennedy, D-Mass.

"It's incredible how fast the bill changes," said one observer of the lengthy congressional fight. Now the Danforth compromise permits defendant middlemen several defenses to the claim that they passed on overcharges.

Congress has worked on a compromise for more than a year. That is enough time. The bill shouldn't penalize retailers who aren't directly involved in price fixing cases. But the nature of the system that distributes consumer goods through middlemen shouldn't prevent suits from being filed and adjudicated.

[From the Sacramento (Calif.) Bee, Aug. 24, 1979]

THE ILLINOIS BRICK BILL

Among the new antitrust measures that Sen. Ted Kennedy has put before Congress this year is a bill to overturn the Supreme Court's "Illinois Brick" decision. In the Illinois Brick case, the court severely restricted who could sue for damages in a price-fixing case, nearly decimating one of the public's most effective antitrust enforcement tools. The Kennedy bill—which has the support of the Carter administration, the nation's governors and attorneys general and most consumer groups—would restore the rights to sue that the court took away.

Because it recognized that the federal Justice Department could not oversee the entire business community, Congress in 1914 enacted a law to encourage private citizens to pursue antitrust violators themselves. Anyone damaged by a company's price-fixing or other antitrust violations can, under this law, sue that company for three times the damages suffered. Congress created that large penalty to provide an incentive for private parties to bring antitrust suits and to deter potential violators.

However, when the state of Illinois recently tried to sue the Illinois Brick Co. under the statute, the Supreme Court ruled that it could not. The Brick company had clearly engaged in price-fixing and other antitrust violations, and the state had clearly suffered damages. But the state had purchased the overpriced concrete blocks through a series of middlemen, and the court ruled that only the first middleman who purchased directly from the Brick Co. could collect damages. Because of this ruling, no end-of-the-line consumers can now bring antitrust suits, despite the fact that the original overcharges have been passed on to them.

The decision could be disastrous for antitrust enforcement. When direct purchasers can simply pass illegal charges on to consumers, they often have little incentive to risk their own supply sources by bringing suit against them. Moreover, in eliminating suits by indirect purchasers, the court has virtually barred state governments, which could be expected to be particularly vigilant, from bringing antitrust suits. The states, after all, make almost all their purchases through middlemen as do the private citizens the state attorneys general could represent.

The decision was highly unfair, since it disqualified the purchasers at the end of the marketing chain—often the only ones to suffer from illegal overcharges—from recovering their losses. Thus, the court not only vitiated a major part of Congress's antitrust effort, but it also established in its place an unfair and far less effective substitute.

The Kennedy bill would, in effect, overturn the Supreme Court's ruling. Its opponents argue that the bill would increase the number and complexity of private antitrust suits, that it would clog the courts and allow legitimate businesses to be harassed by nuisance suits. But there were not many abuses of this right to sue before the court curtailed it. And the small encouragement the Kennedy bill might provide to frivolous suits is a slight price to pay for the increased antitrust vigilance it would insure.

In its Illinois Brick ruling, the Supreme Court acknowledged the difficulties of creating antitrust litigation policies that are both fair and effective, and the court asked for congressional guidance in this matter. The Kennedy bill would provide that guidance in no uncertain terms—by overturning the court's own attempt at policy making in this area and reasserting the Congress's original antitrust intentions.

A BASIC RIGHT TO SUE

Some businessmen and grocery executives view the Illinois Brick Bill with the same honor as a debutante looking at an acne pimple.

That pending federal legislation, and the controversy surrounding it, becomes downright interesting when one considers that price-fixing costs each American consumer $200 a year.

And that is why Congress, battling the legislation around like a shuttlecock for two years, needs to pass it. The battle started when the U.S. Supreme Court found some flaws in the previous legislation. So the Court ruled that, until those flaws are corrected, only direct purchasers can bring suit against companies which collude to destroy open competition by rigging their prices—instead of letting the free enterprise system operate as it was intended to.

If, for instance, you purchased a water heater and then learned the price was fixed by a group of manufacturers, you could not sue because the water heater was purchased through a middle man—the plumbing company. The plumbing company might sue, but there is no incentive. The plumber has his money.

Nor—to use a very real example—can the state of Florida sue a steel company which overcharged the state by $9 million. The state can sue the company for $500,000 because it purchased some of that steel directly from the company, but cannot seek damages for the other $8.5 million because the rest of the steel was purchased through a middle man. The state may sue the middle man, but he has done nothing wrong. He has merely acted as an agent, selling the steel to the state and making a profit.

When one considers that the state of Florida purchases 95 percent of its goods through middle men, the significance of the Illinois Brick Bill takes on a new dimension. It is a classic consumer bill, aimed at punishing those companies which tamper with the free enterprise system.

Illinois Brick has its detractors, the grocery store dealers being among them. Mark C. Hollis, a Public Super Markets executive here, says the bill would allow producers to sue the grocers for selling goods too cheaply.

He has a point, albeit a weak one from a consumer's viewpoint. Yes, meat producers have sued slaughter houses for conspiring to drive prices down. And according to Hollis' argument, passage of Illinois Brick would invite meat producers back into court, with the possible result of grocers' legal expenses being passed on to consumers.

Well, the meat producers are still in court, having been told they are exempt from the Supreme Court ruling on indirect purchasers. So passage of the legislation won't affect them.

But to get to a larger issue. Wouldn't it be just as wrong for a group of grocery store owners to conspire to drive prices down as it would be for them to conspire to drive prices up? It's not a question of whom to cheat—the cattlemen or the consumers. It's a question of not cheating at all.

That's the laudable thrust of the Illinois Brick Bill. Those cheated in the marketplace deserve a day in court. The Illinois Brick Bill would give them just that. If the evidence shows companies conspired to rig prices, the courts will award damages.

Some business groups lobbying against the bill are saying, "Trust us. We'll do the right thing for consumers and look after them better than they can themselves."

That tune sounds familiar because it has been played before. By the oil companies.

Mr. METZENBAUM. Mr. President, I point out that it is not right to provide an exemption from the antitrust laws, to turn the clock back, as we are doing today, and to have it done in such a manner as to prevent any amendment from coming up which has to do with oil companies gobbling up their competitors, oil companies buying up department stores and hotels, oil companies getting far beyond the pursuits of energy.

No, none of those amendments can come up. It has to do with antitrust; but no, that would be a little offensive to the oil companies. That would be pro-consumer legislation. That would be pro the American public. So amendments of that kind cannot come up.

Yes, an amendment that might help little school districts, located in every State in the Union, an amendment that would make it possible for those small school districts not to be overcharged, not to be subjected to price-fixing conspiracies without having an opportunity to have their day in court—such an amendment cannot come to the floor.

What does it really mean? What does it mean that we had a measure debated and discussed to emasculate the Federal Trade Commission, to take away its vitality, to turn the clock back because it was doing an effective job? What did we do? Congress indicated that it would play ball with the business community and turn its back on a Government agency doing its job, because it was doing it too well.

Today, we have a bill that does the same thing, in a different way. The Federad Trade Commission has had a proceeding. They have found that the terri-

torial restrictions are anticompetitive, and they have ruled to that effect. Now we have a piece of legislation which would vitiate the impact of that court decision before the court even made its decision.

Then we even have a bill that says "If you violate this law," the one we are talking about passing, and undoubtedly are going to pass here today, "if you violate the provisions of that law you cannot even be held responsible until you get into the courtroom and some court says that you have violated the law, do not do it the second time. And you do not pay any penalty for having done it the first time." That is what this legislation provides.

We should be ashamed of ourselves. We do not do that with any other piece of legislation on the statute books. Nowhere do we say "You are entitled to the first bite," as in the dog bite laws.

You are not entitled to the first bite if you kill someone. You are not entitled to a first bite if you have an automobile accident and you violate the laws. You are not entitled to a first bite no matter what the law is. But for our bottlers, for the Coca-Cola Co. of America, for the Pepsi Co. of America, for the Beatrice Foods, for all of the other conglomerates that I mentioned earlier on today, each of them are entitled to a first bite, a first violation of the law and then if a judge says, "Don't do it," then after that they may be subjected to it. We do not do that for the auto industry. We do not do it for any other industry in America. We do not say to anyone you can go out and violate the antitrust laws and you are not subjected to those laws until after some courts says "You done wrong."

But we do it for the bottlers. Oh, we have to save those poor bottlers. Their profits are only running 16 and 18 and 20 and 22 and 25 percent on equity. That is not bad.

As a matter of fact, we may run a contest in this country, whose return on equity is greater, the oil companies or the bottlers? Fortunately these poor bottlers that we are so concerned about today would do pretty well in those sweepstakes.

They are not satisfied.

I am told stories that are absolutely unbelievable as to the lobbying effort that has been made to get this bill through. I am told about 30 calls coming in in a day from one State. I am told about some story that one bottler reportedly had spent up to $300,000, in support of this great bill.

We need not worry about the inflation that is taking place in this country. The Senate need not debate that. The Senate need not get itself concerned about higher interest rates. We never really got into that subject in the Chamber. The Senate need not concern itself about so many other problems that are happening in this country, including a higher and higher rate of unemployment. No, we are not talking about unemployment in the Chamber today. That is not the issue before us.

We are talking about our poor bottlers, those giant conglomerates and sirup companies, who are only making tremendous yields on their equity.

We are not talking about the real problems that face this Nation in Afghanistan, Iran, and the Soviet Union. We are not talking about the issues that are of concern to the American people.

There are 215 million Americans and if you went out and polled them and asked them how they feel about the bottlers bill, they would think you flipped your lid and if you told them what the bottlers bill contained then they would know you flipped your lid.

Bottlers bill—tie up the Senate for a whole week to keep a Senator from offering a proconsumer amendment or maybe two proconsumer amendments. Great day.

I agree with the Senator from Arkansas. This is no way for the Senate to conduct itself. No. But the bottlers lobby insists that we get this bill to the floor.

There are all sorts of substantive legislation pending to be brought up. No, we do not do that. We have to take care of the bottlers. Oh, those wonderful bottlers. Up goes the price of Coca-Cola. Soaring through the sky goes the price of Pepsi-Cola, RC Cola and all the other branded pop. We are so concerned about them that the Senate spends a whole week to protect the bottlers. It is wonderful. Do not worry about the senior citizens of this country. They should be able to fend for themselves. What is the matter with those senior citizens? Cannot they take care of themselves? Why should we in the Senate bother about them?

How about those young kids who are looking for jobs in the streets of America? The unemployed, how about the 35 to 40 percent of young blacks who cannot find a job in this country? It will be greater as we have this programed recession of the administration. Do not worry about any legislation for them. They can take care of themselves.

I remember when I was in the business world and I came to Washington and attended a meeting at the Sheraton Park and we talked about the problems facing America because they were burning down our cities. They were burning down Watts. They were burning down Huff in Cleveland. They were burning down Detroit, and they were burning down Washington. We came and out of that was formed the urban coalition that we might do something to save our cities and to see to it that young people in this country, including young blacks and young Hispanics, could find a job. There was a sense of concern.

Well, we have shown it this week. The unemployment is higher for young blacks than it was then. The unemployment is higher for young people than it was then. The unemployment is higher for males and females and people across the country than it was then. We are going to do something about it. We are going to do something great today. We are going to pass the bottlers' bill.

Is it not wonderful? Every Member of the Senate can go home this weekend and stand up and say what we did for the people of this country. We passed the bottlers' bill. We invoked cloture, to keep some Senator who wanted to bring up an amendment that was a proconsumer amendment. We said, "Oh, no, we are not going to let you get to that, fellow. We are not going to let the proconsumer amendment come up." No, we have the bottlers' bill today.

I do not know how we squeezed in the time the other day to indicate the Senate's opposition to the oil import fee. That was pretty good.

We waste our time on stuff that is unimportant, like bottlers.

Let us see what is going to happen if we are really successful.

I guess John Smith in some community is going to be able to go out and really get smashed this weekend. We have got the bottlers bill through the Senate. John Smith I guess is a bottler in some small community in America. But John Smith was not in trouble. We heard this bill in my committee. I did not hear one bottler who said that the giants were coming in and trying to drive him out of business. There was no evidence that the small bottlers were under attack. No, not a scintilla of evidence.

But the fact is we are seeing in some respects two things: one is we are proving the value of the business PAC's. They have been involved in this. The business PAC's have proven their value, if you agree with that point of view.

But the fact is we cannot be very proud of what we are doing.

The Senator from Arkansas was right. What are we doing tying up the Senate for a full week concerned about the bottlers? Are we concerned about what our troops are in Europe, or whether we have a strong enough military defense? Are we talking about whether we should or should not have the M–X? Are we talking about the substantive issues that concern American people?

I think what we should have done before we brought this bill to the floor of the Senate is the Senate should have commissioned Gallup and Hart and Cadell, and I do not know who else, Roper and maybe NBC–ABC, New York Times poll, or is the CBS-New York Times poll, I do not know. We should have gotten all the pollsters in the country and we should have asked them to poll the country and ask them to name the 50 most important issues, not the 10 most. That is all they usually do when they talk about the 10 most important issues.

We should ask them to include the 50 most important issues.

And you know and I know that the bottlers' bill or the problem with respect to the bottlers would never have found the list. This is unbelievable; this is absolutely absurd. The U.S. Senate has taken 3 days to talk about the bottlers' bill.

So the RECORD is clear in connection with the Senator from Arkansas' comments, let me say that the Senator from Ohio in the inception said he was willing to agree to a time limitation with respect to any amendment that I had to bring up and was willing to agree to a time limit with respect to the bill itself or anybody else's amendment.

I am sad to see that we have wasted several days of time while my amendment or my attempted amendment was filibustered; while I was precluded from obtaining the floor. We have just achieved this week a new low in senatorial achievement, in senatorial accomplishment.

I am not proud of the fact that I felt, as chairman of the Senate Antitrust Committee, a responsibility and an obligation to make the fight to protect the antitrust laws of this country from being invaded as does this bill. I am not proud of the fact that I had to sit in the Chamber for several days making repeated efforts to get up a proconsumer antitrust amendment. I am not proud of the fact that the Senate rules did not make it possible to do so.

The victors will be the bottlers. The losers will be the American people. The Senator from Ohio will not lose. But the American people have lost this week. They have lost because the Senate should have been spending its time in more productive endeavors. They have lost because this bill provides exemptions from the antitrust laws, and they have lost because, by manipulating the rules of the Senate, others have been successful in preventing proconsumer amendments from coming to the floor.

AMENDMENT NO. 1759

(Purpose: To exempt licensees from suits by indirect purchasers)

Mr. METZENBAUM. Mr. President, at this time I call up amendment No. 1759.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Ohio (Mr. METZENBAUM) proposes an amendment numbered 1759.

The PRESIDING OFFICER. The Chair would ask the Senator to suspend for a moment.

The Chair would advise that, under the precedents of the Senate——

Mr. METZENBAUM. Mr. President, regular order. I believe, under the rules of the Senate, the amendment is to be read first.

The PRESIDING OFFICER. The Chair is advised by the Parliamentarian that if an amendment is offered that is nongermane on its face, even before it is read, the Chair is obligated, in that situation, to rule that the amendment is not germane. The Chair is advised, through the Parliamentarian, that this is such an amendment.

Mr. METZENBAUM addressed the Chair.

Mr. THURMOND. Mr. President, I thought I had the floor.

The PRESIDING OFFICER. The Chair would advise that no one has the floor at the moment.

Mr. THURMOND. Mr. President, I ask for the floor.

The PRESIDING OFFICER. The floor is not available until the Chair finishes ruling on this matter, and then it will consider the request from the Senator from South Carolina.

The Chair is compelled to rule, on the strength of the advice of the Parliamentarian, that the amendment is nongermane.

Mr. METZENBAUM. Mr. President, I appeal the decision of the Chair.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Chair must advise that an appeal is not debatable under rule XXII.

Mr. THURMOND. Mr. President, I move to table the appeal from the ruling of the Chair.

The PRESIDING OFFICER. The motion to table the appeal is in order.

Mr. THURMOND. Mr. President, I move to table the motion of——

Mr. METZENBAUM. Mr. President, I did not hear the Senator.

The PRESIDING OFFICER. The Chair would indicate that the motion to table the appeal is in order and it is not debatable.

Mr. METZENBAUM. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. BAYH. Mr. President, a point of order.

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. Mr. President, would the Chair be kind enough to advise the Senate what vote is necessary to sustain the ruling of the Chair?

The PRESIDING OFFICER. The Chair will advise that a yea vote would sustain the ruling of the Chair.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Nevada (Mr. CANNON), the Senator from California (Mr. CRANSTON), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Illinois (Mr. STEVENSON), and the Senator from Georgia (Mr. TALMADGE) are necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

Mr. STEVENS. I announce that the Senator from Wyoming (Mr. SIMPSON) is necessarily absent.

I further announce that, if present and voting, the Senator from Wyoming (Mr. SIMPSON) would vote "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 86, nays 6, as follows:

[Rollcall Vote No. 146 Leg.]

YEAS—86

Armstrong	Domenici	Javits
Baker	Durenberger	Jepsen
Baucus	Durkin	Johnston
Bayh	Eagleton	Kassebaum
Bellmon	Exon	Laxalt
Bentsen	Ford	Leahy
Biden	Garn	Levin
Boren	Glenn	Long
Boschwitz	Goldwater	Lugar
Bradley	Gravel	Magnuson
Bumpers	Hart	Mathias
Burdick	Hatch	Matsunaga
Byrd, Harry F., Jr.	Hatfield	McClure
	Hayakawa	McGovern
Byrd, Robert C.	Heflin	Melcher
Chafee	Heinz	Morgan
Chiles	Helms	Nelson
Church	Hollings	Nunn
Cochran	Huddleston	Packwood
Cohen	Humphrey	Percy
Culver	Inouye	Pressler
Dole	Jackson	Pryor
Randolph	Schweiker	Tower
Ribicoff	Stafford	Wallop
Riegle	Stennis	Warner
Roth	Stevens	Weicker
Sarbanes	Stewart	Williams
Sasser	Stone	Young
Schmitt	Thurmond	Zorinsky

NAYS—6

Danforth	Metzenbaum	Proxmire
DeConcini	Moynihan	Tsongas

NOT VOTING—7

Cannon	Pell	Talmadge
Cranston	Simpson	
Kennedy	Stevenson	

So the motion to lay on the table the appeal of the ruling of the Chair was agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the motion was agreed to.

Mr. GLENN. Mr. President, I move to lay that motion on the table.

The motion to lay on the able was agreed to.

Mr. METZENBAUM. Mr. President, if I were good with my vocal chords and could sing, I would sing at this point, "The Party's Over." But I cannot carry a tune so I will not do that.

As far as I was concerned, I thought it important to make the issue with respect to this bill. I thought the world ought to know, if anybody had any interest in it—and, frankly, I do not think anybody has any interest in it except the bottlers—what the issues are and what it is all about.

If they have that kind of an interest, then I think that they understand that the Senate has determined that they will pass the bottlers bill, and the bottlers bill will be the way the bottlers want it; that the bottlers bill will forgive retroactively antitrust violations as far as damages are concerned, and also will forgive future violations unless there is a judge who has said there are violations.

The Senate has clearly indicated that it is not just a small bottlers bill, but it is a big bottlers bill as well.

The Senate has indicated that they are not prepared to accept legislation as an amendment to the bill which would make it possible for the small school districts, the small communities, small businessmen, and consumers to be able to bring an action under the antitrust laws by reasons of the decision in Illinois Brick.

The Senate has indicated that it is not prepared to bring that issue to a vote before the Senate as an amendment to this bill.

I recognize what has occurred. I think the Senate has wasted the time of its Members on this subject. I think it has been enough.

Because I do not think there is any reason to keep wasting more time, I am prepared, Mr. President, to yield back all of my time conditioned upon other Members yielding back their time, and if not be the case I will reserve all of my time.

Since I have brought up most of the amendments, and since I have been at issue with respect to this bill, I am prepared to say at this time that when and if the other Members of the Senate yield back all their time, I will be prepared to yield back my time unless prior thereto some Member, and I do not wish to deny any Member his right to speak, should

put in issue some particular matter as pertains to this bill that I felt I needed to respond to.

Mr. BAYH. The Senator from Indiana has about 5 or 10 minutes of comments that he would like to make, at which time I am prepared to yield back whatever time I might have left, which will be some part of an hour. Does the Senator from North Carolina care to have the floor? I shall be glad to yield to him.

Mr. HELMS. I was going to ask the Senator from Indiana to use his microphone. I have a statement to make, but I shall wait until he is finished.

(Mr. MORGAN assumed the chair.)

Mr. BAYH. Mr. President, the Senator from Ohio mentioned a moment ago that he was proud to have had the opportunity to make the case as he sees it on the amendments and against the bill. I am proud of him as a friend and as an adversary. He is one Member of this body who has the will to take on all comers for something he thinks is right. I have the greatest respect for him because of that. We need more of that.

With all respect, I suggest that just because my friend from Ohio thinks it is right does not necessarily mean it is right.

We sat here very patiently and heard a recitation of all the major problems confronting our country: Interest rates, inflation, unemployment, senior citizens, young kids, young blacks, business taxes, troops in Europe, the MX missile, all of which my friend from Ohio suggested needed to be discussed and we were spending our time discussing the bottling bill.

I do not want to make a Supreme Court case out of this. I have already said that the reason we were making such a parliamentary maneuver is that it was the only way we could keep our friend from Ohio from killing the bill.

If anybody has kept us here a full week, it is the Senator from Ohio who refused to let this measure be voted up or down on the issue. To suggest that those of us who wanted to vote for the bottling bill were anticonsumer, if one just examines who voted here I think we get a rather interesting perspective.

I have supported the consumers' interests. The Senator from Ohio has been very thoughtful and has pointed that out in the record.

But I see nothing but folly in idle support for a consumer issue for which there is not the necessary votes to ever have the issue raised, or at least, which would kill another piece of legislation a Senator feels is important. I happen to believe this bottling bill is important.

I would like to correct the record. There has been a great deal of discussion about the profitability of the bottling business. I point out on page 19 of the record that we have a bottler saying:

I have never earned more than 5 percent on dollar sales. Last year I earned 2 percent.

We also have him describe in some detail what is going to happen when the large bottlers come in and compete with this small bottler. He outlines it:

I am out of business. Retail prices will be raised, in my opinion, by the big groceries and chains who, at least, in the past have always placed national brands above their private labels to assure that those private labels do, in fact, sell.

That is in the record.

We also have the expert witness before the FTC, Mr. Comanor, who testified before our committee, of which the distinguished Senator from Ohio is chairman.

He pointed out that the profit from these small companies is small.

I do not know why we need to start talking about the profit of the sirup companies, which is where the FTC made the mistake in the first place, when they looked at the percentage of the sirup companies instead of the small bottlers.

I feel this as sincerely as I know how, and I think as sincerely as the Senator from Ohio feels on the other side of this thing, in my judgment, without this bill, we are going to have most of the small bottlers in America go out of business. I think the record shows that.

As a result of that, we will have a few large bottlers, of which there are some now, who are going to take over the market, and, when there are a few bottlers, we will have less competition, and we will have a greater tendency to increase the price.

There is no question, in my judgment, that there will be less service, lass availability, because the small bottlers now emphasize service. The large bottlers will emphasize volume sales.

There has been discussion about the antitrust violations. Let me suggest that we have already discussed that.

I ask anyone to look in the record who may have a question about whether this is a bad thing or not.

We are trying to preserve the rights of these small businesses after a 75-year practice has been changed by a split vote of the FTC. We feel that the bottlers, who have been acting according to what the precedent of the courts have said, and an 75-year precedent, should not be accused of a violation of this very small area, the territorial franchise, until a court has ruled upon it.

Mr. President, I close by pointing out that although my friend from Ohio feels very strongly that the issue here involves antitrust, and that his position is proconsumer, if one would look at the record of the last votes, we had a cloture vote of 86 to 6. The next amendment was 88 to 3. The next was 89 to 4.

I leave it to the judgment of the public, even consumer advocates, when they go down that list and see Senators BAYH, BRADLEY, BUMPERS, BURDICK, BYRD, CHAFEE, CHURCH, CULVER, EAGLETON, HART, HATFIELD, HUDDLESTON, INOUYE, JACKSON, LEAHY, MAGNUSON, MATHIAS, MCGOVERN, MOYNIHAN, NELSON, PACKWOOD, PERCY, PRYOR, RANDOLPH, RIBICOFF, RIEGLE, SARBANES, STEVENSON, TSONGAS, WEICKER, WILLIAMS—I left out some of our colleagues, including my good friend from North Carolina.

I just think it is stretching it a little bit to suggest that all these people, all 86 of those who voted for cloture, all 89 who voted 89 to 4, against my friend from Ohio, that all of us are in bed with these big, large oil companies, and against the poor little consumer, because, as my friend from Ohio knows, that is not the case.

We have a legitimate difference of opinion on this issue, on which at least 88 Members of the Senate joined with the Senator from Indiana, and I am glad to have their support, as we feel those bottlers need the kind of assistance necessary to be able to provide the kind of service that would not be available if the FTC's decision stands.

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, I point out to my friend from Indiana that I do not think he really meant, in bed with the oil companies. I think he meant in bed with the bottlers, did he not?

Mr. BAYH. No. I meant in bed with the oil companies, because my good friend from Ohio suggested by being against his application of the oil merger bill and Illinois Brick, that he put all of us who want to help the hometown bottlers in bed with the multinational giants.

Mr. METZENBAUM. No.

Mr. BAYH. I do not think he can sell that voting list on that basis.

Mr. METZENBAUM. I would not do that.

I just say that a number of my friends in the Senate today are in bed with the bottlers.

But I do not say that improperly. I do not say there is anything improper about it at all. I do not mean to suggest that. I think bottlers have done a very effective lobbying job.

I would like to respond very briefly to the comment the Senator from Indiana made about this return.

I pointed out the returns were good, 16, 18, 20, 22, 25 percent. My friend from Indiana pointed out, using different figures, I think, 2 or 2.5 percent, and the other was something down around that area, as well.

I emphasize for the record that he was talking about return on sales and I was talking about return on equity, and there is a big difference.

As a matter of fact, on page 148 of the committee report, there is this exchange with Mr. Koons and myself:

Senator METZENBAUM. You are the only bottler we have today. Has the bottling industry been a reasonably profitable industry?

Mr. KOONS. Yes, sir. I think so. We make a profit on all packages. As I say, I don't have my statement here, but I think that we run around 5½ percent on sales, something like that.

Senator METZENBAUM. And it shows a profit of about 20 percent on equity, approximately, which is certainly respectable and nothing to be——

Mr. KOONS. Nothing to be ashamed about, that's right.

I think a 20-percent profit does put the bottlers in the same league with the oil companies as far as the return on equity is concerned. I am pleased to see that the Senate has such concern about those small bottlers and that we are about to give them an exemption from the antitrust laws.

Mr. HELMS. I yield myself such time as I may require.

Mr. President, I hope the distinguished Senator from Ohio will understand that there is not the slightest hostility on the part of any Senator toward him for his having exercised his rights in accordance with the rules of the Senate. To the contrary, speaking for myself, I express to him a sense of admiration, because from time to time, I feel a bit lonely in this Chamber, and I understand his feeling that he should defend his position as vigorously as he can—and he has certainly done that.

I disagree with him on this issue. He knows that. But he has stood for what he believes to be right, and a man never makes a mistake when he does that.

As for the pending measure, as an original cosponsor of S. 598, I strongly support this legislation to preserve a unique and competitive industry practice—the manufacture, bottling, and distribution of trademarked soft drinks by local companies operating under territorial licenses.

The Soft Drink Interbrand Competition Act allows local manufacturers to maintain their territorial licenses as long as there is substantial and effective interbrand competition. The Federal Trade Commission's decision to bar as unlawful territorial restrictions in soft drink trademark licensing—like most misguided bureaucratic actions—does more harm than good.

In the long run, the FTC decision would prove to be anticompetitive. If territorial licenses are prohibited, it is most likely that many of the small bottlers will be absorbed by larger ones. I think that is the question that many Senators recognize today. Such a restructuring of the industry would be inconsistent with the purposes of the antitrust laws.

Mr. President, this legislation is not—as the administration charges—"an effort by special interests to remove themselves from the application of antitrust rules designed to maximize competition and preserve efficiency." Such a statement misrepresents the intent and purpose of this legislation. The Justice Department lawyers surely must know—if they can read the English language—that S. 598 does not exempt the soft drink industry from prosecution under any of the antitrust laws.

All we are really doing with S. 598 is rendering lawful these exclusive territorial contract arrangements under a specified set of circumstances. The illegality of those contracts is in doubt despite the FTC decision, since an administrative law judge did not hand down the same opinion as the FTC and the question is, in fact, being litigated. The contracts in question will only be considered lawful in the presence of "substantial and effective" interbrand competition with products of the same general class.

Under the trademark licensing system which exists in the soft drink industry, the franchise company produces and sells sirups or flavoring concentrates pursuant to trademark licensing agreements with independent bottlers, participates in advertising and promotional expenditures made in connection with trademarked products, provides advice and technical assistance on production, quality control, management, and sales problems, and assists in development and test marketing of new products and containers.

The bottler, in turn, manufactures, distributes and sells the trademarked products and provides the capital investment necessary for this market. He determines the plant and equipment to be used, the volume of production by size and type of container, the product mix, the wholesale price to be charged, and the manner in which he can maximize his market penetration to secure the widest possible distribution of his products throughout the territory. The bottler delievers soft drinks directly to retail stores and other outlets through what is commonly referred to as the store-door system. On a regular basis the bottler makes deliveries, retrieves empty returnable bottles for reuse, and provides merchandising and other services. Route delivery to a combination of large and small volume stops permits the small accounts to be economically serviced. because the bottler is also making deliveries to high volume accounts on the same route.

Last year, the Judiciary Committee heard testimony concerning the structure and dynamics of the soft drink industry. According to the testimony, there were 1,724 soft drink bottling companies competing in the United States in 1978. Of the 2,048 bottling plants in the United States, 1,412 had fewer than 50 employees. Many of these plants are family owned; many of them hire significant numbers of employees in the small communities in which they are located. Moreover, while this industry has been experiencing a trend of acquisitions in recent years, the testimony before the committee indicated that this growth was principally in the number and market shares of moderate sized firms, which reflects efficiency promoting adjustments to economies of scale and new technology by the soft industry. As a result, a survey of large metropolitan areas reveals that most of them are served by between 6 and 12 franchised soft drink bottlers, plus unfranchised operations and supermarket private labels and that even in the smaller metropolitan areas the availability of fewer then 5 or 6 sources of soft drink supply is relatively rare.

A 1977 profile of the North Carolina soft drink industry is illustrative of the small size and competitive nature of this business, and I ask unanimous consent to have a table in this connection printed in the RECORD.

There being no objection, the table was ordered to be printed in the RECORD, as follows:

North Carolina soft drink manufacturers

Number of plants	87
Domestic owned plants	70
Number of firms	59
Domestic owned firms	52
Single-plant firms	41
Multiplant firms	18
Plants by number of employees:	
1 to 49	61
50 to 99	14
Over 100	12
Number of cities with plants	49

Mr. HELMS. Mr. President, for 75 years the soft drink industry and soft drink bottlers have operated under the belief that their territorial contracts were legal. In repeated litigation the legality of those contracts has been upheld, most recently in January 1980. To subject them now to punitive damages for operating in a manner they believed to be legal is unfair. If, in fact, substantial and effective competition can be proved to be absent from the soft drink market after the passage of S. 598, the soft drink bottler in question would once again be subject to treble damages. Therefore, this is not a total exemption from treble damage threats for all time. Also, this bill does not exempt the industry from treble damages from any violations of antitrust laws not relating to their territorial contracts.

The protracted nature of the litigation and the uncertainty created by the FTC decision has left in its wake the strong possibility that the structure of the industry may begin to fall apart before the litigation is completed especially since there are still appeal avenues open to both sides. It is, therefore, important that Congress enact this legislation as quickly as possible.

Mr. President, I yield back the remainder of my time.

Mr. COCHRAN. Mr. President, I take this opportunity, before we vote on final passage of the bill, to commend the distinguished Senator from Indiana (Mr. BAYH) and the distinguished Senator from South Carolina, (Mr. THURMOND), the ranking minority member of the Judiciary Committee, for the leadership they have provided and the hard work that has gone into presenting the facts about this measure to the Senate; for bringing the bill to the floor, helping it to gain its way through the roadblocks that were thrown in front of it, so that we would have an opportunity to vote on it today.

I have the greatest admiration, also, for the distinguished Senator from Ohio who knew he did not have the votes to prevail, yet he waged a strong fight. I have the greatest admiration for him, even though I have to say that he is wrong on this bill.

We have here a bill that deserves the support it has received from the Senate. It is going to guarantee that there will be substantial and effective competition in the small rural communities as well as the large cities of this country. It is a pleasure to be associated with this measure and to be a principal sponsor of it. I hope we now can move to a vote.

Mr. BAYH. Mr. President, I appreciate the thoughtful remarks of the Senator from Mississippi. The record will show, as I indicated earlier, that the Senator from Mississippi has been a longtime champion of this measure. Before he came to this body, he was extremely interested in providing leadership in the House. I thank him and his staff for their able assistance here.

I say to all my colleagues that I deeply regret that the parliamentary facts of life required us to take so much time. We have many things that are extremely important. There was no way to get a

vote on this measure without going through all the business we went through. Everyone acted courteously and all acted within their rights. I regret the fact that it took us this long. I appreciate the patience of all involved.

Mr. METZENBAUM. Mr. President, I express my appreciation to the Senator from Mississippi for this kind remarks.

Mr. COCHRAN. I thank the Senator.

Mr. CULVER. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. CULVER. Mr. President, I ask unanimous consent that Mr. George Gilbert, of my staff, have the privilege of the floor for the remainder of the day.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. METZENBAUM. Mr. President, in order that my position may be clear, I am prepared to vote immediately. I am prepared to vote without insisting upon the remainder of my time.

I do not know about other Senators. I am prepared to have a voice vote or a rollcall vote, whatever is the wish of the cosponsors of the measure.

Mr. BAYH. I appreciate the wish of Senator METZENBAUM to move quickly. The Senator from New Hampshire and others have had important engagements which they have foregone. I think that they should have an opportunity to vote up or down on this issue and get it over with on a rollcall vote.

Mr. THURMOND. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. THURMOND. Mr. President, I first take this opportunity to commend the distinguished Senator from Indiana and the distinguished Senator from Mississippi for the long, hard and arduous work they did on this bill.

This is a bill that was originally sponsored by Senator Eastland from Mississippi some years ago.

Senator Eastland first introduced the soft drink bill but unfortunately it was not passed by the Senate. At a later date Senator Eastland did sponsor another bill which passed the Senate but was not taken up by the House of Representatives.

I am glad that his able successor has been able to foster this bill and nurture it and promote it as he has.

Mr. President, I also say that this is not a complicated bill. It is a very simple bill. It simply allows the licensee the sole and exclusive right to manufacture, distribute, and sell his product in a defined geographical area. It does protect the public. It has a proviso that reads this way: "Provides that such product is in substantial and effective competition with other products of the same general class."

So that means that in any geographical area there will be competition. There will have to be competition under this bill. If a man, for instance, has a Coca-Cola license he will be in competition with Pepsi Cola or 7-Up or Royal Crown or Canada Dry ginger ale or Nehi or the product of any other company.

Mr. President, I am convinced this bill is in the best interests of the small bottler, and that is the reason I supported it.

I commend all of the authors of this bill. There were 80 to start with; Senator Muskie became Secretary of State, leaving 79. I think that shows the strong sentiment for this bill and I am very pleased that so many did join on this bill and that it has received such magnanimous support during its consideration here in this body.

Mr. President, I say that on this matter I have differed violently with the distinguished Senator from Ohio. I am convinced that the position that the 80 Senators took endorsing this bill was the right position. On the other hand, he stood here and fought his case openly and bravely and I commend any man for taking such a position of standing for his convictions.

Mr. PERCY. Mr. President, I have not spoken on this bill yet although I am an original cosponsor of it. I only intend to speak for 3 or 4 minutes and then we can go immediately to a vote.

To begin, I do wish to address some comments particularly to the distinguished Senator from Ohio. I respect the conviction with which he speaks and I have listened with great interest to his comments on this legislation.

He and I have in common a business background, but I sometimes find myself diametrically opposed to his point of view despite that commonality of background. The issue of franchises represents one of those instances.

I wish him to know that during my years in business, I spent a great deal of time trying to design a distribution system for the motion picture sound projectors we sold to schools, churches, industry, and individuals. We tried many different ways and finally decided to build this business by a system of franchises. We gathered together independent businessmen from all over the country; gave them territories; and set them up in business. This made possible the growth of an industry that really has benefited, I think, our entire economy.

I saw the system work. It was highly competitive. It was looked upon as a cutthroat business. But these private entrepreneurs, with that franchise, were able to take the risk, make the investment, and do the servicing.

Mr. President, as an early supporter and cosponsor of S. 598, the Soft Drink Interbrand Competition Act, I am pleased by the strong showing of support for it this morning. In invoking cloture we are following an unusual, though not unprecedented, procedural course of action. However, it was necessitated by the obvious desire of most Members of the Senate to pass S. 598 without debilitating or totally destructive nongermane amendments.

S. 598 should be considered and enacted on its own merits. It is necessary to prevent the destruction of the soft drink industry as it has existed for many years. Until we enact this legislation, the industry will remain in a state of uncertainty and confusion. This is not the time for action on unrelated, highly controversial issues.

Since 1971 the Federal Trade Commission has been attempting to bar the industry's territorial franchise agreements which restrict the geographical territory in which a bottler may manufacture and distribute soft drinks. The FTC has argued that this is necessary to promote fair competition. In my judgment and based on 28 years of business experience, the FTC's actions will have exactly the opposite effect.

From all the evidence I have seen, the soft drink bottling and distribution industry is highly competitive as it is presently structured. The administrative law judge at the 1971 FTC hearings on this issue found that there was a high level of interbrand competition in the industry. Certainly the Illinois bottlers with whom I have spoken believe they are in a competitive industry. There are 61 bottlers in Illinois with approximately 5,300 employees. In all, 91 bottling companies currently service our State. Of our 61 plants, over 50 are individual firms and nearly 50 have less than 50 employees. These are small businesses in the true sense of the term and all would be threatened if the FTC were allowed to terminate the industry's current method of doing business.

It is my conclusion that rather than promote competition in the soft drink industry, the FTC's action would have the opposite effect. The 93 percent of the industry that is now privately owned would, I am afraid, be swallowed up by larger bottlers. We would be left with a noncompetitive oligarchical industry which would likely be of less service to consumers, the very opposite of what the FTC states it intends.

S. 598 is drafted to assure that competition in the soft drink industry continues, while allowing the industry to continue its traditional small business nature. I urge its speedy enactment.

Mr. President, I commend Senator METZENBAUM. We disagree on occasion, but I admire how hard he fights for what he believes in.

He comes to his conclusions as a result of very careful thought. He speaks out without any fear of the consequences. I believe it is a real Senator who does that, and I am happy to add my expression of regard to those already made by my colleagues.

Mr. BUMPERS. Mr. President, I am a cosponsor of S. 598 and strongly support this important piece of legislation. Without this legislation, many bottling companies might be forced out of business by competition with the very companies who supply sirup to them.

For over 75 years the bottling industry has operated with a system of territorial franchises. These territorial franchises allowed businessmen to invest large amounts of capital in bottling equipment with some protection for their investment. During these 75 years the different types of soft drinks available and the different types of packaging available have continued to grow from 1 or 2 types of soft drinks in 1 package to at least 3 or 4 dozen nationally recognized soft drink brands in 6 to 10 different types of packages.

The majority of these bottling companies are small employers. According

to testimony before the Senate Judiciary Committee there were 1,724 soft drink companies in the United States in 1978 and 2,048 bottling plants; 1,412 of these bottling plants had fewer than 50 employees. In Arkansas there were 33 soft drink bottling companies in 23 cities in 1978. Of these 33 plants, 23 had fewer than 50 employees. Only three plants had over 100 employees.

However, the companies which supply sirup to these bottling companies also operate bottling plants of their own. For example, PepsiCo, the parent company of Pepsi sirup owns bottling franchises in Massachusetts, Connecticut, New York, Pennsylvania, New Jersey, Michigan, Florida, Texas, Nevada, Arizona, California, and Wisconsin. Because of territorial restrictions the bottling companies owned by the sirup manufacturers do not now compete with the small bottlers, but if the territorial restrictions were abolished, they would compete with one another.

A recent FTC decision involving Coca-Cola and PepsiCo held that the territorial franchises of the soft drink industry were unreasonable restraints of trade. The underlying administrative law judge's decision had found that there was substantial interbrand competition among the bottling companies and that the territorial franchises were not unreasonable restraints. The administrative law judge found that removing the franchises would change the industry in several undesirable ways. Many small bottlers would be forced out of business through competition with large bottlers, particularly those owned by the sirup companies, and the use of the returnable bottle, which provides considerable cost-saving to the consumer, would be substantially reduced since a bottler would be uncertain whether he could recapture his large investment in returnable bottles without the guarantee of his geographic area.

If the territorial franchises were eliminated, many large bottling companies could distribute their product, in nonreturnable containers throughout the United States. Several of the large bottling companies are owned by the sirup companies themselves and there is a tremendous potential there for these companies to gain control of the market. Smaller companies would be forced out of business and then the large bottlers could control the market and price the products as they wished.

Right now the small bottlers have some protection through the territorial franchise system. Even with this protection, the bottlers must operate in a highly competitive market.

Our small employers provide important economic and social benefits for their communities and the nation. According to an MIT study by David Birch, "The Job Generation Process," small employers provided over 57.8 percent of the jobs between 1969 and 1976. During that same time period, small firms provided over 66 percent of the net new jobs created. A recent article in the Washington Post, pointed out that small locally owned firms provide markets for suppliers, and funds for financial institutions. Locally owned small businesses promote the community's welfare and support its programs. If a larger company buys out a small firm or forces it out of business and serves the area long distance, the community loses economically and socially since the larger company has no local interest. This legislation will protect the small bottlers who provide these benefits to their communities.

As for returnable bottles, now the industry operates under a store-door delivery system. Large supermarkets would prefer to receive soft drinks through a warehouse system. A warehouse system would concentrate the sales in the hands of large bottlers in metropolitan areas and would encourage the use of nonreturnables.

For example, Shasta soft drinks are warehoused to supermarkets and they are only sold in nonreturnables. It is impossible to recover returnable bottles if they are warehoused and then delivered to various stores. Returnable bottles require significantly less energy to produce in the long run and eliminate the waste problem of nonreturnable containers. Returnable bottles also save the consumer money. In Arkansas a 32 ounce returnable bottle sells retail for between 1.03 and 1.35 cents an ounce while a nonreturnable can sells for 2.76 cents an ounce, over twice as much.

Moreover the price of soft drinks in returnable containers from 1939 to today has increased about 60 percent while the Consumer Price Index for that period has gone up over 400 percent. In Arkansas between 51 and 55 percent of the packaging for soft drinks is in returnable bottles. Eliminating returnable bottles would mean that the cost of soft drinks would r'se significantly for most customers in Arkansas. Passage of this legislation will help keep consumer cost and energy consumption down.

For these reasons, Mr. President, I urge my colleagues to support and quickly pass this legislation.

Mr. ROTH. Mr. President, today I wish to speak in support of S. 598, the Softdrink Interbrand Competition Act. The support of this legislation by a large majority of the Senate, and similarly large support for companion legislation in the House of Representatives, comes as no surprise. Throughout the country, the soft drink industry is part of the way of life of most Amenicans, from school children to retirees.

The Softdrink Interbrand Competition Act would prevent great harm from befalling this industry and at the same time would foster the continuation of an industry practice which dates back to the earliest years of the 20th century.

Section 2 of the bill limits its application only to those areas where there is "substantial and effective competition with other products of the same general class." This provision should work to the advantage of American consumers in two ways. First, it should provide a continued wide range of choice among similar competing products, permitting the satisfaction of a wide range of consumer tastes. Second, intense competition between brands in a limited market area will most likely include price competition, thereby keeping consumer costs for soft drinks at the lowest possible level.

S. 598 will avoid a wrenching change in the structure of the industry. This means that independent bottlers and distributors, and especially the smaller and more vulnerable ones, will have some insulation from predatory competition. The prosperity of small businesses, which provide most of the employment in this country, has always been an important concern of the Senate.

While stabilizing the industry's structure along lines which have worked well for generations, S. 598 would also eliminate a major uncertainty which has impeded the growth and prosperity of companies in the soft drink business. I refer to the unsettled legal status of intrabrand soft drink competition as different opinions are registered by the courts and regulatory agencies.

I am pleased to have cosponsored this legislation. I urge its prompt enactment.

● Mr. LEVIN. Mr. President, I am a cosponsor of the Illinois Brick bill and I am hopeful that the Senate will have the opportunity to vote on this bill on its own merits. This bill would overturn the 1977 Supreme Court decision in Illinois Brick Co. against Illinois, in which the Court held that only persons who have dealt directly with an antitrust violator are entitled to sue that violator for antitrust damages. However, it is my opinion that this bill, while worthy of support on its own merits, is not germane to S. 598 and it is for this reason I do support the nongermane ruling of the Chair.●

Mr. DOLE. Mr. President, in considering S. 598, the Soft Drink Interbrand Competition Act, I feel compelled to note that this legislation is considerably different than the original Eastland bill which attempted to deal with this problem several years ago. The Eastland bill attempted to say that vertical exclusive territorial license agreements between soft drink companies and bottlers were legal per se, under the "per se" rule of the Supreme Court.

However, in 1977, in the GTE Sylvania case, the Supreme Court held that the so-called rule of reason test, rather than a standard of per se illegality, should be used to evaluate vertically imposed nonprice restrictions, such as the territorial restrictions in bottlers' contracts. In 1978, the FTC supposedly applied the "rule of reason" to bottlers' territorial restrictions and concluded that such restrictions were unreasonable restraints of trade.

Yet, in studying the FTC opinion, the Senator Kansas has concluded that the FTC based its decision on only the intrabrand effects of a territorial restriction, rather than on its interbrand effects. Since, by definition, a territorial restriction is a directly intrabrand restriction, under the analysis of the FTC, such restrictions will always restrain intrabrand trade. Hence, even though the FTC acknowledged that the "rule of reason" was the correct legal standard, it actually applied a standard of per se illegality by refusing to consider the interbrand impact of these

restrictions. As a matter of antitrust policy, it is this competition between brands that the Senator from Kansas believes is most significant.

S. 598 clearly articulates a "rule of reason" standard to judge the territorial restrictions of bottleres. In this way, it overturns neither the precedents of the Supreme Court nor the law the FTC claimed to apply. Consequently, this legislation is not a departure from present law, but rather represents a reasonable way of clarifying an ambiguity which has developed in the application of the law. The Senator from Kansas is confident that this bill satisfies the aims of our antitrust laws; namely, it seeks to assure effective competition in the marketplace.

This measure, if enacted into law, would obviate the necessity of having many different lawsuits brought before the FTC in order to clarify the application of the Sylvania case's rule of reason test to the soft drink bottling industry. The bill applies the rule of reason test by requiring in section 2 that territorial license agreement must result in "substantial and effective" interbrand competition between different soft drink products of the same general class in order for the territorial license agreement to be legal. Thus, this language in section 2 resolves the problem that was raised in the case brought before the FTC last year. The bill would have no effect where substantial and effective interbrand competition is not found to exist in a market. The usual rules of antitrust law which measure such vertical agreements under a "rule of reason" analysis would apply in such a case.

The bill insures that both interbrand and intrabrand competition would be considered in judging the legality of a territorial license agreement. By considering interbrand competition, this legislation will preserve the system of vigorous competition which has prevailed in the soft drink bottling industry for over [illegible] years. The evidence of this competition can be seen on several fronts. There are fairly low barriers to entry in the soft drink market, which indicates the existence of a high degree of competition.

In addition, advertising expenditures in recent years have increased by a percentage amount greater than that for sales of soft drinks. This indicates that the various brand manufacturers are engaged in serious competition for market share in their respective soft drink markets. Third, the cost per ounce of a soft drink over the past few decades has increased by a percentage amount which has been much less than the percentage rise in the general Consumer Price Index.

This high degree of competition has been of benefit to consumers. We can see that the price of soft drinks has been remarkably low over the years, and we want to preserve this benefit to consumers. This bill will insure that such benefits continue.

If the bill is not passed, we may see the rapid acquisition of smaller independent bottlers by larger regional or national bottlers because these latter bottlers have greater financial strength and resources to mount a bidding war against the smaller bottlers. In addition to the reduction of competition, this means that many jobs at the smaller bottlers plants are at stake. The unemployment rate is high enough without increasing it through confused application of the antitrust laws. This is another justification for the bill.

In addition, the bill does not provide immunity for the use of territorial or customer restrictions if they are part of a scheme to engage in collusive or exclusionary practices. Thus, the bill cannot be used as a cover for price-fixing, horizontal market divisions, or customer or wholesale boycotts. It is aimed at a specific problem.

Yet another beneficial result of S. 598 will be to shorten and simplify antitrust trials where the legality of nonprice vertical restraints on territories and customers in the soft drink industry is being questioned.

The Senator from Kansas has followed this bill closely in the Judiciary Committee and has participated in its consideration. It represents a valid middle ground compromise approach to the problem before us. Accordingly, the Senator from Kansas is pleased to vote for this bill today.

Mr. DURENBERGER. Mr. President, it is impossible to overstate the significance of the bottling industry to the economy in my State, and the economy of the Nation as a whole.

Sales of soft drinks by Minnesota bottlers totaled an estimated $256.9 million in 1978. The bottlers employed 2,285 Minnesotans, with a payroll in excess of $32 million. Minnesota houses 48 bottling plants, most of which are small, independently owned businesses. All but seven of these plants have 100 employees or less. These plants are located in 32 cities across the State of Minnesota, and paid over $4 million in State and local taxes last year. In addition, these companies purchased goods and services from other firms totaling $154.1 million.

These figures parallel statistics from other States in the Midwest, and in the Nation as a whole. The soft drink bottling industry has been a vital portion of the Nation's economy, and if permitted to stand in its present form, the Commission's decision would have a devastating effect on its continued vitality.

Overall, elimination of bottler territories will have a substantial adverse impact on bottlers, especially small bottlers, on use of the returnable bottle, on soft drink competition, and on industry concentration.

Historically, franchised bottlers have used store-door delivery as a means of handling returnable bottles, assuring quality control, and providing other customer services to both large and small accounts. But most food chains prefer to receive delivery of soft drinks at their warehouse distribution centers rather than at their retail stores. Without the market power that comes from exclusive territories, bottlers will be increasingly pressured to make warehouse deliveries. or to allow chains to pick up franchised brands on their own trucks for backhaul to their warehouses.

This will have a significant effect upon returnable bottles. Delivery of returnable bottles is economical through store-door delivery but not through warehouse delivery. For this reason because returnables involve extra handling costs, and vigorous price-per-ounce competition with the chain's own private label soft drinks, which are sold almost exclusively in nonreturnable containers, many food chains have discouraged the sale of returnables in the past. With the shift to warehouse delivery, returnables would be eliminated at many food chains. Once returnables and nonreturnables are not distributed together, cost of delivery of returnable bottles will increase dramatically; the ultimate effect will be the demise of the route delivery system and, therefore, of the returnable bottles.

The shift to warehouse delivery would also cause the demise of many bottlers. As chains begin to receive franchised brands through thier warehouse distribution systems, many bottlers will lose a major part of their nonreturnable business in food stores to neighboring bottlers, since chain warehouses typically service a larger area than do individual bottlers.

Since sales volume is critical to a successful bottling operation, the bottlers who were unable to secure the warehouse business would experience a sharp increase in unit costs. To survive, such bottlers would have to increase prices to their remaining customers, or reduce costs by cutting back on service and other activities, or both. However, as bottlers cut back on services, which develop demand for the franchised soft drink brands they sell, and increase prices, the result will be a further decrease in demand. The inevitable result will be the loss of hundreds of bottlers.

Obviously, this would have an adverse effect on consumer choice. The loss of independent bottlers will have a direct effect on the choices of soft drink available to customers. Historically, many soft drink brands have succeeded in local markets mainly because they are manufactured and distributed by bottlers of major franchised brands. As the number of bottlers decreases, the slower moving brands would find it difficult to survive since the remaining bottlers would stress high volume brands. Weaker brands would also be unable to obtain distribution through alternative warehouse delivery channels, since food chains prefer to handle only the fast moving brands, and their own private labels. The result would be fewer competitive brands and fewer consumer choices.

Rejection of S. 598 would produce significant adverse price effects. In the short run, there would be a temporary price reduction at the wholesale level for certain nonreturnable packages—principally cans—but only for the chains and other high volume accounts, which represent about 40 to 45 percent of sales of franchised soft drinks. However, no retail savings to the customer can be expected even at these accounts. The chains have a longstanding practice of maintaining a retail price spread between franchised brands and their own private label soft drinks. This fact has been repeatedly demonstrated by experience with warehouse delivery by various soft

drink companies, where lower wholesale prices for nonreturnables delivered to warehouses were not translated into lower retail prices in chain store outlets. Moreover, the consumer would experience a rise in prices in nonchain store accounts—which represent 55 to 60 percent of sales—and a decline in the use of returnables which constitute about 40 percent of the sales of franchised brands and are generally cheaper than nonreturnables on a price per ounce basis.

Finally, rejection of S. 598 would restructure the bottling industry. In a few years, the result of eliminating territories would be the restructuring and concentration of the industry into the hands of a few extremely large, regional soft drink manufacturers. These surviving bottlers would offer fewer brands in a limited number of packages and distribute soft drinks to a fraction of the accounts presently served. In this concentrated eocnomic environment, wholesale price levels would rise even to warehouse delivered accounts, and overall retail prices to consumers would further increase.

Mr. PRYOR. Mr. President, I would like to reaffirm my strong support of S. 598, the Soft Drink Interbrand Competition Act, and encourage my colleagues to vote in support of this legislation.

This legislation is most important as it will benefit the small soft drink bottler and permit the continuance of a territorial distribution system which has been in existence for over 75 years. The existence of exclusive territories allows small- and medium-sized bottlers to compete effectively with large bottlers and giant conglomerates which own bottling operations. It focuses competition within a defined geographic territory, thus allowing the bottler with smaller resources to focus all of those resources in a given area and meet the competition of his larger competitors. This system has allowed second and third generation bottlers to grow and prosper along with their larger competitors.

Without passage of S. 598, there may later be fewer bottlers and greater market concentration in the hands of a few. The elimination of exclusive territories would, thus, not improve the competitive nature of the soft drink industry, it would result in increased concentration as smaller bottlers disappear. This will cause declining product and price variety in the marketplace for soft drinks. This would appear to bring about the very antithesis of the intent of antitrust laws.

Mr. President, S. 598 preserves competition in the soft drink industry. It will benefit the small soft drink bottler and the consumer, who will find lower prices and increased quality and service. I believe that this body should act to approve this legislation which will clarify the antitrust laws and preserve a system of doing business which has benefited all of us.

Mr. BAUCUS. Mr. President, the legislation we are considering today, S. 598, has implications that go far beyond the soft drink bottling industry. The action we take today is an excellent example of Congress standing up to a Federal bureaucracy that we perceive is not operating in the public interest.

So much has been written about how the Federal Government is out of control and how Congress has failed to pull in the reins. But, this legislation is one outstanding example of what we in Congress can do if we are willing to exercise properly our oversight responsibilities.

I applaud the Senate for this action and I trust that we in Congress will continue to monitor carefully the activities of all Federal agencies, and to bring this kind of legislation to the floor of the Senate each time it is warranted.

We also have another lesson to learn from this legislation. I am reminded of the warning of the Roman writer of fables, Phaedrus, who wrote "things are not always what they seem." That message has a unique application with respect to the soft drink franchise legislation that we are considering today.

The FTC took a look at the practice of major bottling companies entering into "territorial franchise" agreements with local soft drink bottlers. Under these agreements, soft drink bottlers and major distributors enter into contracts whereby only one person will be entitled to distribute that particular soft drink in a given geographic area. This means that if MAX BAUCUS is a small soft drink bottler in Helena and has a contract with a major soft drink company to distribute a certain product in Helena, no other individual can obtain that product and distribute it in the Helena area. On its face without looking beyond, that would appear to be an anticompetitive practice.

But it would be a big mistake for Government to end its analysis there and begin to try to terminate territorial franchise practices.

If the real beneficiaries of the FTC's endeavors were other Montanans who wanted to be able to compete with MAX BAUCUS in distributing a product in Helena, then I would be the first to stand up for their right to compete for the distribution of that product. But there are two other factors which are so important that for me they make this legislation a very simple proposition.

The first factor is that it is not other small Montana businesses who would benefit from FTC's attempts to prohibit territorial franchises. Rather, it is large bottlers located in Seattle and Denver and Los Angeles and Chicago who would be taking soft drink bottling franchises away from Montanans. While the territorial franchises may keep some small businessmen from Montana from competing with other small businessmen from Montana, their real benefit is that they are keeping small Montana businesses from being taken over by large businesses owned and operated by large companies located hundreds and thousands of miles outside of our State.

Additionally, the opponents of this legislation overlook the fact that there is a great deal of competition between brands of soft drinks. Although MAX BAUCUS may have exclusive rights to soft drink *x*, nothing in the territorial franchise scheme will prevent any Montanan from competing with MAX BAUCUS with soft drink *y*, *z*, or any other brand for that matter.

It is the protection of small Montana businessmen and the fact that competition does currently exist in the soft drink industry that have convinced me that these territorial franchises are not what the FTC claims them to be. If I believed they were keeping small businessmen out of business, Mr. President, you can rest assured that I would be one of the chief opponents of this legislation. Rather, in my conversations with Montana businessmen, I am convinced that just the opposite is the case: that the territorial franchises permit small Montana businessmen to continue to exist. This legislation would permit territorial franchises to continue.

I believe that the FTC should be working on anticompetitive practices that hurt small businessmen. There must be thousands of other practices that really impact negatively on all of us. I believe my vote on this legislation will be a message to the FTC that they should rearrange their priorities and focus their attention on those practices that really do hurt the small businesses of our country.

I am proud to have been an initial sponsor of this legislation, and I am proud to be identified with a Senate that is taking a stand that will show the country that when the Federal bureaucracy does not act in the public interest we in the Congress can do something about it. This is an important precedent, and I hope it will just be the first of many similar occurrences during my tenure in this distinguished body.

Mr. BOREN. Mr. President, I rise in support of S. 598. The soft drink bottling industry has been in an uncertain state for nearly 10 years, and the passage of S. 598 will eliminate that uncertainty and validate the manner in which the soft drink industry has been operating without challenge, for over 75 years.

The industry has always operated under the belief that it was entirely appropriate to have exclusive territorial provisions or franchises to manufacture, distribute, and sell their products. This belief was reinforced by the Federal courts themselves 60 years ago with a decision that supported the manner in which the industry operated.

Then, in 1971, the Federal Trade Commission decided to challenge the territorial provisions in the bottlers trademark licenses. The Commission apparently felt that the licenses constituted unfair methods of competition in violation of section 5 of the Federal Trade Commission act. As has already been pointed out on the floor by the able and distinguished Senator from Mississippi, Senator COCHRAN, extensive hearings were conducted over a 6-week period and in October of 1975, the administrative law judge at the Commission issued a lengthy and detailed opinion which upheld the legality of territorial provisions and trademark licenses.

The administrative law judge not only ruled that the franchise system was lawful, but that it positively fostered competition. The judge, in his 91-page ruling, went to great lengths to find that the effect of the system was such that there was intense interband competition in

this industry in terms of price, product innovation, and marketing technique.

Mr. President, you can imagine the stunned disbelief in the industry when the full Commission, with only token references to the evidentiary records, overruled the judge and held that the territorial provisions did, in fact, violate the FTC act. The vote was 2 to 1.

In making their finding, the Commission never tried to rebut the judge's opinion that there was intense price competition in the sale of soft drinks—they simply held that without territorial restraints, there would be more competitors and therefore more competition.

One of the most incomprehensible portions of the Commission finding was that bottler territories should not be permitted in the distribution of soft drinks contained in nonreturnable containers, but soft drinks in returnable containers should be permitted.

That ruling has been appealed to the Federal courts.

S. 598 is intended to remedy the chaotic conditions that have prevailed in the industry since the FTC ruling. Specifically, the bill provides that exclusive territorial licenses to manufacture, distribute, and sale trademarked soft drink products shall not be deemed unlawful as long—Mr. President—and this is very important—as long as there is "substantial and effective competition" among different products.

The bottlers that are affected by this bill, Mr. President, are by-and-large family owned businesses. In 1979, over 2,000 bottling plants were in operation throughout the United States. Seventy-five percent of those employ 50 people or less.

Mr. President, if this bill does not pass, and in the event that the Federal courts should reverse themselves and support the FTC's finding, the victims would not be only the small bottling firms I have mentioned, but also the general public.

Here is what I believe would happen. Large bottling companies with regional distribution systems and sufficient operating capital, not available to smaller businessmen, would move into a small marketing area and undercut the price of the local bottling firm. Once the local firm was driven out of business by this price-undercutting technique, the larger regional operation could set any price they chose.

There is no doubt in my mind, Mr. President, that whatever price was then charged for the product, it would be sufficient to not only provide a profitable rate of return for the larger company, but also to make up for whatever losses were incurred during the price-undercutting period. In such a case, far from promoting more competition, the result would be less competition and higher prices to the consuming public.

● Mr. LEVIN. Mr. President, I oppose S. 598, the Soft Drink Interbrand Competition Act. This bill seeks to overturn a Federal Trade Commission decision which held that the territorial arrangements in question were unreasonable restraints of trade. That decision has been appealed and the Court still has the case before it. A legislative remedy to this issue is therefore perhaps unnecessary and is in any event premature.

By giving this industry an exemption from the antitrust laws, the Senate may be creating a difficult precedent for ourselves. S. 598 creates the only single industry exception to the antitrust laws of its type. If there were no alternative, it might be reasonable to create the exemption legislatively. But so long as relief in court is in process and a realistic possibility, creating this exemption now is a mistake.●

The PRESIDING OFFICER. Does any Senator seek recognition?

The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Nevada (Mr. CANNON), the Senator from California (Mr. CRANSTON), the Senator from Massachusetts (Mr. KENNEDY), the Senator from Georgia (Mr. TALMADGE), and the Senator from Illinois (Mr. STEVENSON) are necessarily absent.

I further announce that the Senator from Rhode Island (Mr. PELL) is absent on official business.

On this vote, the Senator from Nevada (Mr. CANNON) is paired with the Senator from Illinois (Mr. STEVENSON). If present and voting, the Senator from Nevada would vote "yea" and the Senator from Illinois would vote "nay."

Mr. STEVENS. I announce that the Senator from Wyoming (Mr. SIMPSON) is necessarily absent.

I further announce that, if present and voting, the Senator from Wyoming (Mr. SIMPSON) would vote "yea."

The PRESIDING OFFICER. Have all Senators in the Chamber voted?

The result was announced—yeas 89, nays 3, as follows:

[Rollcall Vote No. 147 Leg.]

YEAS—89

Armstrong	Garn	Moynihan
Baker	Glenn	Nelson
Baucus	Goldwater	Nunn
Bayh	Gravel	Packwood
Bellmon	Hart	Percy
Bentsen	Hatch	Pressler
Biden	Hatfield	Proxmire
Boren	Hayakawa	Pryor
Boschwitz	Heflin	Randolph
Bradley	Heinz	Ribicoff
Bumpers	Helms	Riegle
Burdick	Hollings	Roth
Byrd, Harry, F., Jr.	Huddleston	Sarbanes
Byrd, Robert C.	Humphrey	Sasser
Chafee	Inouye	Schmitt
Chiles	Jackson	Schweiker
Church	Jepsen	Stafford
Cochran	Johnston	Stennis
Cohen	Kassebaum	Stevens
Culver	Laxalt	Stewart
Danforth	Leahy	Stone
DeConcini	Long	Thurmond
Dole	Lugar	Tower
Domenici	Magnuson	Tsongas
Durenberger	Mathias	Wallop
Durkin	Matsunaga	Warner
Eagleton	McClure	Weicker
Exon	McGovern	Williams
Ford	Melcher	Young
	Morgan	Zorinsky

NAYS—3

Javits	Levin	Metzenbaum

NOT VOTING—7

Cannon	Pell	Talmadge
Cranston	Simpson	
Kennedy	Stevenson	

So the bill (S. 598) was passed, as follows:

S. 598

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Soft Drink Interbrand Competition Act".

SEC. 2. Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture (including manufacture by a sublicensee, agent, or subcontractor), distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: *Provided*, That such product is in substantial and effective competition with other products of the same general class.

SEC. 3. The existence or enforcement of territorial provisions in a trademark licensing agreement for the manufacture, distribution, and sale of a trademarked soft drink product prior to any final determination that such provisions are unlawful shall not be the basis for recovery under section 4 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

SEC. 4. As used in this Act, the term "antitrust law" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (the Sherman Act), approved July 2, 1890, the Federal Trade Commission Act, approved September 26, 1914, and the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), approved October 15, 1914, and all amendments to such Acts and any other Acts in pari materia.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. BAYH. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BAYH. Mr President, I would like to reiterate the appreciation the Senator from Indiana expressed earlier to the distinguished Senator from Mississippi, and I would also like to express my appreciation to the ranking Republican member of the Judiciary Committee (Mr. THURMOND) for his efforts. There have been several others of our colleagues who have been very helpful in this.

I think we should recognize the fact that we have had a number of outstanding staff people working on this: Louise Milone, Kevin Faley, and others on the Subcommittee on the Constitution staff; Mr. Henry Ruempler, Elizabeth Edwards, and Linda Townsend of Mr. COCHRAN's staff; Emery Sneeden, Pete Chumbris, and Mike Chambers of Senator THURMOND's staff, as well as others of our staff.

I also want to express a deep feeling of appreciation to the distinguished majority leader, who made it possible for us to handle this measure, and to his staff

because, without their willingness to let the Senate have a chance to work its will on this piece of legislation, we would not have been here. I regret that we have had to inconvenience some people over such a period of time, but this is, really, one of the glories of the Senate, that one Member of the Senate or a dozen Members have the opportunity to see that an issue is fully discussed and fully examined.

Again, I think we need to say that the Senator from Ohio was operating fully within his rights and was aboveboard and candid and open, as he always is. He is a great man to do battle with. I would rather be with him than "agin" him, but indeed, he was a worthy foe on this matter.

Mr. THURMOND. Will the Senator yield?

Mr. BAYH. I yield.

Mr. THURMOND. Mr. President, I associate myself with the remarks that have just been made by the distinguished Senator from Indiana.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield to me?

Mr. BAYH. Yes.

Mr. ROBERT C. BYRD. Mr. President, I want at this time to express appreciation to Mr. BAYH and to Mr. THURMOND for the leadership that they have demonstrated in the enactment of the bill that the Senate has just passed. They have spent many hours in the course of the subcommittee and committee process. They have worked hard and very effectively, as was shown today, in lining up the cloture vote. This is one instance in which I never did anything to get cloture. I simply said to them, "Can you produce, can you lay the votes on the line?" The only thing I did was offer the cloture motion.

I think that, in the future, I might be well advised, when attempting to get cloture, to just turn to Senators BAYH and THURMOND and leave the job to them. If we can get cloture on the first vote, we can save the time of the Senate.

I also thank Mr. METZENBAUM for his cooperation in this matter. He has demonstrated a spirit of give and take, and he took more than he gave. It is easy to give but not so easy to receive. He has shown a fine spirit of cooperation and he is entitled to some tribute as well.

I thank the Senate for the dispatch with which it has consummated the action on this measure following the cloture vote.

Before I proceed with other things, I yield to the distinguished minority leader.

Mr. BAKER. Mr. President, I thank the distinguished majority leader for yielding. I want to pay my respects to the distinguished Senator from South Carolina and the distinguished Senator from Indiana for their work in this matter. This bill is worthy of their efforts and I think it serves a good purpose and avoids a great deal of the difficulty that might have ensued.

I noted the remarks of the majority leader that. in the future. he might turn to the joint efforts of the Senator from South Carolina and the Senator from Indiana to invoke cloture. I suggest that if we wait for these two to be together on cloture in the future, that would be a rare teaming indeed. I have not seen them work on many matters so agreeably, but it is good to see that much cooperation between two Senators who, in the past, have always disagreed on subjects of major concern.

Mr. President, I also thank the distinguished Senator from Mississippi for his good work in this field. He is a relatively new Member of this body, a highly valued one on this side of the aisle. I have had an opportunity to watch at close range as he has conducted his part of this effort during the rather extended debate on this bill. I extend my gratitude to him for his work and my admiration and congratulations for the skillfulness with which he handled the very substantial part of the responsibilities that devolved on this side of the aisle.

Mr. President, I shall not prolong the discussion any further, except to join with others who have already expressed their appreciation to the Senator from Ohio (Mr. METZENBAUM) for the graceful combination of his expression of dedication to principle on the one hand and his willingness to facilitate the business of the Senate on the other.

Finally, Mr. President, I say that in the course of my 13 years in the Senate, I have seen many parliamentary endeavors and I have seen many parliamentary devices spawned and hatched under the originality of the distinguished majority leader, but I must comment that I do not think I ever saw a preemptive filibuster before, or a preventive filibuster. I rather expect that is what we have just witnessed. I do not know whether it is a good thing or a bad thing, but it worked and worked very well. I congratulate all who are the parents of this enterprise.

Mr. DURENBERGER. Mr. President, will the majority leader yield?

Mr. ROBERT C. BYRD. Yes, I yield.

Mr. DURENBERGER. I thank the leader.

Mr. President, I rise to express my appreciation and to add my own comments of respect to the leaders on both sides on this bill.

Mr. ROBERT C. BYRD. Mr. President, I yield to Mr. HARRY F. BYRD, JR., of Virginia.

U.S.S. "R"

Mr. HARRY Mr. President, on April *Eisenhower* left Norfolk, ected long-term deploym ian Ocean. The *Eisenhow* carrier, is an extremely l eat combat power and sh ificantly to the military n ited States in the Indian

Over the p eks I have sought and fi some information regard *ower* which is necessarily ake known to Congress a n public.

When the arted Norfolk, the ship personnel. Of a ship's air wing of over 5,000, a authorized billets was em

A total of 14 the ship, including 11 pe ted ship's company.

But the prim e reduced strength of the w and air wing is that th does not have personnel ip and its air group at fu

Shortages in pany are particularly se tty officer ranks. The *Ei* uthorized. 1,700 petty offi 3 were on board when th rfolk. The shortage of pe 3 percent and is approac ich could make drastic r e combat readiness of th

Full strength red in any military organi the man- ning of a ship, nt can be reached beyon ctions in strength drama perational capability.

In my judgn *hower* is now a borderlin

Mr. President nous con- sent that a tab *isenhower* manning data e Depart- ment of the Na the RE ORD for the inf Senat

There being n table was ordered to be p ECORD, as follows:

U.S

	Officers	Total
SHIP'S COMPANY		
Authorized billets	147	3,145
Actually assigned	145	2,484
Missed movement	0	125
Total deficit	2	786
AIR WING		
Authorized billets	307	2,489
Actually assigned	294	2,219
Missed movement	0	18
Total deficit	13	288
Total unfilled at sea billets		1,074

UNANIMOUS-C EEMEN

Mr. ROBERT President, this is a reques e cleared with the disting y leader. He is on the flo n cleared with other Sena les of the aisle, particular e princi- pals or will be iscussing the matters.

Mr. President, ous con- sent that an or n intro- duced by Mr. C with the Federal Reserve s be laid before the Sena e Senate proceed to the f ideration of that resoluti following time agreement: 30 min- utes equally divi r. PROX- MIRE and Mr. GA endment be in order; tha option of the resolution, t go into executive session he nomi- nation of Mr. Gr following proviso, as in e n: That there be a 5-mi on the nomination of M ually di- vided between and Mr.