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SENATE

BILL	DATE	PAGE(S)
S. 598	May 13, 1980	S 5253-58 5263-79

ACTION G.A.O. Ref. S 5254(3) OTA

Soft Drink Products: Senate continued consideration of S. 598, preserving the manufacture, bottling, and distribution of trademarked soft drink products by local companies operating under territorial licenses. Pending is the Thurmond amendment No. 1757, of a perfecting nature, to 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.

A motion to close further debate on this measure was entered and in accordance with Senate Rule XXII, a vote on such motion would occur on Thursday, May 15. **Pages S5253–S5258, S5263–S5279**

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SOFT DRINK INTERBRAND COMPETITION ACT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now resume consideration of S. 598, which will be stated by title.

The legislative clerk read as follows:

A bill (S. 598) 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.

CLOTURE MOTION

Mr. ROBERT C. BYRD. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER (Mr. STEWART). The cloture motion having been presented under rule XXII, the Chair, without objection, directs the clerk to read the motion.

The 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.

Harry 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.

SOFT DRINK INTERBRAND COMPETITION ACT

The Senate continued with the consideration of S. 598.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Under the previous order, the Senator from Indiana (Mr. BAYH) is recognized.

Mr. BAYH. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. COCHRAN. Mr. President, the matter before the Senate is an amendment offered to S. 598 in my behalf by the distinguished Senator from South Carolina (Mr. THURMOND).

We have to recognize that the basic legislation that has been reported from the Judiciary Committee is legislation that has the overwhelming support of the membership of the Senate. This legislation was introduced by the distinguished Senator from Indiana (Mr. BAYH), cosponsored by this Senator and over 70 other Members of the Senate.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. COCHRAN. Mr. President, I am happy to yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I believe it is important for the record to show that our distinguished colleague from Mississippi was actively involved in this legislation prior to his coming to this body, and I offer my particular appreciation for the role he has played in the Judiciary Committee as well as now initiating this debate on this important piece of legislation.

Mr. COCHRAN. I thank the Senator from Indiana.

It has been a pleasure to work closely with the distinguished Senator from Indiana on this legislation.

Mr. President, I shall touch on some of the reasons why it is so important for the Senate to act on the legislation and to act on it at this particular time.

(Mr. HARRY F. BYRD, JR., assumed the chair.)

Mr. COCHRAN. Mr. President, most know that the soft drink bottling industry has operated for approximately 75 years under the assumption that it was legal, that it was appropriate to have exclusive territorial provisions or franchises in agreements to manufacture, distribute, and sell soft drink products.

As early as 1920 there was a Federal district court decision supporting this proposition.

But in 1971 following an investigation by the Federal Trade Commission, complaints were issued against Coca Cola, Pepsi Cola, Crush, Dr. Pepper, Seven-Up, Royal Crown, and National Industries, alleging that the bottlers' exclusive territories are unlawful restraints on competition.

During a 6-week proceeding, 43 witnesses testified on this subject. The full record of the proceedings before the Federal Trade Commission consisted of 4,000 pages of trial transcript, 14 stipulations totaling over 500 pages, and 1,300 exhibits totaling thousands of pages.

And on October 3, 1975, following this investigation that began back in 1971, the administrative law judge at the Federal Trade Commission issued a 91-page opinion containing detailed findings of fact which upheld the legality of territorial provisions in trademark licenses.

The matter then proceeded to the full Commission, and the FTC, without precedent or foundation, voted 2-to-1 to find unlawful the territorial licenses.

This legislation, therefore, Mr. President, is in response to that decision by the Federal Trade Commission. The decision has now been appealed into the Federal court system and is pending before the Court of Appeals. Oral arguments were heard in 1978 but no decision has yet been made.

There has been considerable uncertainty created throughout this, one of the major industries in the United States, as to whether or not the operation under exclusive territorial franchises is, in fact, legal and consistent with the antitrust laws, the principles of free and open competition in this country.

Because of that uncertainty, Congress should act. Congress should act at this time to set the matter straight and to reaffirm the legality of 75 years of continuous operation under these franchise arrangements.

The legislation will protect the business opportunities and enterprises of over 2,000 bottlers and the jobs of their employees throughout the country which could be jeopardized if this FTC decision is upheld by the courts and Congress fails to act.

The bill would, in effect, reverse the FTC decision and create a standard whereby as long as there is substantial and effective interbrand competition then the vertical nonprice restrictions, that is, the exclusive territories, which prevent intrabrand competition, will not be actionable under the antitrust laws.

Having worked on this issue both in the other body and here in the Senate, I have reviewed the points that have been raised in criticism of this legislation, very carefully. It is inconceivable to me that the FTC could find any lack of competition or consumer choice in the soft drink industry which results from the franchise system.

The Federal Trade Commission's case is based on a textbook theory about the effects of exclusive territories. The majority of the commission ignored the real-life facts about the nature of the competition in the soft drink industry.

There is effective interbrand competition as determined by every key indicator. These indicators include low prices, high quality products, easy entry for new products, good quality service through deep market penetration, and low concentration, that is, there are many small bottlers.

This was proven and illustrated very clearly in hearings that were held in the subcommittee when a small bottler—as a matter of fact the smallest soft drink bottler in the State of Mississippi, a man named Charles Moak from Indianola—testified that he, for promotional purposes, occasionally will price his product as low as 99 cents for 8 quarts of soft drinks. That is a good price.

Mr. Moak operates under an exclusive territorial franchise. If this legislation is not adopted his firm will be gobbled up by larger regional bottlers, and he will not be able to continue to operate.

The evidence before those hearings clearly indicated that large regional bottlers will inevitably take over from smaller companies; that many smaller bottlers will go out of business with employees out of work. There will, obviously, because of that be an adverse impact on local economies, and an inevitable reduction of tax revenues in every State.

A rapid concentration of this industry will occur. That will lead to the opportunity for those firms to charge higher prices to consumers since the smaller and competitive firms, the more competitive firms, at the local level will be eliminated. Returnable bottles may also be eliminated, wasting energy and reducing consumer choice.

With the demise of the small community bottling operation there will also be a deterioration of service to small retailers.

There was an impression that was clearly made on the subcommittee, Mr. President, during these hearings through testimony of some of the small bottling company owners, who described that they had two or three trucks, that these firms were usually family-run businesses, that small rural grocery stores and service stations and other businesses which served as retail outlets for the product were visited on a regular basis by the small businessmen and women servicing their customers' needs, attending to the needs of the smaller retailer.

But that if the firms ceased to exist, then the only way a small retail operation could purchase products would be from a large regional bottler, many of whom only deliver occasionally to small areas, and then usually in nonreturnable packages, reducing the choices that are available to consumers in those areas; that there will not be the same quality of service available to the small rural communities and small towns throughout the United States without the small independent family-owned bottling operation in existence.

Another reason that was touched on here earlier, Mr. President, why we are so concerned about the apparently interminable delay in resolving this legal question, since the FTC decision in 1975, is the matter of job opportunities, job opportunities in small towns and rural communities.

On the subject of jobs, I have a letter from the International Brotherhood of Teamsters supporting this legislation. The letter states in part:

> From our perspective we believe the basis for the FTC proceeding is in error. The consequences of the decision would have an adverse impact on over 30,000 of our members working in this industry, and a legislative solution is necessary.

The letter elaborates on the jobs question, and I quote from that part of the letter:

> That is, when small bottlers are eliminated, so, too, will jobs. In addition, surviving companies will eliminate stops and again jobs. Our experience in the milk industry is testimony to these consequences, that is, immediately after World War II many of our members worked for small dairies, but with the advent of large volume purchasers these companies were driven from business both in terms of the number of stops, home delivery, for example, and also in terms of competing for the accounts of volume purchasers, like supermarket chains. Not only were jobs eliminated but dairy pension and health and welfare funds were placed in serious financial jeopardy, with one plan being taken over by the Pension Guaranty Corporation.

Another important issue, Mr. President, in this legislation is the opportunity to have refillable containers.

To me, this is one of the least understood of the consequences of the failure of Congress to adopt this legislation in a timely fashion. The FTC decision attempts to exempt refillable bottles. But the real impact of the FTC decision will be to eliminate many firms whose main dispensing package is the refillable bottle. So contrary to the stated intent of the Commission is the reality of the decision and the economic impact that it would have which will cause the demise of the returnable or the refillable package.

A split system with territories permissible for returnable bottles, but no territories for nonreturnables is just simply not feasible.

Nobody who testified before our committee supported the notion that there could be two kinds of territorial permissions, there could be two kinds of franchises, one where the law would prohibit exclusivity with respect to nonreturnable packaging and one which makes territories legally permissible with respect to refillable bottles. There is just simply no way in our economic system and in the real live world of business for that kind of system to exist.

According to the Congressional Office of Technology Assessment, in a study that it made in July 1979:

> If upheld by the courts and not amended by the Congress, the recent FTC decision, which outlaws territorial franchise restrictions for trademark soft drinks in nonreturnable containers, could lead to a rapid concentration of that industry. The outcomes would be an industry with only a few firms having a few large plants, as well as the rapid disappearance of the refillable bottle for soft drinks.

Some may ask, well, so what? What difference does it make? To begin with, the product purchased by consumers in refillable bottles is cheaper than the product purchased in nonrefillable or nonreturnable packages. Customers would be deprived, therefore, by inaction by this Congress of a choice between a higher priced product and a more competitively priced or lower priced product.

Another reason for saying that this is an important consideration is that some States have been moved to adopt laws prohibiting the selling of products in nonreturnable packages. We see, then, one level of government taking action which would discourage the use of nonreturnable bottles and another level of government doing just the opposite.

I think that there is no question, Mr. President, that consumers throughout this country would like to protect the choice they have, in the kinds of containers that are available in the marketplace.

Invariably, in the small towns and rural communities, the country stores, you will find, if they are served by small independent bottlers, there are refillable bottles available. If this legislation is not adopted, that will come to an end.

RESTRUCTURING THE INDUSTRY

Those of us supporting this legislation, Mr. President, believe very strongly that the antitrust laws should not be used to completely restructure an industry for no reason at all. This is especially true where there is already a high level of competition within that industry.

There can be no question but that the Federal Trade Commission efforts in the soft drink cases are about the business of restructuring this industry. The administrative law judge, during the procedural stages of the case, described this matter as "landmark" and said it involved "a fundamental restructuring of a very substantial industry in the United States."

With the demise of literally hundreds of business units at stake as well as the impact of such loss upon employees and the economic contribution to the communities where they are located, there is a compulsion to ask the question: "Did the Congress of the United States, in the 88 years of the history of the antitrust laws, mean them to be used as tools for the predominant purpose of restructuring an industry?" The Supreme Court does not think so; the Attorney General of the United States, other antitrust experts and economists do not think so.

Justice Brennan, speaking for the Supreme Court 15 years ago, pointed out that the restructuring of an industry requires a delicate weighing and balancing of varied economic and social factors and objectives, and that, "A valued choice of such magnitude is beyond the ordinary limits of judicial competence." It is the Congress which determines how to preserve our traditional competitive economy.

That is an interesting observation, Mr. President, and one which I hope is not lost on this body, and the challenge that it presents to the Senate as we attempt to grope with this question that necessarily comes to us. The Congress passed no new law. The Congress did not urge the Federal Trade Commission to embark on a restructuring of this industry under existing antitrust laws or rules of competition.

It is now, then, the responsibility of Congress to say whether or not the FTC, as a creation of the Congress, is reflecting congressional intent through its actions.

The 70-plus Members of the Senate who have joined as sponsors of S. 598 speak loudly and clearly to the question of the intent of this body. It is not reflected in the decision of the Federal Trade Commission on this question.

It is the prerogative—no, it is the responsibility—of this body to adopt this legislation and say that we are not in favor of restructuring an industry when there is no basis in fact or law for doing so.

As late as 1972, a year after this initial investigation by the FTC began, in dealing with the competitiveness of horizontal territorial arrangements, (in the soft drink industry by the way, they are merely vertical) which have been considered illegal since 1899, three Supreme Court Justices, in majority, concurring, and dissenting opinions, cited the Congress as the proper forum to consider antitrust relief where the effect of the decision of the Court will tend to stultify competition.

Justice Marshall, in the majority opinion, echoing the philosophy of Justice Taft and Justice Frankfurter, stated:

> If a decision is to be made to sacrifice competition in one portion of the economy or greater competition in another portion, this decision must be made by Congress and not by private forces or by the courts.
>
> To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions, and to make delicate judgments on the values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

On April 14, 1977, the Attorney General of the United States, speaking to the antitrust section of the American Bar Association, pointed out that:

> The questions at hand involve the basic restructuring of American industry and the shape of the American economy. These are questions that are perhaps most appropriately answered by the legislature, not by the courts.

Maybe the most cogent explanation for the purposes of the antitrust laws came from Judge Learned Hand. He said:

> Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

(Mr. BUMPERS assumed the chair.)

Mr. COCHRAN. This, of course, is exactly what the FTC is not doing in the soft drink cases. Instead, it is on a course to wipe out small units of an independent industry that were created and grew through the efforts of small businessmen and women effectively competing with one another.

The FTC seems intent on substituting bigness by depriving the small soft drink manufacturer of his property and his ability to earn a living.

Private practitioners, economists, indeed, the U.S. Senate itself, recognized the danger to small business when other than the elected Representatives of the people seek to restructure an industry. The danger is amplified when, as in the soft drink industry, the effort is with small business.

The President's call for a White House conference on small business in January of 1980 is a recognition of the plight of the small businessman caught in the maze of a nonbusiness oriented bureaucracy. The enactment of legislation to create an antitrust standard that will recognize a contractual relationship almost a century old is imperative, unless the near certain destruction of a small business oriented industry is determined to be best for the American way of life.

TESTIMONY OF CHARLES MOAK

Earlier in my remarks in discussing the hearings that were held before the subcommittee, I mentioned the testimony of the owner of the smallest bottler firm in the State of Mississippi, a fellow named Charles Moak, from Indianola, Miss. Mr. Moak's business is a family enterprise. His personal experience in the industry, based on his observations, his working every day in the real world, as recounted in his testimony, is so appropriate to the consideration of this legislation. I want to read what he told our committee.

> My first contact with the soft drink business was in June 1937 when at the age of 13 I worked during the summer for Richard Bottling Works of Tunica, Miss., a small, independent operation with no national franchise, belonging to mother's youngest brother. I worked in this plant every summer until I finished high school, doing every job in the plant, beginning with sorting bottles to production to route sales. After 3 years of college, I worked full time as a production and plant manager.
>
> In 1953 my wife and I purchased a small, independent plant at Indianola, Miss. In our first year, we operated two full-time route trucks. I worked in the plant 3 days a week and drove a third truck 3 days and my wife kept the books. We employed six people with a payroll of $12,000 to $15,000 and a total dollar volume of about $75,000. We produced a line of flavored drinks consisting of orange, grape, strawberry, peach, root beer, lemon, and cola. We covered a six-county area and our customers were the farm and country store, a market that disappeared with the advance of farm mechanization.
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> In 1968 a fire destroyed the rear of our building and we moved to a new 60 by 100 building out of the downtown area.
>
> In 1969 the opportunity to obtain RC Cola and Dr Pepper franchises came to us, and believing that our future lay in the franchise system and national brands, we acquired a franchise covering a 2½-county area with a population of 109,000 people.
>
> In our first year as a franchised bottler, we operated 3 full-time route trucks and employed 12 people with a payroll of $38,518. We had sales of $115,000. I supervised the production and worked nights and Saturdays on vending machines which were acquired in the purchase of the franchise territory.
>
> In 1971 we purchased a part of the territory of the Seven-Up Bottling Co. of Leland, Miss. We hired a production manager, operated four route trucks, and I concentrated on sales and vending.
>
> Three years ago my youngest son joined me in the business as sales manager for postmix and premix fountain sirup and took over the vending operation and service. My oldest son joined us 1½ years ago and heads our sales force. Both of these young men have worked in the business during their school years, as I did. I might add, my wife still keeps the books.

Mr. Moak's testimony was especially important because he is the owner of a small bottling company.

Mr. Moak is a small bottler who might lose his business if this legislation is not adopted by the Senate, and he is one of the small bottlers who the opponents of the legislation allege, are inefficient and, if they cannot operate their business efficiently, ought not to survive in the real world of business.

Mr. Moak identified, throughout his testimony, three inevitable consequences if this Federal Trade Commission decision is allowed to stand: Service to customers will deteriorate; the small bottlers' demise will mean that the value of the investment in business will be destroyed; and prices to consumers will increase.

There were questions and answers which followed Mr. Moak's prepared statement, which clearly illustrate what will really happen unless the Senate acts in this case. I asked Mr. Moak the following question:

There was comment earlier about the personalized service of small operations and the flexibility of bottlers in rural or sparsely populated areas of the country.

I would like to ask Mr. Moak, for instance, in the territory you serve in the Mississippi Delta, what if I owned a small service station or a country store and wanted to have a sales operation, a vending machine or just over-the-counter soft drinks there, but I only required about two cases a week? Would that be an account that would be large enough for your operation to serve?

Mr. MOAK. As long as I am there you will get served.

Then I asked:

What if you weren't there? I understand from your testimony that you have a territory that is served by Memphis Coke, which overlaps in some respects in that area, and also Vicksburg, which is a larger bottling operation to the south of you. Would that same customer be able to have that kind of service from a distant bottler if you weren't there to provide it?

Mr. MOAK. I can't see where he would. The cost of the truck operation for the very small store off the beaten path is such that they can't hardly afford it. I make that a part of my business because he is in my territory and I feel that if I sell this small store and you drink my product there, you come down to the supermarket and buy it, or if you go to some other place you buy it, it is a cold bottle sample. I think if we cover every place and make our product just as available as we can, I don't think anybody else could do that.

In addition to quality of service to the small communities, Mr. President, there was a question about what happens to the investments, what happens to the business built up over a lifetime? I asked Mr. Moak this question:

If this is not prying into personal economic secrets, I was curious whether or not you had others make offers to purchase your business. If so, when is the last offer you had?

Mr. MOAK. Just prior to the FTC challenge I had an offer to sell my business. Since then I have had no offer. These particular people that made the offer haven't been back to see me.

Senator COCHRAN. Have you had any offers, or any indication anybody wanted your business, since the FTC action began?

Mr. MOAK. No, sir.

The point is that the value in the marketplace of a small bottling firm which has an exclusive territorial franchise has deteriorated just because of the decision of the Federal Trade Commission. It does not make good economic sense for anyone to come in and offer to purchase one of these firms now when, if the FTC decision stands, it might just fall, like a ripe apple from the tree, into the lap of a larger competing firm, and be gobbled up for little or nothing. A lot of these firms not only will become worth considerably less in terms of investment value but they already have already become worth less.

One of the most compelling reasons for trying to protect the opportunity for small businesses to continue to operate in this industry was clearly indicated during a question-and-answer session with this bottler with respect to prices to consumers. One of the reasons that everybody agrees on as a rationale underlying the antitrust laws is benefit to the consumer on the basis of price. The theory is and the reality is that the more competition there is, the better break the consumer gets on prices of goods. The Federal Trade Commission, as a creation of the Congress, is supposed to help promote and see that consumers' interests are protected. Well, this is one effort where they just flat missed the boat. If this decion is allowed to stand, listen to what the consequences will be. I asked Mr. Moak:

There is an argument in the FTC opinion that small bottlers are inefficient and charge higher prices. What do you charge for your product?

Mr. MOAK. I charge in the marketplace what I feel is a reasonable profit to recover my investment. We compete with every special promotion that we can.

In fact, I brought several tear sheets out of newspapers which will show what our prices are in the supermarket. Here is one—

And he held it up—

for Piggly Wiggly—

A small little store down home—

which happens to be my competition. It is 1 quart of Coke, 6 for 88 cents. I don't think you will get much cheaper. There are others showing 1 quart of Dr. Pepper, Seven-Up, Nehi, and RC, 8 for 99 cents.

Senator COCHRAN. That is 8 quarts for 99 cents?

Mr. MOAK. That is right. The competition does the same thing. I have some of their ads here. I would like to pass these around, if you would like to look at them.

Senator COCHRAN. Senator Dole just observed you can't get water that cheap up here. [Laughter.]

On the other hand, if the exclusive franchise is destroyed, could your prospective competitors for Coke sell it down there in the Indianola area at 8 quarts for 99 cents?

Mr. MOAK. No, sir; they would have to freight it to Indianola. Of course, where they would do me such tremendous damage is to sell it to the wholesale warehouses located in Memphis. Then the wholesale warehouse would deliver it to the stores. They, of course, would deliver in trailer/truckload lots, which is the way groceries are now delivered. That would be a part of their delivery. The Memphis operation I can't conceive of running trucks down in my area to just work those sales.

The point is, and what that illustrates, that if the small bottling operation in Indianola, Miss., goes under as a result of this Federal Trade Commission decision, then that kind of competition will be gone and those consumers in that area will then be subjected to the giant warehouse distribution system, the expensive large trucks, the nonreturnable bottles, all of the things that will inevitably mean higher cost.

ECONOMIC CONSEQUENCES OF RESTRUCTURING

Mr. President, earlier, I mentioned the legal issues involved in restructuring an industry such as the soft drink bottlers. There are serious economic issues, as well.

These economic issues have been studied in detail by one research company, Sanford C. Bernstein & Co., a member of the New York Stock Exchange.

Mr. President, they have compiled a report entitled "Elimination of Exclusivity for One-Way Containers: Implications for Soft Drink Bottlers and Consumers."

Because of the importance of the question that is before us, I will quote from one part of that report, Mr. President, as follows:

Implementation of the FTC order will subject soft drink bottlers to unprecedentedly heavy financial pressures, which only the largest companies will be able to withstand. The pressures will arise from the following sources:

(1) Intensified competition in the large food chains. This is as a result of two factors:

(a) The soft drink bottlers generate their greatest volume and profits in these chains, making this market a prime target for all bottlers intent on geographical expansion once exclusivity for one-way containers disappears.

(b) The chain stores will, in nearly all cases, order soft drinks in one-way containers only in order to eliminate the added hassel and cost of handling refillable soft drink bottles—thus making it for the first time economically feasible for geographically distant bottlers to compete (with cans and plastic bottles) for supermarket business far from their bottling plants. (Shipment of refillables over long distances is simply not economical.) Clearly, considering the benefits of becoming a major supplier to a large chain, those bottlers with the largest financial resources will not let this opportunity to get new business pass unheeded, and the smaller bottlers will be subjected to enormous pressure as their profitability shrinks. Ironically, though, this high level of competitive activity will not be accompanied by lower product prices. In fact, consumers will pay anywhere from 50% to 100% more for the same volume of soft drinks because of the higher costs inherent in the manufacture and distribution of soft drinks in one-way containers. Certainly, the "economies of re-use" of the refillable bottle far exceed the economies of scale for soft drinks packaged in cans or one-way bottles. (Representative figures are shown in the attached table.) However, without the contractual provisions granting exclusive sales territories to soft drinks, regardless of container type, the refillable bottle will disappear from the supermarket shelves (and ultimately from all shelves), and its very substantial "economies of re-use" will be replaced by the far smaller "economies of scale" inherent in the much higher priced one-way product.

(2) The financial problems created by the disappearance of the refillable bottle from supermarket shelves. The chains' shift to only one-way containers will necessarily entail the writeoff of plant and equipment related to the refillable bottle and force soft drink bottlers to make huge capital outlays to accommodate the shift to cans and one-way bottles. The average bottling company has total assets of well under $1.5 million, and long-term debt approximating $500,000. Considering the substantial size of a typical refillable-bottle inventory and the high cost of new can and one-way bottle lines today, it is clear that the demise of the refillable bottle will place a severe strain on the resources of smaller bottlers, just when sales to their primary customers, the supermarkets, are put in jeopardy. Indeed, many small bottlers will be driven to the brink of insolvency by the sharp increase in debt service necessitated by the higher capital outlays, plus the substantial contraction of operating margins as larger bottlers (those with greater financial resources) invade formerly exclusive territories. It is at that point that the parent companies—whether they like it or not—will be forced into making further in-

vestments in the soft drink bottling business, simply to protect their market positions.

Mr. President, these excerpts from the report clearly indicate a new dimension of the economic consequences of the failure to adopt this legislation.

I urge all my colleagues to support the effort to get this legislation through the Senate and enacted into law.

Mr. President, I yield to the Senator.

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER. Is the Senator from Mississippi yielding the floor or simply yielding to the Senator from Ohio for another purpose?

Mr. COCHRAN. Mr. President, this Senator yields to the Senator from Indiana.

Mr. METZENBAUM. Mr. President, the Senator from Ohio does not intend to object, but would be forced to object, since he had a prior understanding he would gain the floor at this point.

Mr. COCHRAN. That is my understanding. I thought the Senator from Indiana would yield to the Senator from Ohio on that at this point.

Mr. BAYH. Mr. President, will the Senator yield, without losing his right to the floor and without having it counted as another speech?

Mr. COCHRAN. Mr. President, I yield, and I ask unanimous consent that it should not count against the opportunity for this Senator to speak again on this issue.

The PRESIDING OFFICER. Is there objection?

Mr. METZENBAUM. I object. Each Senator is entitled to one speech on the floor. The Senator from Ohio objects to the Senator from Mississippi yielding without giving up the floor. If he is prepared to hold the floor for the remainder of the day, I have no objection.

Mr. COCHRAN. I yield to the distinguished Senator——

Mr. BAYH. Mr. President, will the Senator yield for a question?

Mr. COCHRAN. I yield to the Senator from Indiana for a question.

Mr. BAYH. I assume that the Senator from Mississippi, as modest as he is, will not object to his friend from Indiana complimenting him on the fine educational speech he has made, which I think puts this whole measure in proper perspective, and that he will not object to my offering my deep gratitude to him for his speech and for the contribution he has made this morning.

Mr. COCHRAN. I thank the Senator. I yield to the Senator from Ohio (Mr. METZENBAUM).

Mr. METZENBAUM. Mr. President, I commend the Senator from Mississippi for a very excellent statement setting forth the position of the Senator from Mississippi in opposition to the bill pending before the Senate.

The Senator from Mississippi has been very erudite. He has been all encompassing in his remarks, and he has been extremely persuasive. As a matter of fact, he has been so convincing that I point out that he has pending an amendment that was offered on his behalf by the Senator from South Carolina. I think it is a great amendment and, without further debate, I should like to propose that we accept that amendment. I does not require further debate. I know of no one else in the Senate who is even interested in the amendment. I think it moves in the right direction. It is a superb undertaking on his part. It is typical of the quality of his leadership in this body.

Therefore, I should like to urge strongly that a this point we accept the Cochran-Thurmond amendment.

I urge upon the Senator from Indiana that the amendment be accepted.

Mr. BAYH. Mr. President, I do not want to interrupt the Senator.

Mr. METZENBAUM. I am waiting for a response.

Mr. BAYH. I appreciate the cooperation of the Senator from Ohio. He is usually very cooperative, and this is very much in character for him.

The amendment of the Senator from Mississippi and the previous amendment offered by the Senator from Indiana, as well as the bill, are of such important consequence, I think it is important for us to have a chance to debate it a little further, so that all Members who are not here will have a chance to understand the true dimensions of this issue.

Mr. METZENBAUM. The Senator from Indiana, too, is an able and qualified Member of this body. He, too, is very persuasive in his position, so far as his amendment is concerned. The Thurmond-Cochran amendment is an amendment to the amendment of the Senator from Indiana, and that, too, is a good amendment.

I suggest at this time, without further debate, that we might debate the whole bill, but we should know what the bill is going to look like; we should know what its final form is going to be.

So, since the Senator from Mississippi has been so able in presenting an amendment to the amendment of the Senator from Indiana, and since both those amendments are of such a qualified and quality nature, I think we should be able to debate the bill in the form in which the Senate finally will consider it.

Therefore, I should like to urge that we not only accept the Cochran amendment but also that we accept the Bayh amendment, as amended by the Cochran amendment. Then we can get about the business of discussing the amendments to the so-called bottlers' bill. I make that proposal to the Senator from Indiana, because I always like to be helpful in connection with his pending legislation.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. METZENBAUM. I yield.

Mr. BAYH. I am just overwhelmed——

Mr. METZENBAUM. I thought the Senator would be. [Laughter.]

Mr. BAYH (continuing). By the spirt of graciousness and cooperation of the Senator from Ohio. As I said earlier, it is characteristic.

Unfortunately, there may be a few other Members of the Senate who are not as enthusiastic about these amendments as is the Senator from Ohio. The Senator from Indiana learned a long time ago that in an important legislative matter, he should not take anything for granted. I believe that it is important for those of us who feel very strongly about the proposed legislation not to take for granted that the wisdom and the judgment of the Senator from Ohio is shared by all our colleagues.

Mr. METZENBAUM. Will the Senator from Indiana and the Senator from Mississippi, then, be receptive to our agreeing to a vote at a time certain, either by voice vote or by rollcall vote, so that we might be able to consider the bill, as we move down the path together, in its final form? We could give notice to all Members of the Senate that we are going to vote on it by 2 o'clock or 3 o'clock or 4 o'clock or 7:30 tomorrow morning. Any time that the Senator from Indiana and the Senator from Mississippi would find acceptable would be totally acceptable, including some hour in the middle of the night, to accept these wonderful amendments, so long as it came prior to the time cloture was to be invoked.

Mr. BAYH. The Senator from Ohio, as usual, has come up with a real nugget of genius there. I will take his idea as a nexus for a specific request.

Mr. President, I ask unanimous consent that we vote on the Cochran amendment at 2 o'clock; that we vote on the Bayh amendment immediately thereafter; that we vote on final passage of the bill immediately thereafter.

Mr. METZENBAUM. Provided that that does not foreclose my right to offer an amendment in between, and if the Parliamentarian advises me that, once having voted on the Cochran amendment and the Bayh amendment, any Member of the Senate would have a right to call up his amendment, with the understanding that no time would be allowed for debate.

Am I correct that we could do that?

The PRESIDING OFFICER. The Senator is correct.

Mr. BAYH. That is not the unanimous-consent request made by the Senator from Indiana. The request of the Senator from Indiana is that those three votes would come back to back, with no intervening votes.

Mr. METZENBAUM. I am certain that the Senator from Indiana, even though he has an excellent piece of legislation and even though it is going to be more excellent after the amendments are adopted, would not suggest for a moment that the Senator from Ohio be precluded from calling up his amendment. I am perfectly willing to have my amendment called up without any debate and immediately submitted for a vote.

Mr. BAYH. Would the Senator from Ohio limit his amendments to those that were considered germane to the bill befor the Senate?

Mr. METZENBAUM. Not any more than my good friend from Indiana would agree to the same.

I believe that the rules of the Senate are such that we have long recognized that, prior to cloture being invoked, every Member has the right to call up nongermane amendments. I believe we are well aware of the fact that an effort is being made today by filing a cloture motion before debate actually had begun—

at least, begun in reality. We mentioned it last night on the floor. A cloture motion was filed today, before debate had truly begun, and then an amendment in the first degree was called up, then an amendment in the second degree. So that what really is happening is that an effort is being made to do by procedure that which the rules do not actually contemplate.

I believe, further, that what is being done is that we find ourselves in a situation in which the Senator from Ohio has no intent whatsoever to filibuster, no intent to have extended debate. But what has occurred is that the Senator from Indiana and the Senator from Mississippi have the thought in mind of filibustering long enough with respect to a pending amendment so that the Senator from Ohio will never have an opportunity to call up a nongermane amendment.

It may be right that we not have nongermane amendments. I think one can make a very strong argument against nongermane amendments. When the Senate rules are changed to provide that no nongermane amendments may be offered to any piece of legislation, the Senator from Ohio will be prepared to consider that on its merits.

Mr. President, I am ready to vote on the Cochran amendment. I am ready to vote on the Bayh amendment. I am ready to agree to accept them by unanimous consent. I am ready to have it occur by rollcall vote.

What is really involved is an effort to invoke cloture before the Senate has invoked cloture.

What we have before us is an effort to keep a nongermane amendment——

Mr. TALMADGE. Mr. President, will the distinguished Senator yield to me now on a privileged matter for a few seconds?

Mr. METZENBAUM. If I could just finish my sentence I will be happy to yield to my good friend from Georgia.

What we have before us is an effort to keep a nongermane amendment from being called up prior to cloture.

That was never the intent of the cloture rule. Cloture was to cut off a filibuster.

What we have here is a filibuster against the Senator who wishes to call up a nongermane amendment prior to cloture having been invoked.

I am happy to yield at this point to the Senator from Georgia. I will address myself further to this.

Mr. TALMADGE. I thank my distinguished friends from Ohio and Indiana for yielding.

FOOD STAMP A ENTS OF

Mr. TALMAD ent, I ask
that the Chair Senate a
message from th presenta-
tives on S. 1309.

The PRESIDI aid before
the Senate the age from
the House of Re

Resolved Tha he Senate (S.
1309) entitled " ase the fiscal
year 1979 auth ppropriations
for the food st nd for other
purposes", do p wing amend-
ments:

Strike out a cting clause,
and insert: Th be cited as
the "Food Stan nts of 1980".

TITLE I—RED OOD STAMP
ERROR AND EVISION OF
DEDUCTIONS

MEALS IN SHELT WOMEN AND

SEC. 101. (a) Food Stamp
Act of 1977, as ended by—
(1) striking o of subsection
(g) "and (7)" lieu thereof
"(7) and (8)";
(2) striking on (g) "and
(7)" and inser eof "(7)";
(3) inserting re the period
at the end of s ne following:
", and (8) in th and children
temporarily resi private non-
profit shelters women and
children, meals ved, by such
shelters";
(4) inserting ence of sub-
section (i) af 6(e) of the
Social Security ng: "tempo-
rary residents o te nonprofit
shelters for bat d children";
and
(5) striking o of subsection
(k) "and ((7)" lieu thereof
"(7), and (8)".
(b) Section 1 tamp Act of
1977, as amend as follows:
(1) inserting d" a comma;
(2) striking t diately after
"residents"; and
(3) inserting " the follow-
ing: ", public a rofit shelters
that prepare a for battered
women and chil

EXCLUDING ENER YMENTS FROM

SEC. 102. Sect Food Stamp
Act of 1977, as ended by—
(1) deleting e "(10)";
(2) deleting end thereof
and adding the nd (11) any
payments or all der any Fed-
eral, State, or l e purpose of
providing energ
The effective ndment shall
be November 1,

CONS EX

SEC. 103. Sec Food Stamp
Act of 1977, as ended by in-
serting "for all " after "Con-
sumer Price In

DEPENDENT CA OR WORKING

SEC. 104. Sect Food Stamp
Act of 1977 as ended by:
(1) in the fo iking out all
of (1) and inse reof the fol-
lowing: "(1) a deduction for
the actual cost essary for the
care of a depen the depend-
ent's age, up of $160 per
month, per ho ch care en-
ables a househo ccept or con-
tinue employm or education
which is prepar yment, and";
(2) in the fo leting every-
thing after "M he period at
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(3) in the l clause (B),
striking out "t s shelter ex-
penses deductio clause (2) of
striking out "t s shelter ex.
the preceding inserting in
lieu thereof t described in
clause (1) of th ence.".

EXPANDED MED FOR THE

SEC. 105. Sec the Food
Stamp Act of 19 is amended
by—
(1) inserting " before "ex-
clusive of specia
(2) striking o of"; and
(3) striking ceed $35 a
month".

MEDICAL DEDU BLIND AND
DISABL EAS

SEC. 106. Sect Food Stamp
Act of 1977, as nded by:
(1) in the fo ntences, in-
serting "and bli h time "dis-
ability" appear
(2) in the fo tences, strik-
ing out "title at it appears
and inserting "titles I, II,
X, XIV, and X

RETRO TING

SEC. 107. Sec Food Stamp
Act of 1977, as ended as fol-
lows:
"(f) House those house-
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riod of time year, shall be
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SEC. 108 f the Food Stamp
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SEC. 205. The
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SEC. 206. No
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TITLE III—

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The motion to, and the Presiding Of MPERS) appointed Mr. McGOVERN, Mr. HUDDLES Mr. MELCHER, Mr. H LE, and Mr. HAYAKAWA co part of the Senate.

Mr. TALM my distinguished frien a and Ohio.

SOFT DRINK INTERBRAND COMPETITION ACT

The Senate continued with the consideration of the bill.

Mr. METZENBAUM. Mr. President, let me come back to my friend from Indiana and inquire of him as to whether or not his unanimous-consent request as interpreted by the Parliamentarian is still pending because on that basis I am prepared to accept it.

The PRESIDING OFFICER. The Senator is correct. It is the pending business.

Mr. BAYH. Mr. President, I do not wish to interrupt the Senator's dialog, his assessment of what is happening here.

I do feel that it is important to have further debate, discussion, and education on this issue so I hope that the Chair at the conclusion of the remarks of my friend from Ohio will permit the Senator from Indiana to proceed with the debate.

Again, I say to my friend from Ohio that I am prepared to vote if we can vote on the subject matter and not bring in other matters that are not germane.

I understand exactly where he is coming from. He knows exactly where I am coming from. And it is sort of a difference of opinion that does not occur very often between two friends like myself and the Senator.

Mr. METZENBAUM. We are, indeed, good friends, and it is not a personal matter as he knows and I know that about him, but there is a unanimous-consent request at the desk and an interpetation has been given by the Parliamentarian.

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

The PRESIDING OFFICER. The Senator will state it.

Mr. BAYH. Is it possible for the Senator from Indiana to make a unanimous-consent request requesting back-to-back votes on the two amendments and the final passage on the bill without any intervening amendments or votes thereon?

The PRESIDING OFFICER. It is possible.

Mr. BAYH. I make such a unanimous-consent request at this time.

The PRESIDING OFFICER. Is there objection?

Mr. METZENBAUM. Objection.

The PRESIDING OFFICER. Objection is heard.

Mr. METZENBAUM. Mr. President, I wish to make it clear that in objecting I would not object to cutting off debate. I would not object to a vote at any time set by the Senator from Indiana with respect to his amendment, the Cochran amendment, and one amendment as may be called up by the Senator from Ohio without debate. I have no problem with that.

Mr. BAYH. Mr. President, I have to object to that, and the Senator will see why when my time comes to have the floor.

Mr. METZENBAUM. I now yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I appreciate the courtesy, the warmth, and the friendship of the Senator from Ohio, and I think anyone examining the record will find on most issues my friend from Ohio and I are on the same side.

On this one we are on different sides of a very relatively small point, and that is whether we should immediately proceed to consideration of the Soft Drink Interbrand Competition Act. That piece of legislation is extremely important.

The Senator from Mississippi has gone into some degree of detail explaining its importance and the Senator from Indiana will also.

I think it is important for us to look at where we are procedurally so everyone will know in advance just exactly what is happening.

The measure before us, the Soft Drink Interbrand Competition Act, is a very important piece of legislation to a relatively small segment of American industry. It is extremelv important to keep the soft drink bottlers, particularly the small bottlers solvent and to keep them from becoming bankrupt.

The Senator from Ohio feels very sincerely that this legislation would be anticompetitive and would be a breach of our nromal antimonopoly and antitrust laws. He has every right to feel that way. He does not make decisions like that lightly. For that reason he is opposing and has opposed the Soft Drink Interbrand Competition Act.

With 80 percent of the Senate feeling that this measure is important, it stands to reason that if the measure reaches the floor, it is going to pass.

My friend from Ohio has very skillfully used what are certainly his rights, and they have been used historically by others for less laudatory purposes, let me hasten to say, but he has used a series of rights that he has as a Member of the Senate to try to keep us from having a chance to vote on this bill as it now stands.

He is desirous of adding two amendments which are extremely controversial to the Soft Drink Interbrand Competition Act.

The irony of ironies that the Senator from Indiana finds himself in is that he has been a long-time cosponsor and supporter of both of these amendments. One amendment deals with oil merger, which would make it difficult if not impossible for the oil companies to continue to buy other industries and to thus take the resources they need to help us become energy independent. I could make a 2-hour speech on the evils of that practice, as I have been a long-time supporter of this legislation.

However, there are a number of our brethren who are violently opposed to this particular amendment; the oil merger amendment of the Senator from Ohio, and thus if that measure gets onto this measure or gets onto the floor we will have a filibuster on this where the debate will be against the amendment presented by the Senator from Ohio, so we will never get a vote on the Soft Drink Interbrand Competition Act.

Also, the Senator from Ohio is a major champion of a piece of legislation that he and the senior Senator from Massachusetts have been pursuing for a good long period of time, the legislation dealing with the Illinois Brick case.

Now the Senator from Indiana has shared the concern of the Senator from Ohio about the Illinois Brick precedent and is supporting that legislation.

The Senator from Indiana has supported his friend from Ohio and his friend from Massachusetts on this Illinois Brick matter. However, it is fair to say that issue, too, is at least mildly controversial. In fact, that is probably the understatement of the decade. It is violently controversial, and all of us who have studied this know that as much as we might support the Illinois Brick question or we might support the oil company merger question, as soon as one of those gets on the floor then the opponents of those measures are going to debate them at such length that we will never have a chance to get to our innocuous, motherhood, pie-in-the-sky, God-bless-America Soft Drink Interbrand Competition Act.

So what the Senator from Indiana and his friend from Mississippi are trying to do is to eliminate controversy, to permit the U.S. Senate to have a chance to vote on an issue which is cosponsored by 80 of our colleagues on its merits and not be confronted with other matters which are highly controversial and which will involve the Senate in long, tenuous, and acrimonious debate.

I think what the Senator from Mississippi and what the Senator from Indiana are trying to do is to maintain the tradition and the spirit of brotherly love in the Senate and to keep out the acrimony and confrontation. To do that we have, indeed, arrived at a parliamentary situation where using the rules, as all of us have a right to do, we have confined the debate to the bill and to the two amendments which are before use, both of which are germane. Neither of the amendments proposed by the Senator from Ohio are germane, and thus it stands to reason that if we want to keep the debate centered on the Soft Drink Interbrand Competition Act, we would have to oppose these nongermane amendments.

Mr. METZENBAUM. Mr. President, will the Senator from Indiana yield for one moment?

Mr. BAYH. Without losing my right to the floor and without this being counted as another speech.

Mr. METZENBAUM. Of course.

I will point out to the Senator from Indiana that I do not have any amendments laid down yet nor have I indicated what I am going to call up, if at all. So that I know that I have heard rumors about as to what I am going to call up, but I just want to point out to the Senator from Indiana that at this moment neither the oil company antimerger bill, Illinois Brick, or any of the other neferious legislation that I might be inclined to call up has been submitted as an amendment, and it just may never be.

Mr. BAYH. I say to my friend from Ohio, I do not think he accurately described those amendments. I think they are good amendments.

Mr. METZENBAUM. They are not nefarious.

Mr. BAYH. The only difference is that others in the Senate do not agree with us and, unfortunately, sometimes a majority of the Senate does not agree with my friend from Ohio and his friend from Indiana, and if he were to tell us that he did not have any plans to offer these two amendments, then I think we might be able to move along on a little different motion.

Mr. METZENBAUM. Well, the Senator from Ohio is giving a lot of consideration as to exactly which steps to take, and at some later point, perhaps just as soon as we dispose of the Cochran and Bayh amendments, I think I would then be very much prepared to indicate to the Senator from Indiana what I intend to call up. But until I know what the final bill looks like, as modified by Cochran and Bayh, I cannot make up my mind as to what I ought to offer. But I am cogitating on it.

Mr. BAYH. Well, I think the Senator from Ohio is one of the best cogitators in this body, and I will be anxious to find out what that cogitation leads to as far as his determination as to whether he is going to offer these two nongermane amendments.

If he decides not to we will proceed to final passage on this very quickly. If he determines he wants to find another vehicle and bring these up in a way that will not have the effect of killing the Soft Drink Interbrand Competition Act he can count on his friend from Indiana supporting him on these two amendments just as he has when they have been discussed in our subcommittee and in our committee.

I want to compliment my friend from Ohio for the kind of leadership he has provided for that Antitrust and Monopoly Subcommittee. I think it is important to have someone who is concerned about competition and concerned about the issues brought to focus in the Oil Merger Act and in the Illinois Brick case. I just hate to see us making a rather complicated, controversial legislative fruit salad out of something that is a little small cookie called the Interbrand Competition Act.

Mr. METZENBAUM. Does not the Senator from Indiana recognize that bricks and soft drinks and oil can mix very well? He need not answer.

Mr. BAYH. I think perhaps from my own standpoint I had better not because I am not too certain how you would mix them. But I would not want to judge that.

Mr. President, I, for the sake of those who may either want to listen to what I have to say or do not want to listen to what I have to say, would like to indicate that the Senator from Indiana is going to address himself to the merits of the Soft Drink Interbrand Competition Act. Hopefully when other Members of the Senate have had a chance to be fully educated on this they will understand the importance of confining our consideration today and tomorrow to the Soft Drink Interband Competition Act so that we can actually pass it as it is and not have it cluttered up with other amendments which would make it impossible really to ever get a final vote on the current measure which is before us.

So let me address myself to the merits of S. 598. Mr. President, the Soft Drink Interbrand Competition Act is designed to preserve a unique industry practice which has existed for 75 years, the manufacturing, bottling, and distribution of trademarked soft drinks by local companies. While I am anticipating we will hear much over the next few days about economic efficiency and about how such efficiency would be best served by the elimination of territorial franchises, these arguments have little meaning to the small businessmen in Portland, Indiana, who feels his business would be shut down in less than 6 months if such agreements did not exist. Nor would such efficiency be of particular benefit to the families of the 83 employees of the plant who would be out of work and on the unemployment rolls.

Neither, in my judgment, would it be of any benefit to the taxpaying public who would be charged with unemployment compensation, perhaps welfare, and a general lack of economic stimulus caused by these shutdowns all over the country in those communities wherever these bottling plants happen to exist.

I would like to emphasize, Mr. President, that although there has been a concern expressed about the precedent we may be setting here by passing the Soft Drink Interbrand Competition Act, it seems to me that the precedent has already been set and has been established. We are not suggesting that something new and novel be foisted on the consuming public or on the soft drink industry. What we are suggesting is that something that has been good and sound, both from a business practice and a consuming standpoint, for 75 years should not be summarily removed from the books by an act of the Federal Trade Commission, acting on a split vote, contrary to every bit of evidence compiled by the hearing examiner who took evidence on this matter in the field.

What we are saying is that we should continue the relationship which has existed in the soft drink industry and continue the manufacture, distribution and sale of high quality soft drink merchandise. Perhaps the record of the past 75 years is good, solid precedent that should be continued until there is ample evidence that it is not working. This measure is not designed to change things. This measure is designed to continue the kind of relationship that has existed in the soft drink industry over the last 75 years.

Now, if one looks at the soft drink industry, one is impressed with the fact that the most lucrative account for these small bottlers is the large chain store account. Without such accounts, the small bottlers would be left with the low volume, high service industry, sometimes described as the mom-and-pop stores, and the vending machines that exist in offices, service stations, and small businesses throughout the country.

It is this kind of service mechanism, the vending machine, that has made it possible not only for the bottlers to sell their merchandise, but for the consuming public to have ready access to soft drinks at very many diverse locations in a given community. It is that kind of service that has become accepted. The consumer expects it. The way the present franchise is enunciated, that kind of service can be provided by the bottler in a manner that does not permit the inconvenience and the cost of the service to cause the bottler to have to lose money that cannot be compensated for elsewhere and thus have to go out of business totally.

The fear of the soft drink bottlers is that without territorial restrictions, large bottlers in neighboring areas would raid their chain store accounts by offering to sell to them in high volumes from warehouses. These small bottling businesses would then be worth little more than the price of their machinery.

In other words, at the risk of oversimplification, the soft drink market can be roughly divided into two general categories: One, the large supermarket outlet, where large amounts of soft drinks are sold day after day after day; and two, the much smaller stores or the vending machine, one bottle-at-a-time or one-can-at-a-time operation, where a much smaller volume of merchandise is sold.

A bottler, in order to be able to provide the service of the vending machine or the smaller mom-and-pop store operation must incur a significant amount of overhead and expense. It stands to reason that it is much more expensive to deliver and service a machine which sells one bottle at a time, one can at a time, than it is to be able to sell and service to a supermarket where you can sell many cases at a time and have practically no overhead cost whatsoever.

In order for the bottler to be able to finance the service of the vending machine to the office, the beauty parlor, the barber shop, the filling station, the lawyer's office, the doctor's office, the small business, and to the smaller store, it is necessary to have the high volume, low service costs which results from selling in larger quantities to the supermarket.

Now, if we have a removal of the territorial franchise arrangement—take my own State of Indiana, for example, which I am particularly aware of, of course, but the same is true in other States. What would happen is that a huge bottling plant in Chicago, or perhaps in Cincinnati, would truckload semiloads full of soft drinks into, let us say, Portland, Ind., and would take away the large volume business in the supermarkets. Once that large volume had been taken away by larger manufacturers, who produce in a much greater volume than the bottler in Portland could, so that their per unit cost might be just a little bit less, the only remaining outlet for the small bottler in Portland is the high cost, low volume business. Then the operation becomes inefficient, uneconomical, and impossible to continue by these small bottlers, and thus he or she or they go out of business.

It stands to reason that a major bottler who ships in soft drinks by the truckload is not going to take the time to service the local filling station, the beauty parlor, or indeed, perhaps, not even the mom-and-pop store.

So what we are doing is not only putting out of business a small bottler in Portland, Ind., or the Portlands of America, but what we are also doing is seriously diminishing the service to the consumer that is now readily available almost on every corner on Main Street, U.S.A.

We have heard, Mr. President, that the elimination of territorial restrictions would be beneficial to consumers. The reason most often cited is an alleged decrease in the price of a given soft drink. Yet even an official of the FTC states that calculating the alleged benefits is impossible. Moreover, others have contended that the long-range effect of the FTC ruling might be an increase in prices.

I think it is important, Mr. President, to point out that some people have been concerned about consumers.

I suggest there are very few people in this Senate who have been more concerned about consumers than the Senator from Indiana. But if one really examines the facts of this issue and the way the industry operates, I think passage of this bill is important to protect the consumer. Thus, I heartily support it.

I have already referred to the way in which the consumer would not have as much access without the small bottlers who provide the high service, low volume business which exists in many small businesses and in individual locations throughout the community.

If the beauty parlor or the hardware store, the lawyer's office or the filling station, do not have the kind of vending machine service that is provided now by the small bottlers, needless to say the consumer, by not having access, is inconvenienced to say the least.

On the other hand, if one looks at the long-range impact of prices, I think the consumer would ultimately suffer as the small bottlers go out of business.

If one examines the way industries have become concentrated in the past, and the effect that these concentrations have on consumers, one could predict that with the first invasion of a territory that now is in the hands of the small bottler by a large, out-of-territory bottler, there would be a small reduction in the price because of the very volume that a large bottler can sustain. For example, if one is producing Coca-Cola in Cincinnati or in Chicago by the tens of thousands of cases and shipping it by the truckload, it makes sense to assume that such a large volume operation could offer its product at a fraction of a penny per bottle cheaper than the smaller bottler.

Thus, when the large bottler goes into my supermarket that I referred to in Portland, they can offer that case of Coca-Cola at a slightly lower cost than that which is manufactured in Portland. However, once the small bottler is no longer there, once the small bottlers have gone out of business and declared bankruptcy, there is absolutely no competition for that large bottler. The large bottler could raise the price back up again or raise it even higher than it was before he invaded the territory in the first place.

Anybody who believes this is not the way it works ought to ask themselves whatever happened to the radio industry in the United States of America. We used to have a real corner on the market producing radios. The Japanese now make almost all the radios that we buy. We have no radio industry.

What happened was that the Japanese came in with their radios. They underbid the price of the radio being made in the United States. They got our radio industry into economic difficulty. They bought into the American radio industry in those areas where we had the most wholesome industry. The rest of the radio companies went bankrupt. So after there was no competition, the Japanese were then in a position to run up the price of radios.

Admittedly, when we are talking about a radio and a bottle of Coca-Cola. We are talking about different merchandise, different considerations. But the scheme economically is exactly the same: Go in as a huge producer, underbid the small producer, take away his most lucrative marketplace. When he goes bankrupt and there is no competition, then jack up the price and stick it to the consumer by charging even more for the soft drink than now is the case.

(Mr. MOYNIHAN assumed the chair.)

Mr. BAYH. We have heard that current territorial agreements have led and will continue to lead to concentration in the industry. Claims are made that the number of soft drink bottling plants around the country have been reduced by as much as 50 percent in the last 20 years. Yet no one can or will deny that what is meant by economic efficiency in the soft drink industry is simply a further and faster concentration or vertical integration of this industry.

We have heard that there is no intrabrand competition with exclusive territorial franchises. We agree that it must be the case under such agreements. Yet no one has been able to explain how, with further concentration and the possibility of the syrup companies owning all of their brands' bottling plants, there will be intrabrand competition.

In fact, and I think I should point this out for those who are not really students of the competitive situation here, we must make a distinction between interbrand and intrabrand competition because, as the Senator from Indiana intends to point out later on, there has been ample interbrand competition, which, at least as far as the hearing examiner for the FTC was concerned, was sufficient that he felt the franchises were not violative of sufficient competition environment.

In fact, as I have examined this problem, it has become more and more apparent to me that in the absence of these territorial agreements and in the presence of substantial vertical integration, there will not only be an absence of intrabrand competition but there will be substantially less interbrand competition. I defy anyone to explain how that will be of benefit to the consumer.

If Coca-Cola owns all of its bottling plants and 7-Up and Pepsi own all of their bottling plants, and the other companies do the same, the Pepsi Co. is surely not going to set up a situation, nor are any of the other syrup companies going to set up a situation, in which they are in competition with themselves.

As I prefer to say directly, I think what we will have is a situation where we will have less competition, not more.

I have been given information which leads me to believe that should territorial franchises not be permitted in the soft drink industry, if one looks at the Coca-Cola soft drink, the State of Indiana's soft drink business would be divided between Dayton Coke and Chicago Coke. That would mean the end of approximately 50 businesses in Indiana, and unemployment for the people who work in those businesses.

We are told that economic theory is such that those people would find other work in another industry. That could be. However, I doubt they would find that a comfort. And particularly today, to anyone who is familiar with the shape of the economy in many places in Indiana, it would not be a great deal of consolation for someone losing a job with Coca-Cola to be told that they could go out and get a job with Ford, General Motors, or Chrysler. We have 20 percent unemployment in some of those communities and that is not a likely way to recover from losing your job when your small bottling plant goes bankrupt.

In the absence of compelling evidence that the consumer would save substantially through vitiation of the present agreements between bottlers and syrup companies and in the presence of significant evidence that an entire industry would suffer through a potentially devastating reorganization, I decided to offer this legislation for the consideration of my colleagues. About 80 of my colleagues have agreed that the evidence is on the side of the bottlers and have joined me in this effort.

Mr. President, the American small businessman and businesswoman deserves some consideration. He or she is the bulwark of our American economic system and we in Washington must not impose upon such businessmen and women unworkable regulations based solely on economic philosophy and theory without concern for their very pressing economic realities.

Mr. President, I want to go into some detail in examining just exactly what this bill is trying to accomplish. In order to do that, I should like first to look at the FTC decision on the soft drink industry territorial franchise arrangement and to advise my colleagues in the Senate of what the impact of this decision would be on the soft drink industry. I think it is fair to say that elimination of bottlers' territories will have a substantial adverse impact on bottlers, on use of returnable containers, on soft drink competition, and on industry concentration. Let me speak to those points in greater specific detail.

First, let us look at the impact on the bottler. There will be a shift to food chain warehouse distribution from store-door delivery, in the judgment of the Senator from Indiana.

Without exclusive territories where the bottler can maintain store-door delivery, chain supermarkets and other high volume food store customers will insist on warehouse delivery of franchised soft drinks in nonreturnable containers.

A study of the soft drink bottling and canning industry and the impact of the FTC complaint on the industry's future is contained in the Cresap, McCormick, and Paget, Inc. study of July 1972:

> If the FTC order is upheld, most bottlers would lose their sales to supermarket chain stores.

If one cares to look at that in greater detail than the Senator from Indiana feels it is necessary to present right now, I suggest he look at that study on page 3, because I think it makes a very cogent argument about what would happen as far as the loss of supermarket chain store sales is concerned.

The study goes on:

> The loss of chain supermarket, grocery and convenience store accounts would severely affect bottlers' operations . . . [T]he decline in most bottlers' sales would average between 24 and 50 per cent of their present soft drink sales. . . .

So it stands to reason that no business can really remain solvent if, with one fell swoop, the FTC or a court or, indeed, Congress suddenly passes legislation, hands down a case, or hands down a decision which has the impact on every bottling plant of, let us say, the smaller bottling plants losing somewhere between 24 and 50 percent of their present soft drink sales. Without that volume, the business in question becomes bankrupt.

Delivery of returnable bottles is economical through storewide delivery not through warehouse delivery. A split distribution system will stimulate a rapid movement toward nonreturnable containers, the study tells us.

In other words, for those who are concerned about returnable bottles, they should be very concerned about the disappearance of the franchise agreement. If soft drinks are purchased through the store or consumed at a place of business, it is relatively easy to return that bottle to the place from which it was purchased. If, however, we have larger volumes moving through warehouses, a truckload at a time, it then becomes inefficient to try to reclaim the unused returnable bottles. Thus, we see a movement more and more toward total utilization by the industry of nonreturnable containers.

Mr. President. I ask unanimous consent that the Senator from Indiana may be permitted to call a quorum and retain the right to the floor and that, upon regaining the floor, my remarks not be counted as a second speech.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. BAYH. Mr. President, another impact on the bottler would be that customer service would decline and availability of soft drinks would decrease. Smaller unprofitable accounts would be all that remained to a bottler that does not have chain store accounts.

Of course, that makes his whole operation economically tenuous, to say the least.

Also, consumers' freedom of choice in selecting or buying soft drinks would ultimately be diminished.

Price increases required to restore bottler profitability would be substantial and are unlikely to be accepted by bottlers' remaining customers. The majority of soft drink bottler operations would become unprofitable and would go bankrupt.

So, in the judgment of the Senator from Indiana, the whole present structure of the soft drink industry would be significantly changed, and most all of the small hometown bottlers would be out of business.

The kind of personal, store-door service to which we have all become accustomed would disappear. We would see the large, wholesale dispensation of soft drinks, which is about like buying dresses from the Sears catalog. Perhaps that is not a good comparison, because the Senator from Indiana has not bought too many dresses from the Sears catalog.

But I think it is a good comparison to show that the tender loving care that is attendant to every account as long as it is the personal account of a hometown dealer would disappear, and we would have a large impersonal dispensation of soft drinks by the wholesaler, not by the accessible, individual route which now is a fundamental part of the industry.

One might look a little further, Mr. President, at the structure of the industry and the impact that the FTC decision would have.

In my judgment, it is inevitable that there would be a significant concentration in the soft drink industry as a result of the FTC decision.

Many bottlers would be forced out of business by the economic effects of the FTC decision. I have referred to that earlier.

Mergers, sales, or switches to distribution operatives would result in the loss of value of many production facilities.

Also, in my judgment, the result will be a concentrated regionalized bottling system with de facto territories limited by transportation costs, not by the kind of franchise arrangement that exists now.

Let there be no doubt about the fact that there will be a territorialization of the dispensation of soft drinks. But instead of it being by a legal document, where everyone knows in advance who is serving what community, so a small businessman can invest his life savings not only in the bottling but in the initiation and maintenance of the dispensation of soft drinks through the present way of providing on the scene merchandising through the various ingenious machines that have been developed, the territories would be decided by the cost of shipping from point A to point P in Portland, Ind.

These costs are not always constant. They change. They are not immune from raiding by other companies that might want to move into the territory, temporarily depress the prices, and thus take over the territory ultimately with the resulting increase in prices. Because of that uncertainty, one is not liable to see the kind of investment in long range service that exists today.

I think it should be pointed out that the FTC's stated goal of intrabrand competition will be unattainable, and in the desire to reach this goal an industry will be altered radically.

I remind the Senate of what I said a while ago. I cannot envision how Coca-Cola is really going to permit itself to be competing with Coca-Cola, and that is the situation which the FTC decision is trying to attain. The FTC decision totally ignores the hearing examiner's conclusion that there is ample competition existing now between Coca-Cola, Pepsi Cola, RC, Dr. Pepper, 7-Up, and Mountain Dew. The list is as long as my arm and includes, of course, a wide variety of various kinds of carbonated and uncarbonated drinks and other substances, powders, concentrates, that can be obtained in any store in town.

I think when one looks at the real competition for beverages that one has to look at a wide variety of 200 or 300 different options that are available.

The Senator from Indiana was really unaware of this until he started studying it, quite a while back, just to see how much competition exists.

I asked some folks in Indiana to arrange for me to see at one time all of the available beverages that were present in the stores for my constituents, as customers, to purchase.

As I recall, it was somewhere between 250 and 300 different kinds of beverages. It is amazing the kind of competition any consumer that goes into the store faces when he or she has to make a choice as to what kind of beverage he or she wants to serve in his home. The choice is available has due to ample interbrand competition.

To suggest there is no competition out there is foolish. It is equally foolish, in the judgment of the Senator from Indiana, to expect Coca-Cola to compete with Coca-Cola, RC to compete with RC, Pepsi to compete with Pepsi, or Dr. Pepper to compete with Dr. Pepper. That is not the way it is going to work.

So the fact is that we will have less competition instead of more, despite what the FTC stated as a well-intentioned goal.

Perhaps the Senate would like to have a little closer examination of the impact of the FTC's decision on the consumers' choice.

First, with the elimination of store-door delivery and with the elimination of local bottlers, there will be a decided negative impact on consumer choice.

The demise of one hometown bottler will not automatically and immediately be assumed by someone selling the same product from half a State away.

Second, slower moving brands, traditionally piggybacked by bottlers of major brands, will be eliminated in favor of high volume brands.

Soft drink manufacturers are not totally dissimilar from the bottlers so far as the difference in profitability is concerned of various brands they make or various brands they market within the confines of their total company.

Now, the less profitable subbrands of Coca-Cola are sold through the distribution system of the more popular subbrand of Coca-Cola; namely, Coca-Cola itself. However, with the move toward rapid turnover and high volume, it seems to the Senator from Indiana that these traditionally less profitable subbrands will be removed from the marketplace, thus eliminating another choice for the consumer.

Third, the elimination of store-door delivery will limit the locations served to those high-volume locations serviced by warehouse dealers. Once-a-week deliveries to gas stations, beauty parlors, and the like will be eliminated. The Senator from Indiana referred to that earlier.

So it seems to me that, contrary to those who suggest that this is really a pro-consumer decision by the FTC, in the judgment of the Senator from Indiana, the opposite is the fact—that we are lessening the availability of this product which now exists in many locations in a community.

If this FTC decision is permitted to stand, if this soft drink bill is not permitted to pass, we will see a number of these locations closed down and the consumer less well served.

Now let us look again at the impact of this measure on consumer prices.

A temporary intrabrand price war will result, in my judgment, where you have competition within the same brands for high volume, general warehouse accounts, only for soft drinks purchased by those outlets. Bottlers set only wholesale prices, not retail. It will be up to the chain store to pass on this saving. Chain stores will not price national brands in competition with their own cheaper house brands. The price increase will naturally occur in nonchain store soft drinks because of increased cost induced by reduced volume.

Once the restructured industry has stabilized, with many small bottlers eliminated, regionalized large bottlers will no longer compete intrabrand, and price increases will naturally result.

I reemphasize again my deep concern for the consuming public. I am sensitive to those well-intentioned editorials and columns I have seen to the effect that the bottling bill will cost consumers a billion dollars more. With all respect to those who conclude that this is accurate, I do not know where anyone finds a scintilla of evidence to suggest that.

As I mentioned earlier, if one is to follow the consequence of pricing and marketing, the availability to the marketplace of other items that are manufactured—I mentioned radios earlier—it only makes commonsense that as the small bottlers go out of business, there will be no competition for the big boys.

Once they determine what part of the turf they are going to serve, the price goes up. There is less competition, and a higher price. That is axiomatic. I think the consuming public will be poorly served by the implementation of the FTC decision and well served by the passage of the bill introduced by the Senator from Indiana and some 80 of my colleagues.

Let us look now at another impact which I think is very critical today. I want to look at the impact of this FTC decision on the work force which now is manufacturing the soft drink through the present industrial distribution chain.

We are in a situation right now in which we can ill afford to sit still and let an agency decision or the lack of congressional action increase the unemployment which exists in our society today.

I am sure that other Members of the Senate are as concerned as the Senator from Indiana over the unemployment which exists throughout our country. In my State of Indiana, we have some communities with 18, 19, or 20 percent unemployment. In a community such as that, does it make a lot of sense to allow an FTC decision which is automatically going to add 50 or 100 more to the unemployment rolls? There is no doubt about it—that is exactly what is going to happen.

Those who oppose the measure by the Senator from Indiana agree that that is what is going to happen. They say it is good to do away with these small bottlers, for reasons that escape the Senator from Indiana. I think this is going to be tragic. I cannot see the wisdom and the logic of those who believe that we should go ahead with a planned unemployment policy so far as the soft drink industry is concerned.

First of all, there is going to be a demise of hundreds of local bottlers, and this is going to cause the loss of thousands of jobs.

Second, not only will jobs be lost, but also, the demise of individual companies will result in employees' lost pension plans, so that all the money these employees have invested in the future of their families and their own retirements will go right down the drain with the remnants of the syrup which will no longer have a market, as the small businesses go bankrupt.

Third, jobs lost would include management, production line jobs, and delivery route jobs, not just those people who work in the plant but also those who now have the responsibility of distributing these soft drinks throughout an entire community.

Fourth, there is small likelihood that any of the lost jobs would be replaced by expansion in surviving bottler operations. Warehouse delivery requires no route delivery personnel. Management personnel already would be in place in the parent company in Chicago or Dayton or Cincinnati, as would be the case in Indiana, and only a few production line personnel would be added.

For someone who is out of work in Portland, Ind., it is small consolation to say, "We are going to hire a couple of extra people in Chicago." That certainly provides little comfort to those who have lost their livelihood.

I point out that if we are looking at the total cost to society generally, we have to look at the thousands of people joining the unemployment rolls. The cost of unemployment compensation goes up. We have to look at those people who may be forced on welfare. We have to look at the retirement loss to those who may have worked 30 years in the local Coca-Cola plant.

They have invested in their pension and, lo and behold, the pension is no longer there because the plant goes bankrupt.

That kind of impact on society generally is lost in the fuzzy-headed thinking of those who reside in the ivory tower down at the FTC. They ignore the impact on the families and the communities of this kind of ruling that puts the small business out of business.

That is why I joined with my friend from Mississippi and others in introducing this legislation.

Mr. President, I wish to ask my colleagues in the Senate to look further at the effects of eliminating exclusive territorial provisions in the soft drink trademark licenses. Elimination of bottler territories will have a substantial adverse impact on bottlers, especially small bottlers, on the use of the returnable bottle, and soft drink competition, and on industrial concentration.

Let us look at this whole problem in more detail.

First, let us examine in more detail the shift to food chain warehouse distribution. I think that is going to happen.

Historically, franchised bottlers have used store-door delivery as a means of handling returnable bottles, assuring quality control, and providing other customer service to both large and small accounts on their routes. Most food chains, however, prefer to receive delivery of soft drinks at their warehouse distribution centers rather than at their retail stores. Thus, without exclusive territories where the bottler can maintain store-door delivery, chain supermarkets and other high volume food store customers will insist on warehouse delivery of franchised soft drinks in nonreturnable containers. Because of the purchasing power of the high volume chain stores, bottlers generally will be pressured into making deliveries to warehouses or to allow chains to pick up franchised brands on the chain's trucks for backhaul to the warehouses.

Let us look at the effect upon returnables.

Delivery of returnable bottles is economical through store-door delivery but not through warehouse delivery. For this reason, and because returnables involve extra handling costs and vigorous price per ounce competition with the chains' 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 bottle.

Mr. President, I will look again because I just do not think we can overemphasize the impact this decision will have on many bottlers.

I am just convinced that we are going to have large numbers of soft drink bottlers go bankrupt; people who now have been small businessmen in their own communities, the pillars of their communities, are going to be out on the street. They have invested a whole lifetime, and thousands of dollars in developing a small economically viable soft drink bottling plant.

Most of the FTC commissioners, I dare speculate, have never been in a hometown bottling plant but have sat there and listened to the so-called economic experts. Thanks to that kind of decision these small bottlers are going to go out of business. I am sure that the FTC commissioners were trying to do their best, but in my judgment, they got some very, very faulty information.

For example, the basis for the FTC decision is that there must not be enough competition because if there had been sufficient competition the return on the investment to the bottlers would not be as high as it presently has been, the theory being, of course, that with competition between bottlers the return on the price would have to go down to the place that it was just barely above the cost of doing business, enough to make a little profit to stay in business, and, thus, the return on the investment would be less.

Mr. President, it is dangerous to put any magic arbitrary formula on what is or what is not a proper return on investment to a given industry.

But I was interested enough in this particular part of the argument that when our distinguished colleague and friend from Ohio held hearings, we had the FTC folks and we had the experts on whom they rely up to testify.

Again not wishing to be unduly harsh on the FTC, I think that we have to look at the kind of information that they were given to make this decision.

I fault the FTC for not looking behind the so-called expert testimony. I find no excuse at all for the lack of reliability of the testimony itself.

I think it is unfortunate that those folks who delivered the testimony were not delivering relevant testimony.

When we had those expert witnesses who had testified before the FTC and had talked about the fact that the return on investment was too great and thus there was not competition, I asked them some questions. Inasmuch as they had talked about the tremendous conscionable anticonsumer return on investment in the soft drink bottling industry, I said:

Now, Professor, I have a number of small bottlers in Indiana, a little more than 50; most of them employ less than 50 people. Can you tell this committee what the return on investment on this type of bottling operation is?

There was a pause and then a somewhat reluctant assertion that no, they could not.

I said:

Well, now, is it that you say that the reason we need to do away with territorial franchises is that the bottlers are making too great a return on investment, and if there had been sufficient competition the rate of return on investment would be lower, so you say the best way to deal with this is to do away with the franchise and therefore the return on investment will go down? What is the return on investment? I asked again.

Again, unfortunately, I got the response that they do not know.

The figure that were used by the so-called experts to say that my Indiana hometown bottlers were getting too large a return on investment were the return on investment of the sirup cimpanies, the parent companies, the return on investment of Atlanta Coke or Pepsico or Phillip Morris or the major conglomerate owners. They did not discuss the return on investment of the small businesses in question.

In fact, I asked the president of the Indiana Bottlers Association if he would be so kind as to give us a breakdown of what his return on investment was, and I think it might be of some interest to our colleagues in the Senate to know what his response was. His name is Mr. Robert Delauter. He is an outstanding figure in the community of Portland, Ind. I just want to read from the record here, Mr. President:

Mr. DELAUTER. Yes, sir. It is a matter of survival. I think some people misunderstand us. I am an independent bottler. I am not a part of the Coca-Cola Co. What appears in the paper on the Coca-Cola Co. in Atlanta, Ga., has absolutely nothing to do with how much money I make or how much I invest in Portland, Ind. That is my business. If I go broke, that is my loss.

Senator BAYH. Can you give us an idea, if you compare the recent profit figures of Coca-Cola in Atlanta compared with the Delauter operation in Portland? I don't want to get into your finances.

Mr. DELAUTER. I don't know much about the profit of the Coca-Cola Co. in Atlanta, Ga. What I read in the paper is that they have had an increase. In my 25 years in Portland, Ind., I have never earned more than 5 percent on dollar sales. I have never earned more than 5 percent. Last year it was less than 2 percent. In 2 of those 25 years I lost money.

As a matter of fact, I can very recently recall having carried a couple of checks in my pocket for a few weeks to make certain that we weren't overdrawn at the bank, Senator.

Senator BAYH. Many of us can sympathize with that. In fact, maybe a few of us have let those checks slip out in cases. [Laughter.]

Let me ask you now, as I perceive this, quite the contrary to a couple of articles I have seen—and I think here again the folks just had some bad information. Where that is coming from. I don't know. I am sure it is well-intentioned.

If you put a lot of small businesses out of the picture and a few large bottlers get into the picture, it would seem to me that the chance to manipulate the price to the disadvantage of the consumer would be significantly increased, and the willingness to buy the kind of personalized service from local vending machines would go down.

Give us a picture, a succinct picture, Mr. Delauter, of what happens to your business if the FTC ruling stands.

Mr. DELAUTER. Senator, if the FTC is successful in their suit, I will lose most of my take-home market. It will go to NR's and cans.

Senator BAYH. The take-home market from where?

Mr. DELAUTER. From chainstores, independent grocery stores, big accounts in all the counties that I serve. That will leave me with a lot of small accounts, with too little volume to survive. The returnable bottle will disappear. Let me explain why that will happen. It is very obvious to a small bottler.

I would have to compete in my home market against giant bottlers who could sell Coca-Cola in cans and large non-returnable bottles. These are packages which I cannot now produce. I now buy these packages from the very bottlers who would be my main competitors. They could come in and would in fact, offer lower prices temporarily to eliminate me from those big stores.

After I am out of the business, retail prices will be raised, in my opinion, by the big grocers and the chains who at least in the past have always priced national brands above their private labels to assure that those private labels do in fact sell.

Those are the words of a man who has to pay a payroll. He runs a business. He hires several dozen people. He does not have the good fortune of sitting in the ivory tower down at the FTC or some other place and coming in temporarily to advise the FTC. He speaks with actual knowledge of what happens.

I might go one step further and put in the RECORD at this particular time the finding of fact of Mr. Joseph Dufresne, the administrative law judge, who actually went out and took facts and figures and held hearings on this case before the Federal Trade Commission made its determination. Here is what the administrative law judge said in his finding No. 86:

86. Effective interbrand competition has also kept the profits of bottlers of other national brands at a reasonable level. The Pepsi-Cola bottler in Albany, New York, obtains 4½ percent return on the market value of his investments (Strachan, Tr. 2873). The Dr. Pepper-Pepsi-Cola bottler in Dyersburg, Tennessee obtains a five percent before tax return on the replacement value of the company's assets (Burks, Tr. 3047), takes less than $20,000 in salary (Burks, Tr. 3047), has paid only $16,000 in dividends since 1965 (Burks, Tr. 3046–47), and makes a per case profit of only 13 to 14 cents before taxes (Burks, Tr. 3048). The Dr. Pepper bottler in Galveston, Texas, makes a profit of $40,000 on sales of $1,600,000 (Ippolito, Tr. 3271–72), obtains a five percent return on the market value of his investments (Ippolito, Tr. 3268) makes a profit of 15 to 20 cents per case before taxes (Ippolito, Tr. 3267), and has not paid any dividends in the last decade (Ippolito, Tr. 3267).

You tell me, Mr. President how, given those facts, given that judgment by the administrative law judge, you can have a bunch of people who find the profit return to the major syrup companies to be exorbitant and then treat that as being identical to the very modest return on investment of the small hometown dealers. It escapes me, and I think it is totally irresponsible.

Mr. ROBERT C. BYRD. Mr. President, will the Senator yield to me?

Mr. BAYH. I would be glad to yield to the distinguished Senator from West Virginia with the understanding that it does not constitute a second speech.

The PRESIDING OFFICER (Mr. FORD). Without objection, it is so ordered.

ORDER FOR [illegible]M. FOR 1 HOUR

Mr. ROB[illegible]. Mr. President, I ask unan[illegible] that a 2 o'clock the Senate [illegible]s until 3 p.m.

The PRE[illegible]ICER. Without objection, [illegible]d.

REC[illegible].M.

The PRES[illegible]. Under the previous or[illegible]w stands in recess until[illegible].

Thereupo[illegible] 2 p.m., recessed unti[illegible]n, the Senate reassem[illegible] to order by the Acting [illegible]mpore (Mr. METZENBAUM[illegible]

THE [illegible]RMY

Mr. ROB[illegible]r. President, Members o[illegible]now of the vital work [illegible]n Army, a work for G[illegible]rograms for humanity t[illegible]ties and the towns and [illegible] our States. There are [illegible] corps community ce[illegible]ountry and there are 8,[illegible]aces of their service thre[illegible]ed States.

It was 2[illegible], Mr. President, that [illegible]nual dinner of the Sa[illegible]in Beckley, W. Va. I re[illegible]ll that all of the church[illegible] were represented, eith[illegible]rs or someone from t[illegible]; all of the civic organ[illegible] the service clubs, like [illegible], Lions, and others were[illegible]was a night of rejoicing[illegible]vation Army was helping[illegible]eded help.

In West [illegible]are 19 corps community[illegible] 1979, these centers eith[illegible]ed in a positive way [illegible]140,000 citizens—men,[illegible] children—in programs [illegible]d as rightly "rehabilita[illegible]

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In additi[illegible]n Army offers day care pr[illegible]nce at senior citizens cen[illegible]s; emergency disaster se[illegible]t of children in foster h[illegible]tion services for childr[illegible] homes; and hospital vi[illegible]

The Arm[illegible]r the banner of God, a[illegible]ow that this organizatio[illegible]mportant private social [illegible]erates in the State of W[illegible] give as an illustration[illegible] the successful "Hotlin[illegible]mbers of the Salvation [illegible] here from Charleston [illegible]growing problem of chil[illegible] State.

They wer[illegible]bly, some type of Federal [illegible]hen they realized that it[illegible]long time, and

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(Mr. PRYO ... chair.)

THE SOFT DRINK INTERBRAND COMPETITION ACT

The Senate continued the consideration of the bill.

Mr. THURMOND. Mr. President, as we consider S. 598, the Soft Drink Interbrand Competition Act, it is important that we give significant attention to the legislative history and developments leading to the present bill, as well as to the hearings conducted this year on S. 598.

In 1971, the Federal Trade Commission initiated a number of cases challenging the territorial provisions in bottlers' trademark licenses as unfair methods of competition in violation of section 5 of the Federal Trade Commission Act. A decision by the administrative law judge held that the franchise system was lawful. The Federal Trade Commission, however, overruled that decision. This created an issue of such importance to many Senators that they felt it imperative to introduce a bill to clarify the conflicting issues of contract obligations among the various interests affected by that FTC decision.

It has been noted that neither the courts nor the FTC will consider several pertinent factors and that only the Congress can resolve this matter. The Congress is better equipped to cope with the broad range of issues and interests which are involved in the soft drink franchise matter.

Mr. President, I am a cosponsor of S. 598, along with 79 other Senators, and I have maintained a continuing strong interest in this matter from the time that the original legislation was proposed by Senator Eastland. It is my desire and hope that the full record regarding this important matter will be recognized and given due consideration. Briefly, the territorial franchise system for soft drinks has been in effect for over 78 years, with over 2,000 large and small bottlers making capital investments of billions of dollars in reliance on such territorial agreements.

A few years ago, in South Carolina, we had 44 soft drink plants and 36 soft drink warehouses and distribution firms. The great majority were domestically owned. They employed approximately 2,800 people with an annual payroll over $18 million. Our hearings testimony indicates similar situations in the other States. The Nation's soft drink industry is populated strongly by local independent bottlers who face intense interbrand competition and who provide the consumer with a wide range of soft drink choices.

The territorial limitations have provided incentives to bottlers to make investments for production, distribution and marketing, which have resulted in substantial and effective interbrand competition. At the same time, the territorial system has not prevented adaptation in the public interest to changing economic and demographic factors.

Without territorial restrictions, without corrective legislation, there would be a tendency for the larger bottlers with greater capital availability and flexibility to capture much of the smaller firms' business and, at the same time, we would see the remaining small independent bottlers pressed toward submarginal profits. With concentration achieved by the large bottlers, competition would truly be diminished in this field.

The proposed legislation, S. 598, directs the attention of the enforcement agencies in the proper direction and it would, in my opinion, be an appropriate and important addition to the antitrust laws.

Hence, I shall share with my colleagues the views of some of the witnesses as follows:

Mr. President, there was a statement prepared by Hackney and Sons, Inc., Washington, N.C.; Independence, Kans.; and Fountain Inn, S.C., entitled "Economic Impact Statement, Soft Drink Delivery Body and Trailer Industry." I should like to present this statement to the Senate. It is dated April 30, 1979:

ECONOMIC IMPACT STATEMENT

IMPACT ON PATTERN OF DISTRIBUTION IN THE SOFT DRINK INDUSTRY

At the present time, most packaged soft drinks are delivered by route delivery vehicles of local bottlers, driven by local employees. These driver-salesmen fill vending machines, stock supermarket shelves, and arrange special merchandising displays to increase sales. In 1977, 72.1 percent of all packaged soft drinks container units (cans, bottles, etc.) were sold through food stores. Nonreturnable containers of all types accounted for 68.0 percent of food store soft drink unit sales. Expressed differently, 49.0 percent of all packaged soft drink sales were nonreturnable type containers sold in food stores.

If the exclusive territory granted the local soft drink bottler by his franchisor is eliminated, major changes are anticipated in the pattern of distribution of soft drinks to food stores and other chain outlets. Instead of buying brand-name soft drinks from each local bottler, as is the case with the present terriorial limitation, a chain food store's central purchasing department would be able to negotiate directly with large regional bottlers to furnish soft drinks in nonreturnable containers, delivered in bulk to the central distribution warehouse of the food store chain. The food store chain would then deliver these soft drinks in bulk on its own vehicles, along with other canned goods, from its central warehouse to its retail stores. Food store employees would stock the shelves with soft drinks as they stock other items.

The need for conventional route delivery equipment by local bottlers (and the employees to operate it) to service outlets such as food stores would be greatly reduced once warehouse delivery is established. The type of transportation equipment used in the warehouse distribution method by food store chains is the 40-foot van trailer, produced primarily by large trailer manufacturers such as Fruehauf and Trailmobile.

It would be unrealistic to expect a local bottler to lose the entire 49 percent of his total packaged soft drink sales presently represented by food stores' purchases of nonreturnable containers. However, 30 percent sales loss is not an unrealistic estimate, meaning that local bottlers could face a substantial loss in sales to the larger bottlers who are able to sell in bulk. The resultant weakened financial condition of small bottlers would make them vulnerable take-over targets for acquisition by larger bottlers. As large bottlers become larger and small bottlers disappear, less, rather than more, competition will result.

IMPACT ON THE BEVERAGE TRUCK BODY AND TRAILER INDUSTRY

Route delivery beverage truck bodies and trailers are currently supplied by several dozen small manufacturers throughout the United States. Hackney & Sons, Inc. is the largest of these, but still only had total beverage body and trailer sales in 1976 of $24 million and employed a total of 600 persons in three manufacturing plants located in Washington, North Carolina; Fountain Inn, South Carolina; and Independence, Kansas. By comparison, Fruehauf Corporation had trailer operations sales in 1978 of $1.25 billion, with Trailmobile's sales at about half of Fruehauf's.

If the franchise territory system for soft drinks in nonreturnable containers is eliminated, it is anticipated that all companies in the beverage truck body and trailer industry will experience an immediate decrease in soft-drink delivery body and trailer sales of approximately 70 percent (the new level of sales will be 30 percent of previous levels), and that the severity of this decline will last for approximately five years. After that, sales might return to approximately 70 percent of previous levels. It is doubtful whether many of the present manufacturers of soft drink delivery bodies and trailers could survive five years of such declines. It is probable that some will be forced into bankruptcy; others will be forced into acquisition by a larger company. In the face of such a decline, Hackney & Sons, Inc. anticipates an immediate loss of at least 350 jobs and cannot make any predictions as to its ability to survive five years of such economic trauma. The chief beneficiary from this decline will be very large truck/trailer manufacturers, such as Fruehalf and Trailmobile, whose equipment is presently not used in the local delivery of soft drinks.

The reason for the severity of the anticipated decline in beverage body sales is not obvious without some explanation of the buying and operating habits of soft-drink fleet owners. Most soft-drink fleets operate with 90 percent of their fleet on the routes each day and 10 percent as "spares," either held in reserve for peak demand or withheld from duty for normal maintenance. Historically, bottlers have dramatically reduced buying of new delivery equipment in difficult years and simply used up spares.

Assume, as an example, a hypothetical fleet of 100 soft-drink route trucks. This is considerably larger than average, but makes arithmetic simpler for illustrative purposes. Presently, such a fleet would typically have 90 trucks on the route each day and 10 units in reserve. If this bottler's sales are reduced by 30 percent, he would then need only 70 percent of his 90 trucks on the route each day, or 63 units. An active fleet of 63 units would require approximately 7 spares, for a total fleet size of 70 units. Typically, one-tenth of the total fleet is replaced each year, so that the annual replacement requirement would then be 7 units, down from the previous 10. With 30 extra liberated units over and above normal operating and spare requirements, this bottler can simply use up his extra units for 4.3 years before being down to his new required fleet size of 70 units. Thereafter, it would be assumed that he might order 7 units each year to maintain his 70-unit-fleet.

To illustrate this situation more graphically, the present and anticipated phaseover buying pattern is shown in tabular form.

PRESENT ROUTE DELIVERY METHOD

[Assume a fleet of 100 vehicles]

	Number
Units on daily route	90
Spares	10
Total fleet size	100

TYPICAL PROJECTED BUYING PATTERN

[Assuming no growth]

Year	Units retired	New units needed	Total fleet size
1980	10	10	100
1981	10	10	100
1982	10	10	100
1983	10	10	100
1984	10	10	100
1985	10	10	100

REVISED FLEET REQUIREMENTS WITH WAREHOUSE FOOD-STORE DELIVERY ACCOUNTING FOR 30 PERCENT OF SALES (LOCAL BOTTLER'S SALES ARE 70 PERCENT OF PRIOR SALES)

[Initial fleet size 100 units]

	Number
Units on daily route	63
Required spares	7
Total new required fleet size	70
Extra trucks liberated by sales decrease	30
Total fleet size	100

Year	Units retired	New units needed	Total fleet size
1980	7	0	93
1981	7	0	86
1982	7	0	79
1983	7	0	72
1984	7	5	70
1985	7	7	70

It is not anticipated that every bottler would stop ordering new route delivery equipment for more than four years. However, it is reasonably projected that at least 60 percent would do so, with the remaining 40 percent ordering at the new reduced annual level of requirements. The net impact would be a 70 percent reduction in sales to the beverage body and trailer industry. This is similar to the percent decline of orders during the period from August, 1974 through February, 1975, when bottlers were worried about sales declines resulting from sharply higher sugar prices. Fortunately, sugar prices declined, soft drink sales returned to previous levels, and strong spring and summer delivery-equipment orders kept Fiscal Year 1975 from being a disaster in the beverage body and trailer industry. Nonetheless, soft-drink route bodies and trailers delivered in 1975 were still down by 20 percent from the previous year. A softening of sales is now being felt in the beverage body and trailer industry because of anxiety over a possible unfavorable outcome in the FTC case.

SUMMARY

The present system of route delivery of soft drinks evolved over many years of trial and error as the most efficient and economical means of delivering the greatest volume of soft drinks to the consuming public. It evolved without any government interference and in full public view. The system resulted in a great number of independent local industries—the local soft drink bottlers. Many of these are now third-generation family businesses.

The system also gave birth to a great number of small peripheral industries, such as the beverage truck body and trailer industry, which specialized in serving the local bottler. Neither the soft drink industry nor the truck body and trailer industry have enjoyed special favorable tax treatment; in fact, the reverse is true. Soft drinks have been singled out for discriminatory taxes in several states, and the truck body and trailer industry is almost the last industry in America subject to the Federal Manfacturer's Excise Tax.

The Federal Trade Commissión proposes, by the stroke of a pen, to totally restructure the soft drink industry. This restructuring would greatly favor the large bottlers and virtually eliminate many small bottlers. The new structure would have less competition which, in the long run, would lead to higher soft drink prices to the average consumer.

The peripheral industries which have developed to serve the soft drink industry, such as the beverage truck body and trailer industry, would be far more adversely affected by the restructuring. It is probable that most companies in this industry will be driven out of business. These companies are, for the most part, small, independent family businesses. Here again, the beneficiaries will be a few large trailer manufacturers. The level of competition in the truck body and trailer industry will be reduced, with eventual higher prices in that industry also.

The Federal Trade Commission apparently believed that its action would enhance competition in the soft drink industry. Not only do we believe the reverse will be true, but it is clear that competition will also be reduced in the peripheral industry, such as the beverage truck body and trailer industry.

A decision of this magnitude, affecting several industries, should not be made by a Federal Commission but, instead, should be made by the Congress.

Now, Mr. President, I should like to present to the Senate another statement. This one is by J. F. Koons, Jr., president of Central Investment Corp., on September 26, 1979, on the same subject.

STATEMENT BY J. F. KOONS, JR.

Mr. Chairman and Members of the Committee: You have my great appreciation for this opportunity to appear before you to support the imperative need for legislation to overrule the decision of the Federal Trade Commission invalidating exclusive territorial rights in the soft drink beverage industry, assuming that result is not sooner achieved by judicial action.

The company of which I am president, Central Investment Corporation, has its headquarters in Cincinnati, Ohio. It is a publicly held corporation with approximately 65% of the stock owned by members of my family. The company owns two Pepsi-Cola franchises covering nine northern Ohio counties around Mansfield and Canton, and two in Florida—Palm Beach and Ft. Lauderdale. I am also president of the Ohio Pepsi-Cola Bottlers Association, the membership of which includes all Pepsi-Cola franchises in Ohio, all of which are independently owned. With me today is Richard Caudill, President of our Florida operations; my son, Jeff Koons, Vice President of our Florida operations, and Emanuel Goldman of Sanford C. Bernstein & Co., Inc., a security analyst specializing in the soft drink and brewing industries.

When I became president of the company, we were exclusively brewers of beer under the trademark "Burger Beer." The increasing concentration of economic power in the brewing industry subsequent to World War II led to our decision to leave the beer and enter the soft drink business. Observing that concentration develop in an industry that did not have territorial rights, provided me with firsthand experience relevant to my testimony today.

We are aware that other independent bottlers have appeared before you, and we are pleased to join them in support of legislative relief from the FTC decision. We are also grateful to the approximately 80 members of the Senate who have sponsored S. 598. If we could not contribute something more to the debate on this legislation, we would not have requested this opportunity to testify. The fact is, however, that we have made a substanial personal effort to demonstrate that, if the FTC decision is not reversed by judicial or legislative action, it will have an immediate and serious adverse impact on essential national energy, environmental and economic goals. Moreover, the FTC order confiscates without compensation the most valuable property right of any independent bottler—the grant of his exclusive territorial rights which was paid for by him or a predecessor in title. It will lead to the destruction of hundreds of independent bottlers and a reduction in interbrand competition, without increasing intrabrand competition, and without benefits of any kind to the consumer.[1]

The thrust of our case is that, if the FTC decision becomes effective, the near total disappearance of the returnable, reusable glass bottle will soon occur, directly resulting in the adverse effects just mentioned. We have commissioned a study by Franklin Associates, Ltd., consultants on resource and environmental policy and planning, a summary of which we offer for the record, and to which we shall later refer. That study establishes the enormity of the environmental and energy loss consequences that will follow the disappearance of the returnable bottle in the carbonated soft drink beverage industry. When we became aware of how seriously the FTC decision would affect the environment, we filed suit against the Commission in the U.S. District Court in Florida,[2] seeking to enjoin the enforcement thereof on the grounds that the orders entered constituted "major federal actions significantly affecting the quality of the human environment" and that the FTC had failed to file an environmental impact statement as required by the National Environmental Policy Act. A motion for preliminary injunction, which has been briefed and argued, is presently held under advisement by the trial judge awaiting the outcome of the direct appeal from the decision pending in the Court of Appeals for the District of Columbia.

BACKGROUND

Let me briefly describe how the structure of the soft drink industry has developed. Starting with Coca-Cola near the turn of the century, hundreds of independent bottlers have acquired exclusive trademark licenses to manufacture, distribute and sell the trademark licenses to manufacture, distribute and sell the trademarked products within a specified territory. These territories are usually rather small in area, consisting of a municipality and its suburbs, or, in rural areas of the country, a number of counties may comprise a territory. The bottlers, by contract, must purchase all of their syrup or concentrate needs from their franchisor—Coke, Pepsi, Seven-Up, etc.—national concerns which own the formula and the trademark. The bottlers then complete the manufacturing processing of the products in their own plants. The bottler franchisee must maintain a large capital investment in plant, package inventory and production lines, and a fleet of trucks to distribute the product. The soft drink franchisee is a manufacturer of the product sold in addition to his role as a distributor. The franchise owned is perpetual and may be bought and sold at current market values, and transferred in accordance with the owner's wishes at death.

The soft drink industry structure described has permitted the development of vigorous competition among the many popular brands, to the benefit of all consumers. There is intensive price advertising competition among brands seeking to increase their market shares. The effectiveness of competition within the industry is proven by the fact that by 1977 the price per ounce of Coke in the 16 ounce returnable bottle had increased less than three per cent over the 1939 cost of the product, despite a rise in the Consumer Price Index during those years of 344 percent. Nevertheless, in 1971, the FTC filed a complaint against the syrup manufacturers, alleging that the exclusive territorial provisions in the franchise agreements were unlawful because they prevented intrabrand competition among the bottlers. After many delays and a lengthy six-week trial, the Administrative Law Judge, in a 91-page Initial Decision containing 195 detailed findings of fact, upheld the legality of the territorial provisions and dismissed the complaint. Undertaking an extensive rule-of-reason analysis, the ALJ concluded that the effect of the restraint on intrabrand competition is outweighted by its effect on competition in the marketplace as a whole—interbrand competition—and that on balance the challenged territorial restrictions promote competition.

Indeed, the territorial system has helped to promote competition by making it much easier and less expensive for new brands to enter the market. With a ready-made system of local manufacturers and distributors in place, promoters of new brands can "piggyback" by contracting with existing bottlers, instead of having to invest in a complete distribution system of their own.

Unfortunately, the wise and sensible ruling of the ALJ was rejected by the FTC in a 2–1 decision. The case is now on appeal to the U.S. Court of Appeals for the District of Columbia.

To give you some idea of the weakness of the complaint counsel's case before the administrative law judge, we quote the following from one of the briefs filed in the Court of Appeals:

Complaint counsel could not and did not make the type of showing promised by his predecessor: he did not establish the existence of submarkets; could not prove the existence of product differentiation; made no showing of undue concentration either within the "corridor" or nationwide; could not establish that barriers to entry into the soft drink industry were high; did not show that advertising and promotion were inordinate or useless to the consumer; could not call a single chain store representative or other purchaser to testify to any problems in purchasing soft drinks; eschewed the attempt to demonstrate cost savings or other benefits to the consumer; and in six weeks of trial devoted largely to bottler testimony, could not produce a single witness to say that he felt restrained or disadvantaged in his business because of territorial restrictions. Brief of Pepsi-Cola Bottlers Association *et al*, p. 13.

To our knowledge, this statement remains unchallenged.[3]

COMPETITION AND PRICE ADVERTISING

Since presumably the FTC action and decision was based on the belief you could improve competition and reduce price to the consumer by eliminating territorial restraints, we shall briefly give a layman's views on the subject. Based upon our knowledge of the FTC proceeding, there was ample evidence to justify the findings of the Administrative Law Judge that competition is intense and increasing in our industry. We quote from the summary of the ALJ's findings appearing in the brief of the Pepsi-Cola Bottlers Association (omitting citations to the record):

(1) There exists price sensitivity between Coke and other carbonated soft drink brands;

(2) The relative success of the different brands varies according to competitive conditions such as competitors' discounting and promotional activities;

(3) Intense interbrand competition is carried out both in terms of list prices and by means of continuous promotions and discounting;

(4) The interbrand market is characterized by an enormous number of different brands available to the consumer;

(5) The interbrand market is characterized by an enormous variety of package types and sizes, including the economical returnable packages which can compete directly in price on a per-ounce basis with the cheapest form of carbonated drink and even with the prices of Coke and Pepsi of decades ago;

(6) Interbrand competitors must engage in intense marketing activity in order to gain acceptance in the market and prevent subsequent loss of sales to competitors. They must fight for shelf space; and vie with one another in performing in-store and point-of-sale services, in servicing numerous points of sale, in offering free or low-cost special events services, and in placing and servicing vending machines;

(7) Entry of new competitors, both new brands and new product types, into the soft drink market has been frequent and effective

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[1] The FTC originally estimated that savings to consumers from elimination of exclusive territories would be one billion dollars "or more." Later the estimate was reduced to $250 million and then to $50 million. At trial, complaint counsel made no attempt to prove that there would be savings to consumers in any specific amount.

[2] Pepsi-Cola Bottling Company of Ft. Lauderdale-Palm Beach, Inc. v. FTC CA-79-8060, U.S.D.C., S.D. of Fla.

[3] That the FTC's staff found difficulty in developing a consistent theory on which to try the case is apparent from the following remarks of Raymond Hays, Esq., new complaint counsel who entered the case in May 1973. In asking approval at a prehearing conference to abandon his predecessor's approach on the ground proof for it could not be found, he stated

"Perhaps I might say, just by way of background, that all of the Government counsel at this table who are charged with carrying these cases forward are new on the cases. As of May of this year, none of us had any knowledge of any aspect of any of these cases, officially or unofficially.

"Our first duy was to find out about the cases, what were they all about, what was the background, the procedure and what was the evidence. I did that. We did that to the best of our ability and as quickly as possible.

"I say, with a great deal of sadness and with a great deal of humility, that I reached the judgment that I just could not live with the positions that had been taken by Government counsel that preceded us. I don't like to say that. I think the Government should be held to strict accountability where it is possible to do so without prejudicing the public interest.

"But, in analyzing the theory of the case—which was, in part, a per se theory and, in part, a partial rule-of-reason case to be put on in Los Angeles, Minneapolis, Chicago, and Washington—in looking at the backup material to the designated witnesses, I could not discern any continuity in factual development that would support the charges.

"So, with that in mind, I wish to formally move you here today to allow us, among other things, to amend the previous trial briefs and designations of witnesses and designations of documents. When I say 'amend,' I mean, for all intents and purposes, it is a substitution, practically a whole new list of witnesses." (Tr. of November 29, 1973 Prehearing Conference in FTC Dockets 8853, *et al.*, at 3–4.)

and has been made easier by the territorial system of local bottlers;

(8) Bottler profits are reasonable.

The two-member FTC majority that decided the case apparently chose to ignore these findings and as one commentator observed: "The Commission relied primarily upon logic, and only secondarily upon empirical data, to support its conclusions that [the territorial] restrictions had significant anticompetitive effects."[4] From what both our lawyers and our common sense tell us, there is little logic in the Commission's approach, only the dogged determination of two members to reject any kind of vertical restraints in the process of manufacturing and distributing soft drinks.

In an effort on our part to determine the status of competition in the carbonated soft drink beverage industry, we engaged the services of Majers Corporation of Omaha, Nebraska, an independent marketing research firm which monitors newspaper retail food store advertising in the top 106 United States markets. Majers found that out of 45 leading categories (excluding meat and fresh produce) in food stores measured over a period of years carbonated soft drinks ranked second in feature price ad activity and first in dollar volume. (Exhibits 1 and 2)

How competitive is the soft drink industry? So highly competitive that the featured ad price per ounce of Coca-Cola and Pepsi-Cola in the 16-oz. returnable bottle for the 12 months ending November 1977 rested only 2.6 percent higher than the price of Coca-Cola in the only bottle available in 1939. The unadorned facts found by the Administrative Law Judge and now confirmed by the Majers data, establish that the independent franchised soft drink bottler system is highly competitive and that the consumer is receiving the benefit of intense price competition.

THE EFFECT OF THE FTC DECISION ON THE RETURNABLE BOTTLE

Soft drinks are sold in either returnable or non-returnable (NR) packages. By definition, returnables are packages which, following use, are collected by the bottler, washed and reused. Returnables are bottles made of glass which are heavier and more durable than non-returnable bottles. Nonreturnables, packages used only once, consist of cans made from various materials and bottles of lighter glass and thinner construction than returnable bottles. There are also some nonreturnable plastic bottles.

Despite the fact the returnable bottle is the most expensive container for the bottler to purchase, the product can be sold therein to the consumer at the lowest cost per ounce. This reflects the simple fact that the returnable bottle is used on an average of 20 times and the package cost amortized over so many sales. Present approximate costs per container to the bottler of three major package forms are returnable glass (16 oz.) 16.7 cents; (10 oz.) NR glass 7.8 cents; and (12 oz.) cans 8.66 cents.

The returnable bottle continues to enjoy a high level of usage in the market. Approximately 58 percent of all soft drinks are sold in food stores. Figures for 1978 show that 41 percent are in returnables, with the percentages considerably higher for Coke (51.7 percent) and Pepsi (49 percent).

Virtually everyone with knowledge of the soft drink industry agrees that, if the FTC order is allowed to become effective, there will be a rapid movement to concentration within the industry, resulting in the major markets falling under control of the syrup manufacturers. Pepsi-Cola Co., a subsidiary of the conglomerate PepsiCo., Inc., which manufactures the Pepsi concentrate, and from whom all independent bottles must, by contract, purchase all of their Pepsi concentrate, also owns and operates its own bottling plants in franchises covering about 25 percent of the population of the United States.

[4] *The Federal Trade Commission and the Soft Drink Cases:* Stephen Breyer, Consultant; Martin Romm; The First Boston Corporation; *New York, July 1978.* In fairness to Mr. Breyer, we observe he is not entirely critical of the Commission's methodology in this respect.

Mr. President, I ask unanimous consent that I may continue my speech at a later time and it not be counted, when I do resume, as a second speech on the same legislative day.

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

Mr. HEFLIN. Mr. President, I will vote in support of S. 598, the Soft Drink Interbrand Competition Act, and I urge my colleagues to do likewise. The time has come to end the uncertainty that has faced this industry since 1971 when the Federal Trade Commission filed suit against seven soft drink sirup companies alleging that the territorial provisions contained in the trademark licensing agreements constitutes unfair methods of competition.

Following the filing of that complaint, the administrative law judge after a trial lasting from May 5 to June 11, 1975, made extensive findings of fact concerning the soft drink industry and the effects of territorial arrangements. Upon completion the major finding was that the effect of the arrangements was to promote competition of bottlers of different soft drink products.

In April 1978, the FTC in a 2 to 1 decision reversed the trial judge and held that the arrangements were unsuitable restraints of trade. Thus it was almost 7 years from the date of filing of the complaint to a decision that was not even unanimous amongst the Commission members. That case is now under appeal in the D.C. Court of Appeals and no final conclusions are in sight. I believe, therefore, that it is appropriate that Congress act to end the 9 years of uncertainty and to preserve the territorial system within which this industry has developed over the last 75 years. In voting favorably upon this bill by a vote of 14 to 2, the Judiciary Committee felt that regardless of the short-term effects of the elimination of territories, within a few years, the soft drink industry will become concentrated in the hands of a few extremely large soft drink bottlers.

These surviving bottlers would raise wholesale prices to all customers with resulting increases in prices to consumers but offer fewer brands in fewer packages to fewer accounts. This is not good public policy.

I think it is important to note that in enacting S. 598 we are not approving an exemption from the antitrust laws. Rather, we are clarifying the application of such laws to these provisions used throughout the history of the development of this industry and which have been upheld by every court which has had occasion to decide their legality. Thus in clarifying the application of such laws with a test that substantial and effective interbrand competition must be found, the public interest will be protected as well as the continued operations of small, local independent business units. Therefore, I urge my colleagues to vote for S. 598.

S. 598 is an opportunity for us as Members of the Senate to act to protect an industry which has demonstrated competition over its 75-year history at the same time we are protecting the consumers' interests in price competition, availability of services, and distribution of products. When the FTC filed its complaint against the sirup manufacturers in 1971, various savings to the consumer would, it was alleged, result if the territories were destroyed. Instead, what the Judiciary Committee has found is the fact that the elimination of territories will destroy almost all of an industry which has developed over 75 years without providing any benefits whatsoever to the purchasing public.

The territorial concept has promoted intensive interbrand price competition and extensive market penetration by bottlers throughout the country. All of us, I am sure, have bottlers in our own States whose services and products reach all of our constituents. By operating within a territory an individual bottler has been able to develop service to large and small customers, to profitable and not so profitable accounts. If the territories come down, however, many of these bottlers who are viable entities today will be faced with the loss of large chainstore accounts. The store door delivery system utilized successfully by bottlers would be cut back in many areas when warehouse delivery, preferred by large food chains, becomes more prevalent and large bottlers would be the ones most likely to benefit because of their access to such accounts.

One consequence of such a conversion will be a decline in the use of returnable bottles which are incompatible with warehouse delivery. This incompatibility stems from the extra handling costs of returnables. This elimination will increase costs to other customers and eventually doom this type of container. We should not be in a position of waiting for such results to happen.

Senate bill 598, which we are being called upon to consider, is needed in order to prevent the destruction of a system that has been functioning for over 75 years under the understanding that the exclusive territories are legal. Senate bill 598 does not provide an exemption from the antitrust laws but clarifies their application in those circumstances in which there is substantial and effective interbrand competition among bottlers.

Throughout the 9 years that this case has been pending, the Congress has been provided evidence that if it fails to act and the territorial system is destroyed, we will see a restructuring of the entire industry such that within a few years the industry would be characterized by concentration in the hands of a few extremely large bottlers. These few larger bottlers would be in direct contrast to the fact in 1978 there were 1,724 soft drink bottling companies. Of the 2,000 plants in the United States, almost 1,500 have fewer than 50 employees. Many such plants have developed over the years as family owned plants and are significant employers in the small communities in which they operate.

It is clear, however, that the FTC decision would impact on many of these operations because bottlers would be subject to losing large chain store accounts which prefer distribution from central warehouses located in large metropolitan areas. Such areas are generally served by large bottlers who would be most likely to acquire all the warehouse accounts, should the territorial system be eliminated. Once smaller bottlers lose such accounts, sales volumes will decrease significantly. At the same time, unit costs increase sharply. The result would be increased prices and/or reduction in services. The scenario is that more and more bottlers will be unable to remain viable business entities.

It is interesting to note that even the opinion of the FTC in its 2-to-1 ruling against the territorial system agrees with the conclusion of its administrative law judge that many smaller bottlers will not survive if territories are eliminated. Such a fact runs directly counter to congressional interest in promoting a system of independent local businesses which can and do effectively compete with one another. It is that type of system which will promote the public interest and protect the consumer not only in prices but in service, availability, and choices of products they will find in the marketplace.

The Judiciary Committee had before it extensive testimony regarding the various issues involved in this legislation. Consistent with the committee's action in approving this legislation by an overwhelming vote of 14 to 2, I believe that the public interest would be served by passage of S. 598 now, and Congress should move forward without further delay.

TRIBUTE TO SENATOR HOLLINGS

Mr. President, I would like to take this opportunity to congratulate the newly selected chairman of the Budget Committee, Senator FRITZ HOLLINGS, who did a magnificent job over the last several days in managing on the floor the first concurrent resolution. I think that there probably were many issues raised which Senator HOLLINGS might otherwise have supported but which he may have voted against. I am sure he felt that he had the duty to stay with the Budget Committee's recommendations even if his own personal views may have differed from some of the committee decisions.

He handled the bill in a magnificent manner. I think we will find as we go forward under his leadership that we will have a balanced budget year in and year out. The fact is that this is the first time in the history of the Senate, under the budget provisions now provided by law, that we have given the American people a balanced budget.

I think Senator HOLLINGS, the committee, and the staff should be congratulated for this achievement and their fine efforts.

Mr. President, I think most of my colleagues know that I am a strong believer in the revitalization of our military strength. I think this will be one of our most important undertakings during the decade ahead.

In my judgment, the fact that the Budget Committee, under Senator HOLLINGS' leadership, has taken bold action to insure that substantial additional funds will be available to our armed services for the revitalization of our military strength, is a great achievement on his part and he deserves congratulations for that part.

As I stated earlier, for the first time under the current budget process, and indeed, for the first time in 12 long years, we have a balanced budget approved by the Senate.

I think a great deal of the credit must go to Senator ERNEST HOLLINGS of South Carolina for his effort in the last few days. Of course, I would be remiss if I did not praise the efforts of Senator Ed Muskie who, prior to his selection as Secretary of State, worked as chairman of the Budget Committee and did a great job in the committee work. He was not privileged to lead the battle on the Senate floor because of his appointment as Secretary of State. But he is to be congratulated for his work and his efforts prior to his appointment.

I think that a majority of the Senators are convinced that we must have a balanced budget. They kept this in mind and worked toward this end during the last several days as we overcame many obstacles as we moved toward adopting the resolution calling for a balanced budget.

Now, Mr. President, let me return to the business at hand with a few remarks about the history of antitrust litigation as applied to cases of vertical restraint in general.

Mr. President, the earliest major vertical restraint case, *Dr. Miles Medical Co. v. John O. Park & Sons Co.*, 220 U.S. 373 (1911), dealt with a restraint relating to pricing. There the Supreme Court ruled that a manufacturer who sells medicine to a wholesaler is not entitled to restrict resale through interference with the purchaser's pricing decisions. Where the purpose of the arrangement is to destroy competition by fixing prices, the Court held, the restraint is "injurious to the public interest and void." Dr. Miles was qualified in United States against Colgate & Co., where the Court allowed a manufacturer to control resale prices by the simple expedient of announcing his intention not to sell to price-cutters and then unilaterally refusing to sell to any retailer who failed to comply.

Mr. DOLE. With reference to the matter before the Senate, Mr. President, I hope that in all the discussions we have, we keep in mind that we are about to vote to overturn an opinion written by a distinguished Federal Trade Commissioner by the name of Elizabeth Dole when she was a Federal Trade Commissioner, so I shall probably not participate at great length in the debate. But I hope we conclude this before tomorrow night, because she is getting back home tomorrow night. If not tomorrow, I hope we finish at the earliest possible time Thursday, because I have to go home.

Mr. HEFLIN. Is there any significance between her returning home and the Senator's returning home and meeting her?

Mr. DOLE. I have to deal with this.

Mr. HEFLIN. Would it help to create domestic tranquility and peace and quiet in the Dole household if this decision were reached before her return?

Mr. DOLE. That might ease the entrance—or the exit, I am not certain which. I just suggest that, in effect, the effort, by the Senate, in effect, overrules an opinion of which she is the author. We all make mistakes. I am not certain if she made one or we are about to make one, but in any event, I wish you luck.

Mr. HEFLIN. I see the Senator is very good at avoiding the question I asked him, giving an appropriate answer concerning the domestic peace of the Dole household on this issue when she returns.

Mr. DOLE. Well, I think I have a live pair. I am not sure I will when she gets home.

Mr. HEFLIN. Mr. President, the law relating to vertical, nonprice restraints developed somewhat later. White Motor Co. against United States (1963) involved White Motor's practice of selling its trucks to dealers who agreed to resell them to customers not otherwise reserved to the manufacturer and who agreed to confine their business within the assigned territory. The U.S. Supreme Court concluded that it did not "know enough of the economic and business stuff out of which these arrangements emerge" to be certain whether they stifle or invigorate competition and therefore remanded the case for a trial on the merits.

Mr. President, I yield to the Senator from Arkansas.

Mr. PRYOR. Mr. President, I should like to yield a few minutes of my time to the distinguished Senator from Ohio. Then I should like to reserve the right to follow him, if I may.

Mr. METZENBAUM. Mr. President, I appreciate the graciousness of my friend from Arkansas. We are not on limited time, and I do not think anybody actually needs to yield any time to anybody else, because we have all the time in the world except as we approach the cloture period. I did want to make a statement, not too long, about why I am here on the floor opposing a measure that is supported by 80 Members of the Senate and why the Senator from Ohio is out of step with 80 of his fellow Members. Let me say that I am not out of step. This is one of those instances when the whole army is out of step and I am in step.

I appear here in opposition to this proposal as chairman of the Antitrust Subcommittee because my opposition relates to the antitrust exemption which would be granted to the soft drink bottling industry by this measure. I am not going to say that this exemption will be earth shattering. I am not going to say that it would destroy the economy. As a matter of fact, I will say that it will be inflationary. But even that is not enough of a reason for me to stand here and oppose this legislation.

I oppose it because it sets a dangerous precedent. If it is granted, it would be the first major antitrust exemption approved by Congress in more than 30 years.

And, Mr. President, granting this exemption would run directly counter to the constructive efforts the Senate has made to remove artificial obstacles to free competition.

Mr. President, if we pass this measure, I can anticipate that day when the automobile dealers come in here and ask that all their franchise areas be protected and that one not be permitted to compete with another outside their local community.

And, yes, that day ought to arrive when the Japanese manufacturers of all the radio and TV sets that are being bought these days ask for protection of their franchises, one against the other.

I can imagine the day will come when people who manufacture all kinds of items will be appearing before Congress and asking for an exemption from the antitrust laws in order to protect the small businessmen.

Let me emphasize one point on that score. This bill not only protects the small business bottlers, it protects the large sirup manufacturers as well.

Why is it that a Coca-Cola bottler in Mansfield, Ohio, should not have the right to come into Cleveland, Ohio, and sell his product for 10 cents a case less? Would anybody really suggest there would be something evil or pernicious about that?

As a matter of fact, I attempted to work out an arrangement on this measure which would have said that the exemption provided under this law would not be available to the large conglomerates who own some of the major distributing companies in the country and to the sirup companies themselves, but that was not accepted.

I said that if they really were talking about the small bottlers, then they should talk only about small bottlers, and let us not provide this special antitrust exemption for those tremendous conglomerates in the bottling business, or for the sirup manufacturers.

Mr. President, granting this exemption would run directly counter to the constructive efforts the Senate has made to remove artificial obstacles to free competition.

We have a pretty fair record in this respect.

On April 15, the Senate passed by a wide margin legislation that would limit antitrust exemptions in the trucking industry.

Bravo. That is good for competition.

Earlier, we took similar action with regard to the commercial airlines, and we deserve credit for doing that.

We have taken these actions, Mr. President, on the basis of overwhelming evidence that anticompetitive special arrangements for these industries have discouraged innovation, lowered productivity, and passed on unjustified costs to consumers.

There is one thing we can be proud of in the laws of our country, it is that the antitrust laws are the Nation's charter of economic freedom, they are designed to insure that our society receives the important benefits that flow from competition in the marketplace.

I am proud of the fact that as I stand here as a Senator from Ohio that it was an Ohio Senator of the opposite political faith to mine, John Sherman, who was the author of the Sherman antitrust law. The Sherman antitrust law and the Clayton Act were designed to insure that our society receives the important benefits that flow from competition in the marketplace.

As a matter of fact, Mr. President, exemptions from the antitrust laws should be permitted only in those very rare instances where competition is unworkable. In the bottling industry, it is workable. Competition could occur. That is one of the reasons we have pending in the Federal courts at the moment this appeal from the FTC decision.

Mr. President, this measure has the votes to put it through. It has been subjected to one of the finest lobbying efforts I have encountered since I have been in the Senate, and I find no fault about that. But let us not kid ourselves. S. 598 is a giant step backward from our Nation's commitment to competition.

This bill exempts the territorial restrictions which characterize the soft drink industry from the antitrust laws. Those territorial restrictions are part and parcel of that industry.

Why should they not be subject to the antitrust laws? I do not know.

If Congress gives the soft drink industry this special treatment, I predict that the same lobbyists who will have done so well in this area will be back representing other industries to seek similar exemptions for those industries' business practices.

We will, Mr. President, in other words, set the stage for converting antitrust law into a meaningless patchwork of special interest exemptions.

Supporters of S. 598 have argued that territorial restrictions enhance competition between different soft drink brands to a greater extent than they restrict competition between bottlers of the same brand.

There is no need to argue the merits of that claim—and for one simple reason. If, as the bill's supporters maintain, the territorial restrictions are fundamentally pro-competitive, then there is no need for this bill. The courts will uphold the restriction under a test known in antitrust law as the "rule of reason." And if the arrangements are, as I believe them to be, fundamentally anti-competitive, then we have no business enacting this legislation.

The courts are now at this very moment examining the soft drink industry's territorial restriction under the rule of reason test. This is a fair test which applies across the board to all industries in the economy.

And what are we doing? We are worried that the courts may recognize the anticompetitive aspects of territorial restrictions.

And I see no justification for congressional action to pre-empt the on-going application by the Federal court of the rule-of-reason test to the soft drink industry's territorial restrictions.

This Congress does not normally interfere when the courts have deferred a matter which is being considered, which is the very substance of the issue itself.

Mr. President, President Carter's National Commission for the Review of Antitrust Laws and Procedures recommended that exceptions from free market competition "should only be made where there is compelling evidence of the unworkability of competition or a clearly paramount social purpose." In seeking an exemption for its iron-clad territorial restrictions, the soft drink industry simply has not demonstrated the existence of either of these criteria.

We have been told about all of the mom and pop bottlers and how they need some protection from the Goliaths of the industry. We have been assured that there will continue to be some kind of competition.

But the facts are, Mr. President, that this is, purely and simply, an antitrust exemption that will protect the large and provide special privilege for the conglomerates and sirup manufacturers, as well as for the small bottlers.

We must keep in mind that these iron-clad territorial restrictions completely eliminate competition between companies that bottle and distribute soft drink brands produced by the same sirup company. While restrictions like these may assist small companies trying to break into new markets, they stifle competition in concentrated markets.

The sirup manufacturing market is dominated by huge companies like the Coca-Cola Co., Pepsi Co., and Philip Morris.

The five largest firms have 77 percent of the market. Yes, indeed, they need protection from competition.

The average rate of return for these companies over the past 15 years has been an incredible 21 percent. As compared to an average return of 12 percent for all manufacturing in this same period.

In light of these facts, it is impossible to maintain that the industry's territorial restrictions have promoted vigorous interbrand competition.

At the bottling company level, the territorial restrictions have done nothing to stem the tide of increasing concentration. In the typical metropolitan area, the four largest bottling companies have 70 percent of the market. And nationally, the number of soft drink bottlers has dropped from over 4,500 in 1960 to about 1,700 today. Everyone in the industry expects this trend to continue whether or not the territorial restrictions remain in effect. The territorial restriction will only serve to prevent competition among a reduced number of bottling companies in the future.

The Senate should also take note of the fact that many larger corporations, Fortune 500 companies, such as Beatrice Foods, IC Industries, General Cinema and Warner Communication—all of these are major soft drink bottlers.

The Coca-Cola Bottling Co. of New York, a so-called independent bottling company, ranks in the Fortune 500 and owns bottling companies in Maine, Kentucky, Kansas, Nebraska, and Colorado, as well as in New York.

The Coca-Cola Co. and Pepsico, Inc. are themselves among the Nation's largest bottlers.

None of these companies needs to be protected from competition.

Mr. President, there is absolutely no justification for giving the soft drink industry an exemption from the antitrust laws. The Department of Justice has called S. 598 "special interest legislation." The Department of Justice is opposed to the exemption provided in the proposed legislation. I agree with the Department of Justice. There is no reason to exempt the soft drink industry from the same rule of reason test that applies to all other industries.

As one distinguished antitrust expert said, the exclusive territory is "a wall against efficiency" and prevents "the consumer from realizing the benefits of the cost-saving promised by the dynamic, new competition that is being shunted aside."

Mr. President, I recognize that the odds against defeat of S. 598 are very great. I believe, however, that the case against this legislation is overwhelming. I urge my colleagues to defeat this bill and leave to the courts the decision on the legality of the soft drink industry territorial restrictions under the antitrust laws as they are written.

Mr. President, I again indicate to my good friend from Mississippi and my good friend from Indiana that the debate today—the present speaker excluded—has been excellent, it has been eloquent, it has been persuasive, whether emanating from the lips of the Senator from Mississippi, the Senator from South Carolina, the Senator from Indiana, the Senator from Alabama, or any others who have spoken to this subject. I have been mightily impressed.

I have been so impressed that I repeat my offer to accept the wonderful, magnificent, excellent, superbly drafted and crafted amendment of the Senator from Mississippi; and if the Senator from Indiana would like me to accept his amendment as well, I could not be more pleased. I think they are superb amendments and that we should accept them, add them to the bill, either by voice vote or by amendment, so that we might get on to the further debate in connection with this piece of legislation.

(Mr. METZENBAUM assumed the chair.)

Mr. PRYOR. Mr. President, I believe that during the debate on this very critical piece of legislation, it would be most timely to go back just a few moments to discuss the real purpose and the intent of S. 598; because, truly, the real purpose is simply to clarify the application of the antitrust laws to territorial provisions contained in licenses to manufacture, distribute, and sell trademarked soft drink products.

I should like to take a little time this afternoon to touch on some of the highlights of the report of the Committee on the Judiciary together with minority views. It is a most enlightening document, and it succinctly clarifies the purpose and the intent of S. 598. I believe that it will help to convince our colleagues in the Senate that this legislation is sorely needed. The report follows:

S. 598 provides that the traditional territorial soft drink franchise system is lawful under the antitrust laws so long as there is substantial and effective interbrand competition. If, however, it can be established that there is not substantial and effective interbrand competition the provisions of this bill shall not apply. The committee believes that, in the absence of enactment of this legislation, the effect of the recent decision of the Federal Trade Commission in the soft drink cases will be to cause a restructuring of the industry in such a manner that the legitimate interests of many members of the industry and of the consuming public will be harmed.

This industry has been functioning for over 75 years under the clear understanding that such arrangements were legally permissible. Therefore, S. 598 includes a section which would provide protection against crippling and excessive treble damages until such time as territorial arrangements might be found unlawful because of the absence of substantial and effective interbrand competition.

The committee is mindful that the Supreme Court has stated that the balancing of complex economic and social values of the kind involved here is the proper function of the Congress and the action of the committee is consistent with this reasoning.

Historically, the Congress has been committed to fostering competition as the most effective means of protecting the public interest and, at the same time, to promoting an economic system of independent local businesses which can effectively compete with one another.

The committee has concluded that the present territorial franchise system in the soft drink bottling industry can foster effective competition. The committee recognizes that the destruction of the system is likely to depress the value of the franchised bottling plants and cause tremendous economic harm to hundreds of small bottlers who have depended on this system for many years. It is the judgment of this committee, based on the record, that the public interest will be protected by the continuation of vigorous interbrand competition among the various soft drink products. This legislation would not only preserve such competition and protect the consumer but also insure the continued opportunity for small local independent business units to survive. Thus, it has approved this legislation, which shall be applicable in those areas where substantial and effective interbrand competition exists.

Mr. President, in addition to discussing the purpose and the intention of S. 598, I think my colleagues would also be interested if we brought to the attention of the Senate a short history of the industry itself.

Once again, Mr. President, I take this opportunity to extract portions from the Committee on the Judiciary report on this legislation because I think it is most timely that all of us understand fully the history of this industry to which this legislation relates so directly:

Under the trademark licensing system which exists in the soft drink industry, the franchise company produces and sells syrups 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 delivers 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.

I was taken just a few moments ago by our distinguished colleague from South Carolina, Senator THURMOND, when he very eloquently stated that each soft drink returnable bottle is used on the average some 20 times. He said:

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.

In June, 1979, this 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.

What we are talking about, clearly, is the fact that the great majority of bottlers in this country are small business people, continuing:

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 drink 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 (e.g., Shasta) and supermarket private labels" and that even in the smaller metropolitan areas "the availability of fewer than 5 or 6 sources of soft dring supply is relatively rare."

In addition, the soft drink industry has low entry barriers and has experienced the successful entry of many new brands in recent years. Entry has been facilitated by the industry practice of "piggybacking," i.e., using the good will, production and distribution of strong local bottlers of other brands. A number of national brands, such as Dr. Pepper, Nestea, and Lipton canned iced teas, Welch's Grape Soda, Bubble-Up, Frostie Root Beer, NuGrape, and Suncrest have been able to achieve nationwide distribution in a very short time by means of piggybacking.

Mr. President, some of those I have never had the opportunity to consume or to taste, but I have just noticed the reaction of several of these very fine pages who assist us so well and who perform so many worthwhile functions. I have noticed that they do very, very directly relate to some of these brand names that I have just mentioned. I continue to read:

For example, Nestea canned ice tea was able to obtain distribution in areas serving approximately 90 percent of the population in 3 years by entering into exclusive territorial licenses with 135 established national brand bottlers. The committee is not aware of any significant evidence that in those areas of the United States where a few bottlers carry many brands of soft drinks those bottlers have engaged in shared monopoly or other types of illegal joint conduct.

Mr. President, I believe the Federal Trade Commission proceeding should be discussed at this time so that our colleagues will be aware of additional history as it relates to the soft drink industry and why this legislation is so necessary. Continuing:

On July 15, 1971, the Federal Trade Commission filed complaints against seven soft drink syrup companies, alleging that the territorial provisions contained in the trademark licensing agreements between the companies and their bottlers constitute unfair methods of competition. The complaint against Coca-Cola was tried from May 5 through June 11, 1975. The trial record in the *Coca-Cola* proceeding was subsequently incorporated as the record in the *PepsiCo* case.

In the *Coca-Cola* case the Administrative Law Judge (Judge) made 195 detailed findings of fact concerning the safe drink industry and the effects of the territorial system upon competition in the distribution and sale of soft drinks. The Judge ruled that even though territorial provisions eliminate competition among bottlers of the same soft drink product (intrabrand competition), the net effect of the arrangements was to promote competition among bottlers of different soft drink products (interbrand competition). Indeed, the Judge found that elimination of the territorial provisions "would adversely affect competition because it would lead to the business failure of many small and some large bottlers as well to the accelerated growth of large bottlers" and "the contributions to the economies of the area in which small bottlers and their employees now earn their living would certainly diminish subsantially and would disappear completely where the bottler was forced out of business."

The specific findings of the Judge revealed a highly competitive industry whose competitiveness was largely caused by the territorial provisions. The Judge found "intense competition in the sale of flavored carbonated soft drinks which stems from the fact that there is a large number of brands available to the consumer in local markets." He found a large number of brands available "in large urban areas, small towns, and rural areas alike." He also found that local and regional brands "have been strong competitors in specific markets for decades" and that private label soft drinks "since the early 1960's have become a substantial competitive force in the soft drink industry."

The Judge found "keen interbrand price competition" which compels Coca-Cola bottlers to price equal to or below their major competitors because even a few cents differential on a six-pack would adversely affect sales. In an effort to reduce prices, bottlers have emphasized returnable bottles, which are "the most economical packages sold . . . in almost every market. . . ."

In fact, not only is Coco-Cola in 16-ounce and 32-ounce returnable bottles cheaper than private labels in manv local markets, but in July 1971, when the FTC cases were started, "the average retail price of Coca-Cola in the United States in 16-ounce returnable bottles, according to Neilsen sources, was lower than the average price per ounce at which Coca-Cola in the 6½-ounce returnable bottle was sold at retail in 1900."

The Judge found that elimination of the territorial provisions was likely to produce some unfortunate changes in the industry. "Without exclusive territories the use of the returnable bottle by bottlers . . . would be substantially reduced, if not eliminated." This would happen because without territories bottlers would be uncertain whether they could recapture their large investment in returnable bottles and because the loss of the high volume accounts would adversely affect the costs of producing and delivering returnable bottles. Moreover, those bottlers which, as a result of elimination of territories, lost chain store customers "would be obliged to cut back service to small accounts or to raise prices, either of which would reduce volume."

In addition, "a substantial number of soft drink brands and flavors would be eliminated in local markets" and "even better known brands such as Seven-Up and Dr Pepper might not survive in many local markets." The Judge found that smaller companies, such as the Dr Pepper Co. and Thomas J. Lipton Co., "would be placed in economic peril as availability of their products in many markets was reduced or eliminated entirely." Finally, "hundreds of bottlers would go out of business if exclusive territories were determined to be unlawful. The number of bottlers would be reduced to a fraction of the number that would otherwise exist under the present system."

THE OPINION OF THE FEDERAL TRADE COMMISSION

Complaint counsel for the Federal Trade Commission appealed the decision of the Administrative Law Judge to the Commission. Because of numerous changes in the membership of the Commission, oral argument before the Commission was held on two different occasions, in March and July 1976. In April 1978, 2½ years later, the Commission in a two-to-one decision, reversed the Judge and held that the territorial arrangements in question were unreasonable restraints of trade.

Both the Commission and respondent soft drink companies recognize that the governing legal principles are those recently enunciated in *Continental T.V., Inc.* v. *GTE Sylvania Inc.* There the Supreme Court held that the correct standard for judging vertically imposed nonprice restrictions, such as the territorial restrictions in bottlers' contracts, is the rule of reason, rather than a rule of per se illegality. The Court observed that "[v]ertical restrictions [on *intra*brand competition] promote *intra*brand competition by allowing the manufacturer . . . to compete more effectively against other manufacturers" and that *inter*brand competition "is the primary concern of antitrust law. *Sylvania* thus established that the mere fact that a vertical restriction eliminates *intra*brand competition is the starting point, not the conclusion, for legal analysis; the question is whether the overall effect of the restraint is to promote interbrand competition.

The Committee believes that the Commission based its opinion in the *Coca-Cola* and *PepsiCo* proceedings simply on the intrabrand effects which are inherent in any territorial restriction. Thus, the effect of the Commission's decision has been to impose a rule of per se illegality which in the committee's opinion is not consistent with *Sylvania*. It is difficult to imagine territorial restrictions in any industry surviving the rationale found in the Commission opinion.

For example, the Commission acknowledges only that the soft drink market is "not devoid of interbrand competition." The Commission also observed that the large number of brands available is "no measure of the intensity of the competitive interaction among the brands." This observation is a departure from the Commission's usual emphasis upon levels of concentration. It concluded that the significant effect of piggybacking was, not that it facilitated market entry of many new products, but that it enabled too few local bottlers to control the distribution of too many brands. The committee believes that these are but a few of the instances in which substantial record evidence relating to the effects of the territorial restrictions was inadequately treated by the Commission.

The Commission opinion relies principally on the intrabrand effects of the restraint. It finds that intrabrand competition is almost completely foreclosed. It finds that interbrand competition is also restrained because bottlers may not compete outside their territories with bottlers of the other brands. However, that conclusion would apply to any situation in which a licensee is prohibited from selling outside of its territory. The Commission finds that some prices to chain stores might be reduced by elimination of the restraint. The committee believes that in reaching these findings the Commission may have failed to take into consideration certain aspects of the record. For example, the Commission appears to have paid little attention to the unanimous, uncontroverted testimony that "there is no assurance that the chain stores would pass this reduction on to the consumer" and that "chain stores are not likely to reduce their retail prices for national brands."

The Commission's decision was appealed by the companies to the U.S. Court of Appeals for the District of Columbia, where the cases are now pending. Oral argument in the *Coca-Cola* and *PepsiCo* cases before a panel of the court of appeals was held in October 1978. Whatever the court of appeals decides, it is probable that this case will continue either via petitions for certiorari to the Supreme Court or via remand to the FTC. If there is a remand to the FTC a new trial could be held with another round of briefing, oral argument and time consuming decision making. The more protracted the proceedings the more likely it is that the continuing uncertainty will cause disintegration of the existing industry structure which will be irremediable even if the franchise system is eventually vindicated. The committee believes that passage of this bill will clarify the status of bottler franchises and as a result eradicate the uncertainty caused by the current proceedings.

IMPACT OF THE RULING BY THE FEDERAL TRADE COMMISSION

The Administrative Law Judge made detailed findings regarding the consequences of elimination of the territorial provisions. These consequences would be felt by bottlers, by soft drink franchise companies, by various retail accounts, and by consumers. Elimination of territories would affect survival of returnable bottles, ease of market entry, the level of services offered to retailers, advertising and promotion, and pricing. The committee believes that the Judge correctly described the probable effects of elimination of territories.

Store door delivery has been utilized successfully by bottlers for many years to assure quality control, to handle returnable bottles and to provide other services to large and small customers. However, most large food chains distribute products from central warehouses located in large metropolitan areas. Consequently, such food chains prefer that soft drinks be delivered to their warehouses rather than to individual stores. Since large metropolitan areas are generally served by large bottlers, these large bottlers would have the most direct access to the chain warehouses and, therefore, would be most likely to acquire the warehouse accounts should the territorial system be eliminated. As a result, smaller bottlers would lose the chain store accounts, which represent a large portion of their sales and profits and would be left with the smaller, less profitable accounts.

Sales volume is a crucial factor in the financial viability of a bottling operation. If a small bottler loses his chain store accounts his sales volume will decrease significantly and his unit costs will increase sharply. In such a circumstance, the bottler would have to increase prices, or reduce service to customers, or both. However, such actions will result in the loss of more customers who are unwilling to pay higher prices or to tolerate decreased service. With the loss of these customers the bottler will be unable to remain viable. The committee believes that this scenario will be repeated hundreds of times in this industry if the decision of the Federal Trade Commission is permitted to stand.

The Administrative Law Judge found that "[i]f the chain stores converted to a system of warehouse delivery, the chain stores would eliminate returnable bottles entirely because the returnable bottle is incompatible with warehouse delivery." This incompatibility results from the facts that returnable bottles involve extra handling costs and compete vigorously in price with the private label soft drinks sold by the food chains (which are sold almost entirely in non-returnable containers). If the food chains do eliminate returnable bottles when they adopt a warehouse delivery system for soft drinks the cost of delivering returnables to other customers will increase dramatically. The committee believes that the ultimate result will be the abandonment of the route delivery system and, therefore, the demise of the returnable bottle.

The opinion of the Federal Trade Commission does not disagree with the conclusion of the Administrative Law Judge that many small bottlers would not survive if territories are eliminated. The demise of these bottlers will affect the choices of soft drinks available to consumers because many of the newer soft drink brands have succeeded in particular markets by being piggybacked by bottlers of the older franchised brands. According to the Administrative Law Judge "[t]he chains already want fewer brands and flavors and would cut out slower moving brands if they had warehouse delivery . . ." These preferences of chain stores and the obvious need for surviving bottlers to deal only in high volume brands will, the committee believes, result in fewer consumer choices among competitive soft drink brands.

If territories are eliminated, wholesale prices for non-returnable packages may fall temporarily for large volume accounts, principally chain stores. However, it is the committee's opinion that it is unlikely that chain stores will pass on these reduced prices to their customers because their past practice has been to maintain a retail price differential between their own private label soft drinks and the franchised brands. Moreover, it is clear that prices in non-chain stores, which account for 55–60 percent of sales, would rise and the cheaper returnable bottles would be more difficult to find.

Regardless of the short term effects of the elimination of territories the committee believes that within a few years the soft drink industry would become concentrated in the hands of a few, extremely large, regional soft drink bottlers. These few surviving bottlers would raise wholesale prices to all customers including food chains. Consequently, retail prices to consumers would increase. Simultaneously, the surviving bottlers will offer fewer brands in fewer types of packages to significantly fewer accounts than are presently served. The committee therefore believes that the public policy stated in the antitrust laws would be better served by retention of the existing, competitive structure of the soft drink industry under the standards of this bill.

Mr. President, I thought my colleagues would like and enjoy hearing some of these facts relative to this decision, to the need for this legislation, to the history of the bottling business, and to the purpose of S. 598.

Mr. President, at this time I yield to my very good friend, Senator DECONCINI.

Mr. DECONCINI. I thank the Senator from Arkansas for the stimulating statement he has prepared. I am going to do likewise, but I doubt that I can deliver it with the eloquence with which he has.

Mr. President, I think it is important with respect to this issue that Ernest Gellhorn's statement—he is a professor at the University of Virginia Law School—be included in the RECORD.

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

Mr. DECONCINI. I think it will have weight in convincing Members of this body if it is read into the RECORD, and knowing that the Chair is anticipating the statement with great anxiety, I will commence to read it:

The primary question raised by H.R. 3567 is simply whether territorial distribution arrangements—specifically the allocation of exclusive territories to franchised bottlers—should be allowed where substantial and effective competition exists among trademarked soft drink products. If, as I believe, the goal of antitrust is to protect and improve consumer welfare through competition, then this proposed bill is consistent with the antitrust laws.

Where substantial and effective competition exists among soft drink products, franchised bottlers would be allowed by this legislation to retain their historic territories to bottle and sell soft drinks without fear of lawsuit by the government or private claimants.

With the consumer protected by interbrand competition, this bill would assure that soft drink producers could seek the benefits of vertical integration by contract. These contract arrangements are generally designed to increase the efficiency of each firm's distribution system; in a competitive market these efficiency gains should result in lower product prices or, at least in intensification of competition among branded competing soft drinks. On the other hand, where markets lack strong and vigorous competition, this legislation would have no effect. That is, the usual rules of antitrust which measure such vertical arrangements under a rule of reason analysis would apply.

As will be described below, this proposed legislation is supported by the rationale of, and is consistent with, the Supreme Court's recent decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). It would, in other words, codify existing legal rules. Yet, as illustrated by the Federal Trade Commission's opinions in *Coca-Cola*, Dkt. No. 8855, and *PepsiCo Inc.*, Dkt. No. 8856 (FTC April 7, 1978), (the *Cola* cases), alternative interpretations apparently are possible. Thus without this legislation it may take years of litigation and numerous hearings and appeals to resolve the question. Adoption of H.R. 3567 would establish the legal standard in a way likely to protect the consumer interest.

An understanding of the role which H.R. 3567 would play in the antitrust laws requires analysis of these laws and the practices they prohibit. In serving the consumer interest, the antitrust laws seek to prevent individual firms, either acting alone or with each other, from restricting output and thereby raising price (or its equivalents) above competitive levels. Reduced to their primary elements, two practices are attacked by the antitrust laws: (1) collusion among competing sellers to raise prices directly or indirectly; and (2) individual or group efforts to exclude other sellers from competing and thereby to gain a larger share of the market.

Under this framework, collusive practices have been banned by legal prohibitions of price fixing and market division. Each involves a horizontal agreement by competing firms where the effect on rivalry has seemed clear and little justification could be offered. Thus, per se rules have been applied to make such horizontal agreements illegal without further consideration of their purpose, justification or effect. However, where the horizontal arrangement does not fit within these categories—such as a trade associations public distribution of market statistics from its members, or a cooperative program of institutional advertising by all or some firms in an industry—the courts have applied a more lenient rule of reason test in order to determine whether some justification might support the practice and whether it outweighs any adverse effects. When this latter rule of reason measure is applied, the courts usually examine the purpose of the arrangement, the market power of the participants and the effect of the arrangements on competition.

A similar approach has been followed in examining exclusionary practices by individual firms (monopolization or attempts to monopolize) or joint actions such as vertical tie-in agreements, horizontal group boycotts and similar arrangements. In situations where the exclusionary practice raises serious antitrust questions, those in or seeking a monopoly position are trading today's monopoly returns for a larger share of the market by making it unprofitable for others to compete with them. Here the law is in a state of flux as both per se and rule of reason tests are applied.

One reason for this lack of legal clarity, especially in regard to the rules governing territorial restrictions in vertical distribution arrangements, is that the courts and agencies have often tried to borrow antitrust concepts developed for collusive horizontal practices. However, they have applied these horizontal rules without careful consideration of their analytical foundations or whether they have any relevance for vertical agreements whose only possible harm could be exclusionary. On the other hand, many, perhaps almost all, vertical restraints are designed for another purpose. That is, rather than being aimed at restricting output, their likely goal is to increase firm efficiencies. For example, vertical sales restrictions required by firms without market power are generally conceded as having no possible effect on price or interfirm competition; yet the aim and result of horizontal sales restrictions are to restrict output and thereby to affect price. It is therefore not surprising that attempts to apply horizontal, per se, rules to their vertical counterparts have proved unsatisfactory and been unstable.

As will be explained below, this borrowing of horizontal case rules to vertical arrangements without qualification was first developed in the area of vertical price fixing. Subsequently, it was extended to territorial and customer allocations. In both areas the horizontal case rules are clear. Price-fixing among competing firms has been condemned on a per se basis without regard to the reasonableness of the prices, any justification for the arrangement, or other supposed beneficial effects, since 1897. See *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150

(1940). Horizontal agreements to divide markets by allocating exclusive territories, assigning customer classes, or like arrangements similarly provide participants with an opportunity to restrict output and thereby to raise prices. Therefore, beginning in 1898 courts have condemned such territorial restrictions under increasingly rigid per se rules. See *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); *United States* v. *Topco Assoc., Inc.*, 405 U.S. 596 (1972). The application of these rules to similar vertical arrangements has long been criticized and with telling effect in recent years, at least in regard to vertical territorial restraints.

The development of the law regarding restrictions on the distribution of goods and services began with early efforts by manufacturers to set prices below which retailers could not subsequently resell their products. In the still leading case of *Dr. Miles Medical Co.* v. *John O. Park & Sons, Co.*, 220 U.S. 373 (1911), the Supreme Court ruled that a manufacturer who sells medicine to a wholesaler is not entitled to restrict resale through interference with the purchaser's pricing decisions. It relied on ancient property law rules making restraints on resale invalid. Where the purpose of the arrangement is to destroy competition by fixing prices, the Court held, the restraint is "injurious to the public interest and void." In reaching this result, the Court equated vertical price-fixing with horizontal cartel behavior. Since the latter was per se illegal, it followed that resale price maintenance was similarly prohibited.

The Court's assumption that a manufacturer's interest in eliminating price competition among its resellers is based on the same motives and consequences as those by resellers in forming a cartel, however, was badly flawed. That is, unless forced to do so by his retailers, the manufacturer would seem to have no interest in assuring retailers a monopoly profit, especially since it would be done at his expense. As one leading antitrust critic has correctly observed, a "rule of per se illegality was thus created on an erroneous economic assumption." R. Bork, The Antitrust Paradox 33 (1978).

Perhaps recognizing the infirmity of its own rule, the Supreme Court shortly cut back its prohibition of vertical price fixing by creating an exception to the per se rule in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). There the Court allowed a manufacturer to control resale prices by the simple expedient of announcing his intention not to sell to price-cutters and then unilaterally refusing to sell to any retailer who failed to comply. However, the exception, which was based on the absence of any agreement essential to a Sherman Act contract, combination, or conspiracy, quickly proved illusory.

Mr. BAKER. Mr. President, at least 80 Senators have placed commonsense above the vagaries of antitrust theory and will give their support to S. 598, a bill which promotes interbrand soft drink competition and preserves the existence of hundreds of small bottlers throughout the Nation.

All too often, Federal regulatory agencies have attempted to impose their view of ideal competition. While no one can doubt the integrity of their motives, the effects have often been less than ideal. Government regulation, where it is truly needed, must reflect the realities of the market it seeks to regulate. This bill recognizes the realities of the soft drink industry and seeks to preserve the vigorous competition which characterizes it.

For over 75 years the soft drink industry in general and interbrand competition, in particular, have thrived because of the territorial license system we seek to preserve today. Elimination of this system will destroy the bottling industry as we know it. Small bottlers will not be able to compete with the largest bottlers for chainstore accounts or adapt successfully to a large-scale warehouse distribution system.

In my own State of Tennessee, the demise of small bottlers would have a disastrous effect. In 1978, bottlers employed approximately 4,400 persons and paid State and local taxes of $6 million. These bottlers bought goods and services from other firms totaling $223.6 million.

These figures are not unique to Tennessee. Virtually every other State in the Nation can demonstrate a similar adverse impact. And yet, opponents of this bill argue that it is anticompetitive; that economic efficiency will be promoted by voting against this legislation.

Over the years, only the FTC has concluded that intrabrand competition is so important that the adverse effects on interbrand competition and the survival of hundreds of small bottlers are of secondary importance. The courts and Congress disagree.

As the Judiciary Committee report notes, the administrative law judge who heard the case found that the elimination of territorial licensing would "adversely affect competition because it would lead to the business failure of many small and some large bottlers as well to the accelerated growth of large bottlers" and "the contributions to the economies of the area in which small bottlers and their employees now earn their living would certainly diminish substantially and would disappear completely were the bottler was forced out of business."

As the economic recession deepens, now is not the time to pursue a questionable antitrust philosophy which threatens to put hundreds out of their jobs. I am not convinced that 75 years of industry practice and judicial scrutiny should be put aside in deference to a split decision of the Federal Trade Commission.

I am convinced that the legislation will promote interbrand competition and small businesses throughout the country, and I urge my colleagues to support it.

● Mr. CULVER. Mr. President, I am pleased to lend my strong support to this legislation designed to preserve a unique industry practice—the manufacture, bottling, and distribution of soft drinks by local, independent companies.

The Soft Drink Interbrand Competition Act will permit local bottlers to operate under exclusive territorial licenses for their trademarked soft drink products as long as there is "substantial and effective competition" between different trademarked brands. For the last 75 years, these territorial licenses have served to create an industry organization of 2,000 plus small units which effectively compete with each other.

According to all the key indicators of competition, there is today intense competition in the soft drink industry. This competition has been a major factor in keeping consumer costs down. The cost of a 6½ ounce cola bottle in 1939 was 77/100ths of 1 cent per ounce. The cost today in the 16 ounce returnable bottle is 79/100ths of 1 cent per ounce. This is on a 2.6-percent increase over 28 years. I only wish the Nation's overall inflation rate was somewhere close to that low figure.

We must continue to be aware of the needs of the small business person in America and to protect the invaluable contribution he or she makes to our economy and our way of life. I believe this legislation is vital to the survival of the small bottler and to the maintenance of a high level of service we have come to expect from the soft drink industry.

I am very concerned that, should territorial licenses be prohibited, we would find these predominately small bottling businesses swallowed up by large, regional firms. This would have a serious adverse effect on conservation measures now making great strides in the soft drink industry. The fact is that returnable bottles cannot, as a practical matter, be distributed and collected by large regional operations. Without this bill, we could see a phase out of the use of returnables which save energy in production, are less expensive to the consumer, and greatly reduce our waste disposal burden.

Mr. President, I urge my colleagues to fully support this significant legislation.●

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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