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ACTION Remarks by Mr. Weiss

MEMBERS URGED TO OPPOSE MISLEADINGLY LABELED "SOFT DRINK INTERBRAND COMPETITION ACT"

(Mr. WEISS asked and was given permission to address the House for 1 minute and to revise and extend his remarks and include extraneous matter.)

Mr. WEISS. Mr. Speaker, the soft drink industry has again persuaded some of our colleagues to reintroduce the Soft Drink Interbrand Competition Act, a bill packaged as pro-competition, pro-consumer legislation which requires "prompt action" to "protect" hundreds of small businesses. What is necessary, however, is a careful, deliberate scrutiny of this special interest proposal before taking what may be unfair and arbitrary action which will in great measure exempt this industry from antitrust standards, and quite possibly inflate consumer prices—solely for the benefit of some of the largest and most profitable corporations in America.

A short summary of the history of this bill will help place it in some perspective:

In 1971 the Federal Trade Commission (FTC) filed a complaint against the seven largest manufacturers of soft drinks alleging that their exclusive territorial franchises, coupled with what is known as "piggy-backing" (a system whereby a "coke" or "Pepsi" distributor, for example, owns or controls distribution in an area of seemingly unrelated and competitive soft drink products such as "Welch's" or "True-Ade") were anti-competitive and violative of the antitrust laws. After lengthy administrative litigation, the FTC eventually decided that such arrangements were anti-competitive and ordered a break-up of the territorial franchises. The industry took an appeal to the federal courts, where the case is now pending in the circuit court of appeals.

Within six months of the original FTC complaint, the industry came to the Congress seeking an exemption from the antitrust laws. Then in the 94th Congress, the industry sought yet a different legislative test, that being a "rule of reason" rather than "per se" standard. Now, after the FTC has in fact used the "rule of reason" test in its ruling, the industry seeks yet another standard, to be found nowhere else in antitrust statutes.

This bill is unwarranted and directly contrary to the public interest. As is obvious, territorial monopolies preclude price and service competition between similar brands, insuring artifically high prices and high profits. Grants of such territorial monopoly treatment happily have been severely limited over the years to a very few industries; for example, telephone, and even those instances are now on the decline. Yet, we are now asked to create another—the soft drink industry.

This is not small business legislation. This bill would shield the largest "Coke", "Pepsi" and "7-Up" manufacturers and bottlers, and give little, if any, market share protection to the supposed beneficiaries—small bottlers, passage of this bill will not guarantee survival of the small "Mom & Pop" local bottlers; indeed, this is an industry whose members have been shrinking under the present exclusive territorial market conditions, a decline which is, according to the president of "Coke," likely to continue regardless of passage of this legislation.

This is not consumer legislation. It is a measure clearly designed to maintain the current inflated pricing structure in the soft drink industry for the benefit of a few, at a cost to many. In previous Congresses, this bill was opposed by the Department of Justice, FTC, Consumers Union, Consumer Federation of America, and Congress Watch, to name just a few such organizations.

Finally, this is not proper legislative procedure. The Federal Trade Commission was specifically created to deal with antitrust situations. The Federal judiciary, in our system of checks and balances, is available for review of such agency action, and such a review is now underway in this very case. Only in instances of the most serious disregard for the public interest should special interest legislation such as this ever be considered, and certainly not in the middle of the appellate process.

For all of these reason, I urge my colleagues to oppose this misleadingly labeled "Soft Drink Interbrand Competition Act."

The detailed factsheet from the FTC follows:

FTC Decisions Concerning Territorial Restraints on Bottlers of Coke and Pepsi

In April, 1978, the Federal Trade Commission issued final orders and opinions in two companion cases, the *Coca-Cola Company*, Docket No. 8855, and *Pepsi Co., Inc.*, Docket No. 8856. In the opinions, the Commission held that for the most part the territorial restraints imposed by Coke and Pepsi on their bottlers were anticompetitive and in violation of Section 5 of the Federal Trade Commission Act. The Commission's decisions, which are not final until they are reviewed, are now before the Court of Appeals for the District of Columbia. Until the judicial review process is completed the Commission's orders have no effect.

BACKGROUND—THE SOFT DRINK COMPANIES AND THEIR BOTTLERS

The Coca-Cola Company (Coke) and Pepsi Co., Inc., (Pepsi) market most of their soft drink products by selling soft drink syrups and concentrates (syrup) to independent bottlers. The bottlers usually add carbonated water to the syrup and package the soft drinks for delivery and sale at the wholesale level.

The relationship between Coke or Pepsi and most of their individual bottlers is a contractual one. Under the terms of the contracts, Coke's bottlers receive a license to sell Coca-Cola (and Coke's other soft drinks, e.g., Tab); Pepsi's bottlers receive a license to sell Pepsi (and Pepsi's other soft drinks, e.g., Teem). Also under the terms of the contract, the soft drink companies and their bottlers *agree to territorial restraints*. In other words, the bottlers agree not to operate their business outside specified boundaries. These exclusive territorial restraints prompted the Commission to issue complaints.

THE PROBLEM WITH TERRITORIAL RESTRAINTS

Territorial restraints have economic consequences akin to those of resale price maintenance. In the case of resale price maintenance, manufacturers or producers are able to fix the prices at which their products are sold. The result is that consumers usually end up paying higher prices for the finished product. The same is true with territorial restraints.

When producers and distributors agree among themselves that only one distributor will operate in a given geographic area, the agreement effectively eliminates competition among distributors of the product. Producers and distributors are free to charge retailers higher prices so long as consumers differentiate the product from others. In other words, because of lack of competition among distributors, producers can charge higher prices, and in the end, consumers pay more.

COMMISSION PROCEEDINGS

An Administrative Law Judge (ALJ) first heard the complaint against Coke and ruled that an inquiry into the reasonableness of the territorial restraints was required. During the inquiry, an extensive record was compiled consisting of some 4,000 pages of testimony and more than 4,000 pages of exhibits. Meanwhile, because of the similarity of issues, the parties in the proceeding against Pepsi agreed to let the determination of the reasonableness of Pepsi's territorial restraints rest on the record in the Coke proceeding along with some additional testimony. At trial, representatives of local bottlers were allowed to intervene as parties with full rights to present evidence and arguments and to cross-examine witnesses.

In October, 1975, the ALJ issued simultaneous decisions concluding that neither Coke nor Pepsi violated the law by imposing territorial restraints on their bottlers. This initial decision was vacated by the Commission which heard oral arguments on two separate occasions and then issued its own rulings on April 7, 1978. The Commission decision came on a 2–1 vote with Commissioner Clanton dissenting. Chairman Pertschuk and Commissioner Pitofsky did not participate.

THE COMMISSION'S OPINION

(a) The Commission found that Coke and Pepsi and the parties who joined did not justify the territorial restraints on bottlers in the case of soft drinks packaged in nonrefillable containers such as cans and non-returnable bottles (non-returnables). The Commission concluded that these territorial restraints were unlawfully anticompetitive chiefly for the following reasons:

The territorial restaints prevented the bottlers of Coke from competing among themselves; likewise, they prevented the bottlers of Pepsi from competing among themselves (intrabrand competition);

The territorial restraints prevented the bottlers from expanding beyond their agreed-upon territories thus eliminating potential competition;

The territorial restraints indirectly lessened competition in delivery services of the soft drinks; and

The territorial restraints deprived consumers of the benefits of open intrabrand competition.

(b) The Commission also found that Coke and Pepsi did justify the territorial restraints on bottlers in the case of soft drinks packaged in refillable, returnable bottles (returnables). The Commission concluded that territorial restraints in the case of returnables were not in violation of the law because the restraints are necessary for the bottlers to identify their own bottles for return to the bottling facilities in order to be refilled.

WHAT HAPPENS NEXT

The Commission's rulings are final agency decisions in these adversary litigation matters but the orders are not final until reviewed and sustained on appeal. The Commission's decisions have been appealed by Coke, Pepsi, the bottlers and bottlers' associations. They are now pending in a consolidated proceeding before the United States Court of Appeals for the District of Columbia.