CONGRESSIONAL RECORD
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SENATE

BILL	DATE	PAGE(S)
S. 598	May 14, 1980	S 5310-31

ACTION G.A.O. Ref. S 5326(2)(3) 5327(1)

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.

In accordance with Senate Rule XXII, a vote on the motion to invoke cloture on this measure should occur at approximately 10:15 a.m., tomorrow.

Pages S5310–S5331

SOFT DRINK INTERBRAND COMPETITION ACT

The ACTING PRESIDENT pro tempore. The clerk will state the pending business before the Senate.

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.

The Senate resumed the consideration of the bill.

The ACTING PRESIDENT pro tempore. The Senator from Ohio is recognized.

Mr. METZENBAUM. Mr. President, I am going to address myself at this point to the issue that is before the Senate, on why we find ourselves engaged in an anomalous situation.

We in the Senate are presently awaiting the tolling of the hours with respect to the cloture motion that has been filed. In the past, cloture has almost with no exception, almost with no exception, always been used to cut off a filibuster, when somebody insisted upon talking and using dilatory amendments in order to drag out the debate. That has been the normal procedure, and because of that we have had cloture made possible when 60 Members of the Senate vote to cut off debate, that it could be done, and there was a limit placed as to what could occur thereafter.

As a matter of fact, not only did we have a limit as to what could occur with reference to the subject debate, but we also provided that no nongermane amendments could be made after cloture had been invoked.

Now, what do we have? Now we have a filibuster taking place on the floor of the U.S. Senate, not by anyone attempting to drag out the debate, because I am certainly not attempting to do that.

We have a filibuster taking place to preclude this Senator from calling up a nongermane amendment. That is what it is all about.

If we call up the nongermane amendment and if they did not like it, wanted to cut off debate, I certainly would not discuss it for more than 15 minutes.

As a matter of fact, I agreed yesterday that I would be willing to call up the amendment and have a vote on it without any debate, because everybody knows what the issue is in Illinois Brick.

What is really occurring on the floor of the Senate at the moment is that the consumers of America, the people of America, are being foreclosed. People are being told that we are going to pass a carving out of the antitrust exemption for the bottlers—a well-heeled, well-financed, well-organized lobbying group. They have done a great job. They have done such a great job that they have 80 cosponsors, and I salute them for their efforts. But the fact is that an amendment then was called up and an amendment in the second degree to that amendment was called up, which precludes this Senator from calling up a nongermane amendment.

There is no question that this is a filibuster. The first thing I said when I came to the floor yesterday was, "Let's agree on the amendment pending and the amendment in the second degree. Let us accept them." I am prepared to accept them now. I am prepared to accept them at any point. But the fact is that the authors of the amendment and the amendment in the second degree do not want to do that, because part of this preconceived, premeditated effort is to keep this Senator from calling up the so-called Illinois Brick amendment.

The Illinois Brick amendment is a proconsumer amendment, and the bottlers' bill is an anticonsumer proposal. But the consumers of this country do not have as effective a lobby as does the bottlers bill. The consumers do not have anybody to be here saying, "Look, we want Illinois Brick. We want to overturn the action of the Supreme Court because it is unfair." No, there is nobody around to say that—although I will say that a lot of Senators have indicated that.

At this point, Mr. President, I ask unanimous consent to have printed in the RECORD the names of the 22 cosponsors of the Illinois Brick bill, of which one, as was pointed out yesterday, is my very distinguished friend, my good friend, the Senator from Alabama, and he has been a strong supporter of that matter.

There being no objection, the names

were ordered to be printed in the RECORD, as follows:

SENATE COSPONSORS OF ILLINOIS BRICK BILL

Kennedy, Metzenbaum, Danforth, Morgan, Stafford, Bayh, Domenici, Durkin, Culver, Riegle, Tsongas, Levin, Proxmire, Leahy, Exon, Nelson, Hart, Williams, Ribicoff, Matsunaga, Pell, and Moynihan.

Mr. METZENBAUM. Mr. President, they do not want me to call up that measure because somebody might filibuster against Illinois Brick. I am not going to filibuster against Illinois Brick. I have said that I am willing to have the amendment called up, with no debate. I am willing to agree to an hour's debate, a half-hour's debate. I am willing to call it up in the middle of the night, in the middle of the afternoon, or in the middle of the morning. I could not care less. The Members of the Senate are being precluded, by a filibuster, from having an opportunity to vote on that amendment.

It is a sad day; it is truly a sad day. I have gone back and looked into the records, and I have found an instance when Senator Mansfield was the majority leader when this procedure was used. I think it was used under Senator Johnson on some occasions. I am told—but I have not been able to confirm the fact—that it has been used under the present majority leadership.

But that is not what cloture is all about. Cloture, historically, was intended to cut off a filibuster. Cloture, in laying down a first-degree amendment and a second-degree amendment, was not intended to keep a Senator from calling up an amendment that was nongermane.

I say to my fellow Senators that today it is against me that this procedure is being used, but perhaps tomorrow it will be used against the Jesse Helmses, the Orrin Hatches, the Jake Garnses, the Strom Thurmonds, and many others who have seen fit to come to this floor and make their point, even though oftentimes they were not in the majority.

I am not saying this to be critical of any of those Senators, I want to make that very clear. I am saying that today we have a new procedure—not totally new, but not used very often—to preclude a Senator from calling up a nongermane amendment, by filing a cloture motion and immediately thereafter calling up an amendment in the first degree and an amendment in the second degree.

Mr. President, I should like to talk about what is in the amendment I want to call up, and I will discuss it at some length, to indicate how the people of this country are getting the short end of the stick, as we proceed here today.

Mr. President, let us talk about what the substantive question is. We know what the procedural question is.

We understand that a filibuster is being conducted against a Member of the Senate calling up a nongermane amendment, a proconsumer amendment, while this body moves forward, hellbent for election, to pass an anticonsumer piece of legislation.

I have repeatedly stated during the consideration of this bill, in committee and on the floor of the Senate, that the exemption from the antitrust laws provided by this legislation for the bottling industry sets an extremely dangerous precedent. If we in this body do not make absolutely clear our commitment to preserving and strengthening the antitrust laws, then I believe we can look forward to a procession of other industries coming to Congress to seek the same special treatment that this bill provides to the bottlers. It is for that reason, in order that we may indicate our true commitment to substantially strengthening our ability to make the antitrust laws work, that I have attempted to call up the Illinois Brick amendment.

The amendment I hope to call up—but at this point I am being precluded from doing so—is based on legislation that was reported last year by the Judiciary Committee, and it would reverse some of the very negative results of the Supreme Court's Illinois Brick decision.

Mr. President, the Illinois Brick decision bars indirect purchasers from bringing private damage actions against an antitrust violator. What has it done? It has turned the antitrust laws upside down.

It bars those truly injured by antitrust violations from obtaining judicial relief, while providing windfall profits to middlemen who suffer no injury. I will illustrate what I am talking about.

Assume, for a moment, that manufacturers of drugs, hardware products, household appliances—you name it; take just a few examples—agree among themselves, and there is no question that they sit down and work out an agreement, to fix the prices of their products at levels higher than those products could command in a competitive market. Other customers—the retailers and wholesalers—purchase these products at the inflated prices and mark them up for resale to the consumer. There is no question that there are overcharges, no question that it has come about by reason of a preconceived conspiracy to set prices. In this manner, most or all of the illegal overcharges are passed on to the ultimate consumer.

What happened? The Supreme Court ruled in the Illinois Brick case that these consumers are barred from recovering because they are not direct purchasers. The middlemen, on the other hand—the wholesale jobbers, the people who actually do the selling to the stores—can collect treble damages from the antitrust violator, even though they have suffered no injury. It may be a store; it may be a wholesale jobber; but it is not the ultimate consumer.

Who are these ultimate consumers deprived of remedy by the Illinois Brick decision?

They are average citizens. They are the little people of America. They are people who always get it in the neck. They are the small businessmen. It is that group of people about whom we always speak how we want to help the small businessman, how the bottlers bill is going to help the small businessman. The bottlers bill may help a small group of small businessmen, but the Illinois Brick amendment will help a large group of small businessmen.

The other people who will really be hurt are the individual consumers.

Let us not forget the taxpayer. The taxpayers whose tax dollars are wasted on illegal overcharges paid by the State and Federal agencies for goods they consume will also pay the bill.

Balance the budget, save local governments money, save the State governments money, oh, yes, do all those things in the rhetoric but when it comes to Illinois Brick, which really has to do with savings and economies of purchase, and rolling back the rising tide of inflation for governmental agencies, oh, no, we are not going to let the Illinois Brick amendment come up because it is nongermane. But the fact is the rules of the Senate provide that I am entitled to bring up this amendment at this moment. But by reason of the filibuster that is taking place, by reason of utilization of the rules of the Senate in order to preclude that which is actually contemplated by the rules of the Senate, the Illinois Brick amendment cannot get to the floor.

Testimony last year before the Judiciary Committee revealed, for example, that 90 percent of State government purchases were made through middlemen. Over the last 15 years, and I emphasize this point, States have recovered hundreds of millions of dollars in antitrust suits, most of which would have been barred had the ruling in Illinois brick been applied.

Let me read a portion of a letter from the first assistant attorney general of the antitrust section, the State of Colorado, addressed to the National Association of Attorneys General. It says:

> As we have discussed, the Illinois Brick rule has had a serious impact upon one very important segment of governmental purchasers, public schools. In a great number of treble damage class actions brought over the past several years, public school districts and boards of education were among the highest volume purchasers of the products at issue in the litigation. By deciding that indirect purchasers of price-fixed items could not sue for damages under the federal antitrust laws, the Supreme Court effectively cut off this large body of tax supported institutions from recovering overcharges for illegal collusive conduct, since schools almost always purchase indirectly.
>
> For this reason,

He continues in his letter:

> among many others, the Illinois brick legislation is absolutely crucial to States and local governmental entities.

He goes on to say in his letter:

> I have compiled a list of school districts, colleges, and other institutions of education which received substantial (over $2,000) recoveries in the recent Master Key Antitrust settlement. Not one cent of this recovery would have been possible had the Illinois Brick ruling applied to that case.

I emphasize this to my fellow Senators:

> Not one cent of this recovery would have been possible had the Illinois brick ruling applied to that case.

He carries on:

> The Master Key litigation was a Sherman Act case for price fixing by manufacturers of finish hardware and Master Key systems

which were sold, indirectly, to large numbers of governmental entities as well as private contractors. The case was settled during trial in September 1976 but the fund was not distributed until earlier this month.

He goes on then to indicate by dollar amount the school districts that will benefit and he goes on to talk about the totals: $216,000 for Alabama, $1,617,000 for California, $419,000 for Florida, $355,000 for Georgia, $832,000 for Illinois, and the list continues on, including my own State, $711,000 for my own State; for the State or Indiana, $430,617; $858,000 for Pennsylvania, a total in that one case of $15,387,546.89.

All of this would have been foreclosed under the Illinois brick decision which my amendment would overturn and which would rectify and correct.

Mr. President, I ask unanimous consent that the entire letter as well as the entire list be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE STATE OF COLORADO,
DEPARTMENT OF LAW,
May 30, 1979.

Re Illinois Brick.
Ms. LYNNE ROSS,
National Association of Attorneys General, Hall of the States, Washington, D.C.

DEAR LYNNE: As we have discussed, the Illinois Brick rule has had a serious impact upon one very important segment of governmental purchasers, public schools. In a great number of treble damage class actions brought over the past several years, public school districts and boards of education were among the hghest volume purchasers of the products at issue in the litigation. By deciding that indirect purchasers of price-fixed items could not sue for damages under the federal antitrust laws, the Supreme Court effectively cut off this large body of tax supported institutions from recovering overcharges for illegal collusive conduct, since schools almost always purchase indirectly. For this reason, among many others, the Illinois Brick legislation is absolutely crucial to states and local governmental entities.

I have compiled a list of school districts, colleges, and other institutions of education which received substantial (over $2,000) recoveries in the recent Master Key Antitrust settlement. Not one cent of this recovery would have been possible had the Illinois Brick ruling applied to that case. The Master Key litigation was a Sherman Act case for price fixing by manufacturers of finish hardware and Master Key systems which were sold, indirectly, to large numbers of governmental entities as well as private contractors. The case was settled during trial in September 1976 but the fund was not distributed until earlier this month.

As you will see from the attached compilation, many of the recoveries of even small school districts were substantial and affected every part of the nation. Also, I am providing a list of "category codes" for distribution of the fund which was provided me by counsel for the states in the case. The second page points out the varying percentages for distribution to school districts across the nation. I hope this information will be of value to you in pointing out to others the importance of the Illinois Brick legislation being considered by the Congress at the present time.

Best personal regards.

B. LAWRENCE THEIS,
First Assistant Attorney General, Antitrust Section.

STATE SCHOOL DISTRICTS AND INSTITUTIONS OF HIGHER EDUCATION RECEIVING OVER $2,000 FROM THE MASTER KEY SETTLEMENT DISTRIBUTION

ALABAMA	
Auburn University	$4,693.57
University of Alabama	4,375.74
University of Alabama in Birmingham	3,516.61
Baldwin County School District	2,558.67
Jefferson County School District	8,802.57
Birmingham City School District	8,578.63
Huntsville City School District	5,470.73
Mobile County School District	11,335.65
Montgomery County School District	6,222.82
Tuscaloosa County School District	2,109.45
ALASKA	
Anchorage School District	12,017.07
North Star Borough School District	3,080.13
ARKANSAS	
Arkansas State University	2,191.52
University of Arkansas at Fayetteville	4,061.64
University of Arkansas at Little Rock	2,637.44
Fort Smith School District	2,028.21
Little Rock School District	3,309.87
Pulaski County Special School District	4,515.24
ARIZONA	
Mesa School District No. 4	2,389.09
Scottsdale School District No. 48	3,831.96
Glendale UHS No. 205	2,724.44
Phoenix UHS No. 210	5,574.05
Scottsdale HS No. 212	3,833.81
Tucson School District No. 1	5,384.87
Tucson School District No. 101	6,493.41
Yuma UHS No. 70	3,717.89
CALIFORNIA	
Hayward Unified School District	2,082.77
Livermore Valley Joint Unified School District	2,629.91
Oakland City Unified School District	3,940.25
Berkeley City Unified School District	2,171.87
Fremont Unified School District	5,302.51
Mt. Diablo Unified School District	7,796.24
Richmond Unified School District	3,615.97
San Ramon Valley Unified School District	2,358.65
Fresno Unified School District	5,761.65
Kern County Joint Unified School District	4,478.82
Baldwin Park Unified School District	2,354.47
Charter Oak Unified School District	2,005.11
Bassett Unified School District	2,130.95
Beverly Hills Unified School District	3,173.76
Bonita Unified School District	2,052.19
Claremont Unified School District	2,023.15
Compton Unified School District	3,945.97
Covina Valley Unified School District	2,375.15
Glendale Unified School District	6,008.94
Hacienda La Puente Unified School District	4,686.06
Las Virgenes Unified School District	2,665.55
Long Beach Unified School District	3,375.06
Los Angeles Unified School District	100,254.17
Norwalk-La Miranda City Unified School District	2,420.47
Palos Verdes Peninsula Unified School District	7,132.27
Pasadena Unified School District	3,684.39
Pomona Unified School District	4,132.31
Rowland Unified School District	4,187.09
Santa Monica Unified School District	2,912.18
Torrance Unified School District	5,887.71
Whittier Union High School District	2,371.63
Wm. S. Hart Union High School District	2,648.39
Novato City Unified School District	2,040.97
Anaheim UN High School District	10,163.03
Capistrano Unified School District	3,188.2[illegible]
Cypress Elementary School District	2,746.29
Fountain Valley School District	3,699.57
Fullerton UN High School District	3,464.16
Garden Grove Unified School District	10,145.87
Huntington Beach Union School District	6,108.60
Newport-Mesa Unified School District	3,950.15
Ocean View Elementary School District	5,779.03
Orange Unified School District	7,561.94
Placentia Unified School District	4,701.90
Santa Ana Unified School District	3,595.95
Tustin Unified School District	6,298.46
Westminster Elementary School District	2,819.78
Alvard Unified School District	2,131.61
Corona-Norco Unified School District	4,140.2[illegible]
Riverside Unified School District	3,871.61
Elk Grove Unified School District	2,241.83
Folsom-Cordova Unified School District	2,949.36
Sacramento City Unified School District	11,789.07
San Juan Unified School District	6,064.60
Chaffey Union High School District	2,409.03
Ontario-Montclair Elementary School District	2,430.37
Redlands Unified School District	2,818.02
Rialto Unified School District	2,041.41
San Bernardino City Unified School District	8,417.53
Chula Vista City Elementary School District	2,016.33
Grossmont Union High School District	2,429.93
San Diego City Unified School District	16,088.58
Sweetwater Union High School District	3,091.04
San Francisco City Unified School District	8,548.01

Jefferson Union High School District	4,342.42
Laguna Salada Elementary School District	2,365.91
San Mateo City Elementary School District	2,405.51
San Francisco Unified School District	4,010.87
Lompoc Unified School District	3,626.09
Santa Barbara City Elementary & High School School District	4,233.73
Alum Rock Union Elementary School District	3,720.47
Campbell Union High School District	4,549.88
Cupertino Elementary School District	5,507.55
East Side Union High School District	4,790.78
Franklin-McKinley Elementary School District	2,100.81
Fremont Union High School District	5,112.64
Milpitas Unified School District	2,572.27
Moreland Elementary School District	2,122.81
Union Elementary School District	2,680.29
Oak Grove Elementary School District	2,553.79
Palo Alto City Unified School District	2,450.83
San Jose Unified School District	6,039.52
Santa Clara Unified School District	4,111.19
Santa Cruz City Elementary School District	2,038.55
Santa Rosa City Elementary & High School District	2,300.57
Modesto City Elementary & High School District	2,362.61
Simi Valley Unified School District	8,608.27
Oxnard Unified High School District	3,838.83
Ventura Unified School District	2,055.71
Cabrillo College	2,022.71
Cerritos College	2,635.63
El Camino College	3,792.19
Citrus College	2,068.25
Los Angeles City College	13,703.53
Foothills College	7,559.30
Grossmont College	2,425.31
Monterey Peninsula College	2,107.41
College of Marin	2,499.01
Riverside City College	3,776.35
Orange Coast College	2,126.33
Pasadena City College	3,577.91
College of San Mateo	8,140.54
Shasta College	2,873.02
Ventura College	4,302.59
Washington High School	2,070.45
South County Community College	3,964.89
Hudson Elementary School	3,337.66
Excelsior High School	2,916.14
Costa Mesa Elementary School	2,936.60
San Joaquin Elementary School	2,845.96
North Orange Community College	2,897.44
Los Rios Community College	3,580.77
Sweetwater Community College	2,097.51
Jefferson Elementary School	2,164.17

COLORADO

Colorado State University	6,044.32
University of Colorado	5,704.04
University of Colorado Medical Center	7,525.32
University of Northern Colorado	3,156.89
Northglenn—Thornton School District	3,773.22
Westminster School District	2,910.51
Cherry Creek School District	3,497.85
Littleton School District	3,485.54
Adams—Arapahoe School District	4,129.37
St. Vrain Valley School District	2,888.80
Boulder Valley School District	4,490.34
Denver County School District	13,707.69
Colorado Springs School District	6,613.03
Jefferson County School District	15,923.57
Poudre School District	2,817.37
Mesa County Valley School District	2,742.44
Pueblo School District	4,437.99

DELAWARE

Delaware Technical and Community College	4,682.00
University of Delaware	7,680.50
Caesar Rodney School District	2,905.21
Capitol School District	2,540.29
Indian River School District	2,630.54
New Castle County School District	27,836.06

FLORIDA

Brevard Community College	2,809.43
Broward Community College	2,147.31
Florida Junior College	4,385.16
Miami-Dade Comm.	4,692.35
St. Petersburg Jr. College	2,724.05
Valencia Comm. College	2,145.66
Florida International University	2,702.55
University of Florida	7,485.20
Florida State University	5,243.15
Florida Tech. University	2,638.37
University of South Florida	5,687.48
Duval County School District	12,025.47
Alachua County School District	2,442.59
Marion County School District	2,443.04
Seminole County School District	3,911.77
Escambia County School District	4,953.49
Leon County School District	2,436.69
Bay County School District	2,244.46
Okaloosa County School District	2,856.55
Volusia County School District	4,062.69
Brevard County School District	5,635.71
Orange County School District	9,243.02
Broward County School District	15,534.06
Sarasota County School District	2,753.97
Palm Beach County	8,025.42
Pinellas County School District	10,187.37
Hillsborough Co. School District	12,689.65
Dade County School District	33,958.37
Manatee County School District	2,283.83
Pasco County School District	2,690.31
Lee County School District	3,228.75
Polk County School District	6,662.90
Sarasota County School District	2,753.97

GEORGIA

Georgia State University	8,883.05
Georgia Institute of Technology	4,742.12
University of Georgia	9,618.68
Columbus College	2,152.77
Georgia Southern College	2,895.05
Valdosta State College	2,240.62
West Georgia College	2,217.23
Atlanta City Schools	14,614.35
Bibb County Schools	5,114.48
Chatham County Schools	6,353.48
Clayton County Schools	6,255.13
Cobb County Schools, Marietta	9,891.81
Dekalb County Schools	15,813.19
Dougherty County Schools	4,052.71
Douglas County Schools	2,108.54
Fulton County Schools	6,682.95
Gwinnett County Schools	5,603.87
Hall County Schools	2,167.80
Houston County Schools	2,983.09
Muscogee County Schools	6,515.00
Richmond County Schools	6,234.43

HAWAII

University of Hawaii	11,915.12
Department of Education, Honolulu District	10,804.75
Department of Education, Central District	8,764.17
Department of Education, Leeward District	8,222.91
Department of Education, Windward District	5,818.93
Department of Education, Hawaii District	4,586.14
Department of Education, Maui District	3,333.42

IDAHO

University of Idaho	2,426.92
Boise State University	2,826.74
Boise City School District	3,545.62

ILLINOIS

Belleville Area College	2,632.24
Black Hawk College Quad-Cities	2,335.20
City College of Chicago	16,251.69
College of Du Page	4,607.06
College of Lake County	2,567.18
Easten Illinois University	2,831.41
Illinois Central College	3,306.78
Illinois State University	5,833.16
Joliet Junior College	2,446.49
Moriane Valley Comm. College	2,981.21
Northeastern Illinois University	2,715.27
Oakton Comm. College	3,336.74
Rock Valley College	2,223.92
Southern Illinois Univesity at Carbondale	6,310.81
Southern Illinois Edwardsville	3,569.29
Thornton Comm. College	2,362.31
Triton College	6,612.42
University of Illinois	6,064.00
University of Illinois, Urbana, Ill.	9,573.65
Western Ill. University	4,207.02
William Rainey Harper College	4,169.64
Alton Public Schools	2,663.49
Aurora (East) Public Schools	2,127.17
Aurora (West) Public Schools	2,277.09
Champaign Public Schools	2,381.52
City of Chicago Public Schools	120,180.22
Comm. Cos (Arlington Hts.)	2,388.85
Decatur Public Schools	4,142.34
Dundee Public School	2,878.46
E. Saint Louis Public Schools	5,169.49
Elgin Public Schools	5,799.23
Elmhurst 205 Public School	2,401.33
Evanston Elementary	2,028.62
Granite City Public Schools	3,044.03
Harlem Public Schools	2,045.00
Maine TWP High Public Schools	2,820.01
Moline Public Schools	2,626.32
Naperville Comm. Unit	2,467.11
Palatine Public Schools	2,751.78
Peoria 150 Public Schools	5,412.83
Quincy Public Schools	2,156.03
Rock Island Public Schools	2,456.11
Rockford Public Schools	9,077.79
Schaumburg Public Schools	3,893.38
Springfield Public Schools	4,734.17
Thornton TWP High	2,583.03
Township HS Public Schools	2,514.56
Township HS (Mt. Prospect)	4,728.55

Valley View Comm. Unit	2,272.93
Waukegan Comm. Unit Public School	3,301.55
Wheaton Comm. Unit District 200	2,741.75
M.S.D. of Lawrence Township	2,140.58
M.S.D. of Perry Township	2,853.35
M.S.D. of Warren Township	2,367.47
M.S.D. of Washington Township	2,956.40
M.S.D. of Wayne Township	2,766.34
Indianapolis Public Schools	17,670.37
Monroe County Community, School Corp.	2,768.15
Portage Township Schools	2,208.82
South Bend Comm. School Corp.	6,673.25
Lafayette School Corp	2,032.33
Evansville Vanderburgh School Corp	6,205.00
Vigs County School Corp	4,783.53
Warrick County School Corp	2,087.69
Richmond Comm. School Corp.	2,246.56

IOWA

Area Education Agency II Ankeny IA	2,050.63
Cedar Rapid Comm. School District	4,830.31
Council Bluffs Comm. School District	2,729.81
Davenport Comm. School District	4,884.22
Des Moines Independent Comm. School District	8,163.03
Dubuque Community School District	2,783.06
Sioux City Community School District	3,506.11
Waterloo Community School District	3,371.23

INDIANA

Ball State University	7,626.00
Indiana State University	5,014.90
Indiana University at Bryan Hall	14,307.60
Indiana University Northwest	2,097.83
Indiana University—Purdue University	9,125.38
Indiana University at South Bend	2,541.13
Indiana University—Purdue University	4,015.74
Purdue University Main Campus	13,122.43
Purdue University Calumet Campus	2,989.64
Fort Wayne Community Colleges	8,716.43
East Allen County Schools	2,691.99
School Corporation Bartholomew Consolidated	2,975.61
Greater Clark County Schools	2,969.96
Muncie Community School Corp.	3,223.29
Elkhart Community School Corp.	3,013.80
New Albany-Floyd Co. Cons. Schools	2,858.55
Marion Community Schools	2,288.60
Kokomo-Center TWP Con. Schools	2,554.59
Gary Community School Corporation	8,176.54
School City of Hammond	4,050.19
Michigan City Area Schools	2,519.79
Anderson Community School Corp.	3,986.23

KANSAS

Kingman USD No. 331	2,007.67
Emporia State University	11,336.57
Coffeyville Community Junior College	3,086.12
USD No. 405	4,459.95
USD No. 259	18,340.89
Johnson County Community College	12,667.55
USD No. 345	2,425.69
University of Kansas	17,899.98
Dodge City Community Junior College	2,306.66
Barton County Community College	2,629.66
USD No. 475	2,986.70

KENTUCKY

Eastern Kentucky University	4,775.00
Moorehead State University	2,676.26
Murray State University	2,951.24
Northern Kentucky University	2,238.70
University of Kentucky	7,961.28
University of Kentucky Comm. College System	6,077.79
University of Louisville	5,761.11
Western Kentucky University	4,731.18
Christian County Schools	2,100.73
Fayette County Schools	6,917.87
Jefferson County Schools Louisville	23,910.81
K2 Kenton County Schools	2,216.61
Pike County Schools	3,227.73

LOUISIANA

Louisiana St. University	13,310.31
Louisiana Tech. University	2,551.31
Northeast Louisiana University	2,549.63
Southern Unit Agricultural Southern Branch	2,312.83
University of N.O. New Orleans	4,091.51
University of Southwestern	3,951.95
Delgado Vocational Technical College	2,897.69
Pres-Acadia Par School Board	2,082.31
Pres. Bossier Par School Board	3,404.06
Pres-Caddo Par School Board	9,072.41
Pres-Calcasieu Par School Board	6,695.29
Pres-E Baton Rouge Par School Board	13,051.02
Pres-Iberia Par School Board	2,903.05
Pres-Jefferson Par School Board	12,687.59
Pres-Lafayette Par School Board	5,188.75
Pres-Lafousche Par School Board	3,419.86
Pres-Livingston Par School Board	2,262.18
Pres-Orleans Par School Board	16,810.44
Pres-Quachita Par School Board	3,662.55
Pres-Rapids Par School Board	4,976.59
Pres-St. Bernard Par School Board	2,195.85
Pres-St. Landry Par School Board	3,736.26
Pres-St. Tammany Par School Board	3,626.05
Pres-St. Mary Par School Board	2,699.31
Pres-Trangipahoa Par School Board	2,806.19
Pres-Terrebonne Par School Board	4,069.33

MAINE

University of Maine at Orono	3,634.40
University of Maine, Portland	2,650.43

MARYLAND

Anne Arundel Community College	2,122.58
Catonsville Community College	3,113.42
Community College of Baltimore	2,930.83
Essex Community College	3,075.95
Montgomery College	4,857.48
Prince George's Community College	3,738.50
Morgan State University	2,025.23
Towson State University	4,918.97
University of Maryland	15,660.63
Allegany County Public Schools	3,656.24
Anne Arundel County Schools Superintendent Public Schools	18,254.17
Baltimore City Public Schools Superintendent	36,712.72
Superintendent, Baltimore County Public Schools	27,338.43
Carrol County Public Schools	4,874.50
Cecil County Public Schools	3,217.10
Charles County Public Schools	4,278.52
Frederick County Public Schools	5,666.17
Harford County Public Schools	8,104.63
Howard County Public Schools	6,138.37
Montgomery County Public Schools	27,175.08
Prince George's County, Public Schools	33,654.63
St. Mary's County Public Schools	2,970.50
Washington County Public Schools	5,401.48
Wicomico County Public Schools	3,168.84

MASSACHUSETTS

Nauset Regional School District	2,899.78
Downey Elementary School	2,302.90
Brockton High School	7,033.24
King Phillip Regional School District	2,258.40
Peabody Public Schools	2,586.75
Olny School	3,691.10
Lee School	3,850.12
Hart-Dean School	2,077.62
Marshall School	3,145.06

MICHIGAN

Central Michigan University	4,987.62
Eastern Michigan University	5,665.94
Ferris State College	3,096.69
Grand Valley State Colleges	2,350.42
Michigan State University	13,637.72
Northern Michigan University	2,596.37
Oakland University	3,018.76
University of Michigan	14,012.11
Wayne State University	10,453.75
Western Michigan University	6,556.54
Delta College	2,851.67
Grand Rapids Community College	2,342.94
Henry Ford Community College	5,284.70
Jackson Community College	2,028.09
Kalamazoo Valley Community College	2,023.11
Lansing Community College	5,708.65
Macomb Community College	7,803.14
C. S. Mott Community College	2,819.57
Oakland Community College	6,232.97
Schoolcraft College	2,952.05
Washtenaw Community College	2,327.04
Wayne Community College	4,866.05
Albion Public Schools	2,151.75
Ann Arbor Public Schools	4,151.83
Battle Creek Public Schools	2,151.75
Bay City Public Schools	3,377.98
Benton Harbor Area Schools	2,336.80
Birmingham City School District	2,646.82
Dearborn City School District	3,706.84
Detroit City School District	54,021.95
East Detroit City School District	2,162.96
Farmington Public School District	3,159.78
Flint City School District	8,703.10
Grand Rapids City School District	8,945.15

Grosse Pointe Public Schools	2,349.68
Highland Park Community Schools	2,035.85
Huron Valley Schools	2,517.33
Jackson Public Schools	2,602.46
Kalamazoo City School District	3,544.00
Lansing Public Schools	7,001.59
Lapeer Community Schools	2,067.33
Livonia Public Schools	6,324.33
Midland Public Schools	2,608.19
Monroe Public Schools	2,070.91
Plymouth Canton Community School	3,852.54
Pontiac City School District	5,118.60
Port Huron Area School trict	3,642.93
Portage Public School District	2,357.31
Rochester Community College	2,514.94
Roseville Community Schools	2,340.86
City of Royal Oak School District	2,737.92
Saginaw City School District	4,367.89
Southfield Public School District	2,693.80
Taylor School District	4,630.45
Traverse City School District	2,358.51
Troy Public School District	2,843.32
Utica Community Schools	6,827.74
Walled Lake Consolidated Schools	2,659.70
Warren Community Schools	6,996.58
Waterford School District	3,936.49
Wayne-Westland Community Schools	5,304.37

MINNESOTA

Minneapolis Special School District No. 1	12,107.54
Anoka Independent School District No. 4	8,104.62
Burnsville Independent School District No. 191	2,752.57
Rosemont Independent School District No. 196	2,758.41
Bloomington Independent School District No. 271	4,757.21
Edina Independent School District No. 273	2,232.88
Hopkins Independent School District No. 274	2,088.42
Osseo Independent School District No. 279	3,722.90
Robinsdale Independent School District No. 281	5,501.33
Rochester Independent School District No. 535	3,698.02
Moundsview Independent School District No. 621	3,585.30
North St. Paul-Maplewood Independent School District No. 622	2,694.43
Roseville Independent School District No. 623	2,618.77
White Bear Lake Independent School District No. 624	2,380.89
St. Paul Independent School District No. 625	9,074.44
Duluth Independent School District No. 709	4,611.99
St. Cloud Independent School District No. 742	2,884.33
South Washington Area Independent School District No. 833	2,643.15
Stillwater Independent School District No. 834	2,169.66
University of Minnesota	24,798.88

MISSISSIPPI

Alcorn State University	2,542.10
Gulf Coast Junior College District	2,048.73
Mississippi State University	2,559.47
University of Mississippi	2,488.34
University of Southern Mississippi	2,438.30
De Soto County School District	2,154.66
Jackson Separate School District	4,618.84

MISSOURI

Central Missouri State University	3,047.60
Florissant Valley Community College	2,535.02
Forest Park Community College	3,238.42
St. Louis Community College	3,308.06
Southeast Missouri State University	2,374.84
Southwest Missouri State University	3,465.81
University of Missouri at Columbia	7,491.55
University of Missouri, Kansas City	3,934.85
University of Missouri, St. Louis	3,967.59
Columbia School District 93	2,279.71
St. Joseph School District	3,030.14
North Kansas City District 74	4,052.71
R-X11 Springfield	4,930.06
C-1 Hickman Mills	2,455.18
C-2 Raytown	2,393.24
Independence School District 30	2,809.17
Kansas City School District 33	9,419.21
C-6 Fox	2,025.24
Hazelwood School District	4,517.79
R-11 Ferguson-Florissant	3,615.85
R-VI Rockwood	2,126.98
R-IX Mehlville	2,475.69
Parkway	4,992.82

MONTANA

University of Montana	2,886.52
Montana State University	3,422.49
Great Falls SD N. 1	2,152.44
Great Falls SD A	2,157.67
Billings Elementary SD	2,443.60
Billings Elementary SD	2,339.76

NEBRASKA

University of Nebraska—Lincoln	5,446.64
University of Nebraska—Omaha	3,678.98
Lincoln Public School	5,331.18

NEVADA

Clark County School District (Las Vegas)	16,698.72
Washoe County School District (Reno)	6,166.70

NEW HAMPSHIRE

University of New Hampshire	5,048.81
School Department, City of Manchester	3,283.71
School Department, City of Nashua	2,322.82

NEW JERSEY

Bergernfield Board of Education	3,198.05
Carlstadt-East Rutherford Regional Board of Education	3,099.04
Hackensack Board of Education	4,661.41
Lenape Regional High School Board of Education	5,236.47
Willingboro Board of Education	3,672.23
Bellmawr Board of Education	2,010.80
Caldwell-West Caldwell Board of Education	2,340.55
Cedar Grove Board of Education	2,344.51
West New York Board of Education	3,141.88
Hamilton Township Board of Education	4,193.62
Sayreville Board of Education	7,235.85
Butler Board of Education	2,199.32
Montville Township Board of Education	4,318.54
Lakewood Board of Education	4,427.20
Toms River Board of Education	4,552.55
Wayne Township Board of Education	11,673.52
Hillsborough Township Board of Education	2,178.95
Scotch Plains-Fanwood Board of Education	3,713.13
Union Township Board of Education	5,113.58
Rutgers State University	41,752.69
Mercer County Community College	3,297.95

NEW MEXICO

University of New Mexico—Albuquerque	6,403.00
New Mexico State University—Las Cruces	3,953.87
Albuquerque School District	15,619.48
Gallup School District	2,485.13
Las Cruces School District	2,926.23
Santa Fe School District	2,225.28

NEW YORK

Arlington Central School District	3,028.75
Auburn Enlarged City School District	2,688.46
Baldwin Public Schools	3,036.69
Bethpage Union Free School District	3,574.41
Central Islip Public Schools	3,662.99
Central Square Central Schools	2,582.50
Cheektowaga-Maryvale Union Free School District	2,672.97
Charkstown Central School District	5,734.73
Corning-Painted Post Area School District	3,539.48
Deer Park Union Free School District	3,012.73
Fayetteville-Manlius Central School District	2,285.81
City School District of Glen Cove	2,324.20
Greece Central School District	4,501.39
Hicksville Union Free School District	3,307.94
Hilton Central Schools	2,579.02
Horseheads Central School District	2,347.57
Huntington Union Free School District	3,687.02
Jericho Union Free School District	3,423.95
Lakeland Central School District of Scrub Oak	3,609.06
Liverpool Central Schools	4,828.45
Mahopac Central School District	3,606.23
Mamaroneck Union Free School District	2,153.57
Massapequa Union Free School District	5,632.45
Mineola Union Free School District	2,280.94
Monroe-Woodbury Central School District	3,495.25
Monticello Central School District	2,096.15
Northport-East Northport Union Free School District	5,323.48
Pittsford Central School	6,484.86
Plainedge Union Free School District	2,292.10
Rochester City School District	8,906.18
Rush-Henrietta Central School District	3,871.04
Sewanhaka Central High School District	4,552.50
South Huntington Union Free School District	3,997.85
Sweet Home Central School District	3,142.84
Three Village Central School District	6,098.14

Uniondale Union Free School District	2,706.20
Utica City School District	3,661.61
Vestal Central School	2,621.52
Wantagh Union Free School District	2,339.81
Watertown City School District	2,630.56
West Seneca Central School District	2,160.42
State University Construction Fund	347,225.77

NORTH CAROLINA

East Carolina University—Greenville	2,376.12
North Carolina State—Raleigh	3,520.11
University of North Carolina Chapel Hill	3,961.66
Central Piedmont Community College	5,553.56
Alamance County	2,118.44
Buncombe County	3,874.14
Burke County	2,206.14
Caldwell County	2,379.46
Catawba County	2,081.45
Cumberland County	5,750.70
Davidson County	2,642.55
Durham County	2,715.26
Forsyth County	7,050.21
Gaston County	5,603.33
Guilford County	4,134.52
Greensboro County	4,311.99
Johnston County	2,451.22
Mecklenburg County	12,586.30
New Hanover County	3,352.42
Onslow County	2,497.46
Randolph County	2,256.53
Robeson County	2,130.24
Rowan County	2,332.11
Wake County	8,849.44
Wayne County	2,282.84
Wilson County	2,121.63

NORTH DAKOTA

University of North Dakota	3,028.14
North Dakota State University	2,438.76
Bismarck School District	3,908.60
Fargo School District	3,716.93
Grand Forks School District	3,809.63
Minot School District	3,485.86

OHIO

Akron City School District	9,524.57
Austintown Schools	2,506.79
Bedford School District	2,547.35
Berea City School District	7,291.69
Boardman School District	2,684.31
Brecksville-Broadview	2,075.16
Canton Board of Education	3,275.19
Cincinnati Board of Education	19,205.71
Cleveland Board of Education	25,598.40
Columbus School District	24,605.08
Cuyahoga Falls Board of Education	2,895.22
Dayton Public Schools	14,197.45
Hamilton City School District	3,770.00
Lima City Board of Education	2,951.16
Lorain City School District	7,032.91
Mad River Township School District	2,474.75
Marietta Board of Education	2,231.68
Marion City Schools	2,315.77
North Olmsted City Board of Education	2,361.31
Northwest Local Board (Cincinnati)	3,229.84
Shaker Heights Board of Education	4,002.92
South Euclid-Lyndhurst	2,784.16
Sylvania Board of Education	2,081.78
Washington Local Schools	3,124.00
Wayne Board of Education	2,036.75
West Clermont School District	2,098.83
Willoughby-Eastlake City	4,258.26
Worthington City Schools	2,346.01
University of Akron	8,101.44
Bowling Green University	18,892.07
University of Cincinnati	20,979.97
Cleveland State University	15,593.32
Kent State University	20,253.90
Miami University	19,162.78
Ohio University	22,587.96
Ohio State University	50,962.31
University of Toledo	7,253.28
Wright State University	3,209.66
Youngstown State University	4,760.29
Cuyahoga C.C.D	8,456.08
Avon Lake Board of Education	2,468.95

OKLAHOMA

Central State University	2,602.78
Oklahoma State University	4,308.87
University of Oklahoma	4,080.67
Lawton School District	3,421.62
Moore School District	2,185.34
Midwest City School District	3,349.09
Oklahoma City School District	8,952.77
Putnam City School District	3,662.47
Tulsa City School District	11,472.76

OREGON

Portland Community College	2,731.70
Clackamas County School District 12	2,718.20
Lane County School District	4,132.40
Marion County School District 24 J	4,392.71
Multnomah County School District 1	11,959.18
Washington County School District 48	4,070.54

PENNSYLVANIA

Bloomsburg State College	2,934.86
California State College	2,541.54
Clarion State College	2,590.27
Edinboro State College	3,466.00
Indiana University of Pennsylvania	5,473.44
Kutztown State College	2,710.38
Millersville State College	3,080.56
Shippensburg State College	2,835.42
Slippery Rock State College	3,125.85
West Chester State College	4,575.56
Pennsylvania State University	33,583.47
Temple University	17,204.50
University of Pittsburgh	17,204.00
Bucks County Community College	3,394.63
Community College of Allegheny	7,875.18
Community College of Philadelphia	5,279.00
Community College of Delaware County	2,395.34
Harrisburgh Area Community College	2,285.07
Montgomery County Community College	3,063.34
Northampton County Area Community College	2,117.21
Allegheny County Schools	13,080.71
Pennsylvania Hills School District	2,914.67
Armstrong School District	2,459.79
Reading School District	3,256.60
Altoona Area School District	2,933.03
Bensalem Township School District	2,128.32
Centennial School District	2,757.61
Central Bucks School District	3,001.11
Council Rock School District	2,293.03
Neshaminy School District	2,645.92
Pennsburg School District	2,878.72
Butler Area School District	2,801.46
West Chester Area School District	2,741.80
West Shore School District	2,205.32
Central Dauphin School District	2,767.04
Harrisburg City School District	2,474.58
Chester-Upland School District	2,475.09
Upper Darby School District	2,493.19
Erie City School District	3,849.43
Connellsville Area School District	2,044.17
Chambersburg Area School District	2,323.37
Scranton City School District	3,010.29
Lancaster School District	2,579.12
Allentown City School District	3,906.29
Hazelton Area School District	2,638.27
Wilkes Barre Area School District	2,553.11
Williamport Area School District	2,238.21
Mifflin County School District	2,157.13
Abington School District	2,128.57
North Penn School District	2,598.50
Bethlehem Area School District	3,622.24
Easton Area School District	2,036.52
Philadelphia City School District	62,321.36
Warren County School District	2,331.02
Hempfield Area School District	2,576.06
Bristol Township School District	2,713.49

RHODE ISLAND

Rhode Island College	2,852.70
Rhode Island Junior College	3,206.19
Pawtucket	2,366.7[illegible]
Cranston	2,896.8[illegible]
East Providence	2,090.28
University of Rhode Island	4,391.92
Providence	4,439.99
Warwick	3,900.39

SOUTH CAROLINA

Clemson University	2,689.18
University of South Carolina	5,365.04
Aiken School District	3,373.96
Berkeley County Schools	3,236.15
Charleston County Schools	7,202.39
Florence School District	2,199.55
Greenville County Schools	4,829.78
Horry County	2,874.66
Richland School District No. 1	4,760.88
York School District No. 3	2,057.39

SOUTH DAKOTA

Sioux Falls School District	4,445.68
Rapid City School District	3,483.02

TENNESSEE

East Tennessee State University	2,517.19
Memphis State University	5,362.61
Middle Tennessee State University	2,613.36
University of Tennessee—Knoxville	7,685.20
Blount County School District	2,062.02
Davidson County School District	14,231.23
Hamilton County School District	4,059.40
Knox County School District	5,245.26
Montgomery County School District	2,907.65
Rutherford County School District	2,414.45
Shelby County School District	4,518.48
Sullivan County School District	3,613.78
Summer County	3,426.52
Chattanooga Schools	5,512.59
Knoxville Schools	5,780.64
Memphis Schools	22,428.48

TEXAS

Killeen ISD	2,755.31
Harlandale ISD	2,975.87
Edgewood ISD	3,264.79
San Antonio ISD	10,784.84
North East ISD	5,595.19
Northside ISD	5,060.56
Brownsville ISD	3,925.91

Plano ISD	2,912.34
Carrollton—Farmes Br	2,077.42
Dallas ISD	22,701.90
Garland ISD	4,880.61
Grand Prairie ISD	2,281.96
Irving ISD	4,111.63
Mesquite ISD	3,337.07
Richardson ISD	6,219.61
Ector County ISD	3,929.63
El Paso ISD	10,267.34
Ysleta ISD	7,146.55
Fort Bend ISD	2,202.61
Clear Creek ISD	2,785.30
Aldine ISD	5,383.01
Cypress-Fairbanks ISD	2,487.99
North Forest ISD	2,957.98
Goose Creek ISD	2,508.30
Houston ISD	34,226.65
Pasadena ISD	6,108.21
Spring Branch ISD	6,630.92
McAllen ISD	2,508.30
Port Arthur ISD	2,158.64
Lubbock ISD	5,537.63
Waco ISD	2,625.47
Midland ISD	2,659.93
Conroe ISD	2,542.94
Corpus Christi ISD	6,734.49
Amarillo ISD	4,439.12
Tyler ISD	2,709.85
Arlington ISD	4,886.01
Birdville ISD	2,606.65
ort Worth ISD	12,071.12
urst-Euless-Bedford ISD	2,872.48
Abilene ISD	3,057.09
San Angelo ISD	2,498.05
Austin ISD	9,840.01
Victoria ISD	2,166.28
Laredo ISD	3,691.38
Wichita Falls ISD	2,638.32

UTAH

University of Utah	7,437.09
Utah State University	3,265.99
Weber State College	3,025.44
Utah Technical College	2,236.98
Davis School District	8,004.99
Granite School District	13,294.15
Jordan School District	8,632.08
Nebo School District	2,486.54
Weber School District	4,347.98
Salt Lake City School District	5,401.71
Ogden School District	2,644.91
Provo School District	2,056.15

VERMONT

University of Vermont	3,754.00

VIRGINIA

eorge Mason University	2,192.28
ld Dominion University	3,876.98
University of Virginia	5,199.87
Virginia Commonwealth University	4,368.58
Virginia Polytechnic	4,862.93
North Virginia Community College	6,783.28
Tidewater Community College	2,973.15
Arlington Schools	3,114.08
Augusta Schools	2,067.83
Chesterfield Schools	5,850.58
Fairfax Schools	23,024.93
Hanover Schools	2,038.21
Henrico Schools	6,213.80
Henry Schools	2,290.29
Loudoun Schools	2,557.65
Pitsylvania Schools	2,646.16
Prince William Schools	2,915.17
Roanoke Schools	2,917.19
Tazewell Schools	2,022.02
Alexandria Schools	2,210.99
Chesapeake Schools	4,830.83
Hampton Schools	4,847.02
Lynchburg Schools	2,059.92
Newport News Schools	5,210.25
Norfolk Schools	7,682.15
Portsmouth Schools	3,722.39
Richmond Schools	6,174.79
Roanoke Schools	3,180.87
Virginia Beach Schools	10,221.95

WASHINGTON

Auburn School District 408	2,172.93
Bellevue School District 405	5,766.47
Central Valley School District 356	2,910.40
Clover Park School District 400	3,697.45
Edmonds School District 15	5,968.99
Everett School District 2	3,100.47
Evergreen School District 205	2,632.59
Federal Way School District 210	4,086.34
Highline School District 401	5,263.33
Kennewick School District 17	2,565.52
Kent School District 415	4,226.30
Lake Washington School District 414	4,583.38
Longview School District 122	2,134.49
North Thurston School District 3	2,121.24
Northshore School District 417	3,381.73
Puyallup School District 3	3,065.48
Renton School District 403	3,745.17
Richland School District 400	2,259.35
Seattle School District 1	15,620.33
Shoreline School District 412	3,127.25
South Kitsap School District 402	2,063.18
Spokane School District 81	8,161.01
Tacoma School District 10	8,347.10
Vancouver School District 37	4,468.06
Yakima School District 7	3,091.46
State of Washington RE Institutions of Higher Education	54,255.22

WEST VIRGINIA

West Virginia University	5,414.09
Marshall University	2,824.91
Cabell County Schools	2,936.71
Kanawha County Schools	6,824.93
Mercer County Schools	2,173.03
Raleigh County Schools	2,589.32

WISCONSIN

University of Wisconsin—Madison	24,307.87
University of Wisconsin—Eau Claire	2,677.48
University of Wisconsin—La-Crosse	2,879.96
University of Wisconsin—Oshkosh	4,998.30
University of Wisconsin—Green Bay	2,606.52
University of Wisconsin—Menomonie	3,333.39
University of Wisconsin—Milwaukee	8,329.14
University of Wisconsin—Kenosha	2,664.17
University of Wisconsin—Platteville	3,185.30
University of Wisconsin—River Falls	2,986.24
University of Wisconsin—Stevens Point	4,500.45
University of Wisconsin—Superior	2,216.96
University of Wisconsin—Whitewater	4,867.75
Appleton Joint School District	16,184.77
Ashwaubenon Public Schools	3,791.22
Cudahy Public Schools	2,653.53
Eau Claire Board of Education	6,163.91
Elmbrook Schools (Joint Common School District No. 21)	18,109.07
D.C. Everest Area Schools (Joint School District No. 1)	4,076.90
Kenosha Unified School District No. 1	10,392.74
Marshfield Public Schools	2,588.78
Board of Education (Joint School District No. 1)	2,699.75
Board of School Directors-Milwaukee	40,253.39
Oshkosh Area Public Schools	8,592.61
Racine Unified School District No. 1	14,796.95
Joint Union High School District No. 1	2,074.82
West Allis Schools	9,248.24
Monona Grove Public Schools	2,284.88
Grafton Public Schools	2,006.47
Janesville Public Schools	14,046.05
Kiel Area Schools	2,373.27
Muskego-Norway Schools	2,862.64
Neenah Joint School District	5,135.82
Plymouth Joint School District	3,351.35
Verona Area School District	2,179.86
School District of Wausau	3,058.96
Area Vocational Technical & Adult Education District, Eau Claire	2,119.13
North Central Technical Institute	3,189.16
Waukesha County Technical Institute	3,980.63

WYOMING

University of Wyoming	2,967.81
Laramie School District 1	2,954.35
Natrona School District 1	3,105.07

STATE TOTALS MASTER KEY ANTITRUST LITIGATION SETTLEMENT DISTRIBUTION

Alabama	$216,380.41
Alaska	42,622.80
Arkansas	102,699.73
Arizona	149,500.68
California	1,617,080.60
Colorado	188,167.06
Connecticut	248,391.79
Delaware	80,146.88
Florida	419,533.34
Georgia	355,499.60
Hawaii	66,564.92
Idaho	50,352.25
Illinois	832,977.86
Indiana	430,617.79
Iowa	194,063.94
Kansas	157,796.12
Kentucky	230,405.74
Louisiana	258,441.63
Maine	61,007.95
Maryland	336,519.34
Massachusetts	372,329.03
Michigan	792,690.03
Minnesota	371,619.80
Mississippi	138,435.45
Missouri	296,098.62
Montana	52,613.44
Nebraska	101,518.57
Nevada	47,071.36
New Hampshire	50,839.96
New Jersey	427,839.75
New Mexico	87,580.75
New York	1,724,168.90
North Carolina	315,621.81
North Dakota	56,352.57
Ohio	711,360.88
Oklahoma	154,012.68
Oregon	153,968.36
Pennsylvania	858,235.11
Rhode Island	60,062.16
South Carolina	147,997.59
South Dakota	49,849.84
Tennessee	273,575.34
Texas	760,250.06
Utah	115,631.41
Vermont	37,154.54
Virginia	317,232.69
Washington	328,819.52
West Virginia	101,177.55
Wisconsin	431,031.52
Wyoming	33,637.17
Grand total	15,387,546.89

(Mr. HUDDLESTON assumed the chair.)

Mr. METZENBAUM. Mr. President, it it absurd that average citizens must bear the cost of antitrust violation while middlemen are permitted to reap the benefits of treble damage antitrust awards, and it is also absurd that a filibuster is being conducted against this proconsumer amendment to keep it from being called up while the anticonsumer bill is pending on the floor of the Senate.

Who owns the Senate? Whose Senate is this? Do the people not have an opportunity to have their amendments called up and only special interests have an opportunity to be heard? I hope not.

The worst part about this particular issue is that one of the Members of the Senate for whom I have the highest respect, the distinguished Senator from Indiana, finds himself in that very difficult position of being both the author of the legislation as well as a cosponsor of the Illinois Brick amendment.

And the concern he expressed yesterday was that there might be a filibuster and/or if Illinois Brick were to be attached to the bottlers bill, it might cause it to be defeated.

I do not know if that is so. It might gain more strength. I think Illinois Brick could only be attached if we had a majority on the floor of the Senate, and I do not see why it would be defeated unless there might be someone else who then thinks he would filibuster against Illinois Brick. But they are using a cloture motion to cut off this amendment from being called up and if that were the case, then why not use a cloture motion to cut off a filibuster against Illinois Brick?

What would Illinois Brick do? First, it would partially, and I emphasize "partially," overturn Illinois Brick by permitting Federal and State governments to sue for damages under the antitrust laws for themselves and on behalf of citizens who are indirect purchasers.

Second, it would modify the Supreme Court's ruling in the Hanover shoe case, allowing defendants in antitrust cases to raise the pass-on defense, thereby protecting themselves from duplicative recovery.

It would also modify the rule announced in government of India against Pfizer, Inc. to limit recoveries by foreign governments to no more than actual damages, as opposed to treble damages, under U.S. law.

It would permit the Federal courts to determine the amount of plaintiffs' attorney's fees that can be recovered in class action cases in Government suits.

It would permit the courts to award attorney's fees to prevailing defendants in cases that plaintiffs have brought in bad faith or vexatiously.

Finally, the amendment would be applicable to all pending cases, with the exception that the pass-on defense would not be permitted in direct-purchaser cases pending at the time of the enactment.

Let me emphasize. This amendment is a half-way measure. It make some compromises. It takes care of certain other problems that business interests had concerns about. It corrects only some of the many inequities created by the Illinois Brick decision, but at least it is a major step in the right direction and it would permit the States through their State attorneys general to bring an action on behalf of the State and on behalf of the State itself and on behalf of citizens who are indirect purchasers.

Let me tell Senators some things it does not do. The amendment does not, for example, permit consumers to sue antitrust violators on their own behalf. It should, but it does not in an effort to compromise the issue. It does not permit small businessmen to sue on their own behalf. It should, but it does not in an effort to compromise the issue.

It permits only Federal and State antitrust authorities to act and authorizes them to bring only two kinds of suits: suits on behalf of citizens who are victimized by antitrust violations and suits on their own behalf when they themselves are victims of antitrust violations.

It is estimated that there are $0.5 billion in the claims currently pending in State and Federal proprietary suits, $0.5 billion in overcharges, but they cannot be brought with any real efficacy by reason of Illinois Brick. As a matter of fact, I cannot tell you how many more millions or billions of dollars in claims are at stake in State parens suits.

It is beyond me how responsible spokesmen for the business community, the Business Round Table, to be precise, can oppose a mild measure like this one.

I remember when the Business Round Table was talking about providing a link between Government and the business community. I remember when they said there needed to be more communication, that we have to work together for the general good.

I remember when the Business Round Table was moving in a direction that some of us felt would indicate that they would be concerned about the total good, about the total welfare of the Nation, that they would not be just another U.S. Chamber of Commerce or National Association of Manufacturers.

Well, it did not take very long. The Business Round Table continued to create and to add to its muscle, and as it added to its muscle it turned its back on the consumers and the public, on the States and the local governmental agencies.

They talk about balancing the budget at Business Round Table meetings. They talk about cutting down governmental spending at the Business Round Table meetings. They bring in great speakers, and they get people who are specialists about how we have to cut back on the public dollar, Federal, State, and local. They have some of the finest orators on the subject.

But Illinois Brick would make it possible to do something about it, and the Business Round Table is opposing that. They do not really care about the fairness and the equity of a doctrine that precludes suits being brought against corporations that have willingly engaged in price-fixing.

They ought to be in the forefront of this legislation supporting Illinois Brick. But, no, when it comes to helping the school districts and the counties and the State governments, and making those who have willfully engaged in overcharging conspiracies pay the piper, then they use all of their muscle to defeat the legislation, and that is what we find present in this situation.

This is a mild amendment that I would propose. It is an amendment that has a host of supporters:

The Amalgamated Clothing and Textile Workers Union; the American Association of State Highway and Transportation Officials; American Coalition of Citizens with Disabilities; the American Federation of State, County and Municipal Employees; the Arizona Public Service Co.; the Associated Retail Bakers of America; Citizens for Class Action Lawsuits; Common Cause; the Computer and Communications Industry Association; Congress Watch; the Consumer Federation of America; the Cooperative League of the U.S.A.; the Disability Rights Center; the Disabled American Veterans; the Independent Bankers Association; the International Association of Machinists and Aerospace Workers; the International Ladies Garment Workers Union; MCI Communications Corp.; the National Association of Attorneys General; the National Association of Counties; the National Association of Homebuilders; the National Association of State Purchasing Officials; the National Conference of State Legislatures; the National Consumers League; the National Council of Senior Citizens; the National Farmers Union; the National Governors Association; the National Homeowners Association; the National Institute of Governmental Purchasing, Inc.; the National League of Cities; the National Retired Teachers Association; the American Association of Retired Persons; the National World Electric Cooperative Association; the Oil, Chemical, and Atomic Workers International Union; the Paralyzed Veterans of America; the Public Interest Economic Center; the United Auto Workers; the United Mine Workers of America; the United Steelworkers of America; the White House; and the Women's Lobby.

That is a pretty impressive list of people and groups that support the Illinois Brick amendment. But, no, we cannot bring it up. It is nongermane. The rules say, Senator, that you can bring up a nongermane amendment prior to invoking cloture. But, no, you cannot do that if there is a pending amendment in the first degree and an amendment to that in the second degree.

Yesterday I stood on the floor of the Senate and said "Let us adopt that amendment in the first and second degree. Let us adopt either one of the amendments, the first degree amendment or the second degree amendment or both of them." There is no controversy about those amendments. They are good amendments. The authors do not want to adopt those amendments, and they do not want to adopt them because they know if they do then I can call up the Illinois Brick amendment prior to cloture being invoked. That is an absolutely unbelievable situation, a filibuster being conducted under the cloak of cloture. But it is just exactly the question of man bites dog, it is the opposite. Normally you use cloture to cut off debate. They are using cloture to keep a Member of the Senate from doing that which he has a right to do under the rules of this body.

I would say this amendment should be called up, would be called up, and will be called up if the author of the first degree amendment, the author of the second degree amendment, see fit to accept and approve their amendments. Their amendments have been on the floor for better than 24 hours, and nobody is opposed to them. Why are we not accepting them? We are not accepting them because the business community does not want Illinois Brick to be brought up, and, unfortunately, there are people in the Senate who are willing to go along with that point of view. Why do they not go along with the rights of the consumers of this country and the attorneys general and the whole list of groups who feel that Illinois Brick ought to have its day in court on the floor of the Senate?

It is a recognized fact that we have been trying to bring Illinois Brick to the floor of the Senate for weeks and months. But, no, we cannot do that. There might be a filibuster.

Well, let there be a filibuster and let us vote cloture and bring it to a head. I will not filibuster against it, and I am not prepared to filibuster this measure or other measures, but the fact is that the rules are being turned around so that a Member cannot bring up an amendment that he has a right to bring up.

I am being blocked from doing so. This amendment would not expose business to spurious time-consuming litigation generated by unscrupulous lawyers and professional troublemakers. No, not on your life could that occur because under this amendment only State and Federal antitrust authorities would be able to bring suits on behalf of indirect purchasers.

No private lawyer can set out to enrich himself at the expense of business.

I want to make it clear that I do not actually think that that is right. I am not worried about the lawyers making a fee. I am worrying about the corporations who engage in conspiracies to overcharge the American public by their being brought into court.

As a matter of fact, I feel very strongly that the amendment that I want to bring up does not go far enough. But, in an effort to compromise the issue, we accepted the fact that only the attorneys general would have the right to sue.

There is not any logical reason why those who are hurt, the consumers, why the business groups that are hurt should not have a right to see themselves and that their lawyers should be compensated. I have no quarrel to find with that.

Mr. President, State and Federal antitrust authorities have no incentive to waste their time and resources on spurious suits. They will only bring suits that have merit if this amendment were to be adopted. They will bring those suits in order to redress the harm done the individual consumers and, maybe even more importantly, to deter future antitrust violations. No deterrent effect arises from filing nonmeritorious, spurious suits which are continually thrown out of court.

Mr. President, we in Congress have a responsibility, we have a responsibility that we are avoiding, to the American consumer to reverse the effects of Illinois Brick. If we do not act now on this vital issue we inevitably stand to lose face with the American people—and rightfully so.

There is no secret about the fact that this Congress has been charged by many as being the most anticonsumer Congress in many a year. This is a Congress that has not been willing to adopt a consumer protection advocacy agency. This is a Congress that has decimated the Federal Trade Commission, the only major agency that concerns itself with consumer rights. This is a Congress that would have difficulty in finding a single piece of legislation of major moment that is proconsumer.

We have treated the American consumer shabbily; and we are treating the American consumer even more shabbily today. We are involved in a filibuster against a proconsumer amendment so that we can enact a piece of legislation that is anticonsumer, that provides an exemption from the antitrust law.

This legislation cannot be viewed in isolation. Unfortunately, over the past several years, Congress—and the administration—have demonstrated the low priority they place on the protection of consumer rights. Time and again consumer interests have been sacrificed for the benefits of one or another more politically expendient cause.

I cannot think of any logical reason under the Sun why we should be passing a piece of legislation that says that the Coca-Cola Distributing Co. of Mansfield, Ohio, cannot sell its product for 10 cents or 20 cents or 50 cents a case less in Cleveland, Ohio. That is plain absurd.

We want to pass that legislation, provide an exemption from the antitrust laws while a matter is pending in the Federal courts, and yet we are not willing even to permit to come to the floor a measure which would be proconsumer, which would make it possible to bring actions under the law by the Attorney General of the United States.

Consumers suffered when Congress refused to send a paltry $15 million to establish a consumer protection agency. That agency would have saved hundreds of millions of dollars every year for the people in this country. No, in the interest of economy, we had to save that $15 million and not enact a consumer protection agency.

Consumers suffered when the President decided that the only possible way to conserve energy was to lift price controls and price individual Americans out of the energy market, deregulate natural gas prices, deregulate jet fuel, deregulate oil—deregulate anything that makes the oil companies richer and the consumers poorer. That is the name of the game.

As a matter of fact, Mr. President, we had a great victory this week, although the battle is not over, because the President seems determined to impose an added 10-cents-a-gallon tax on gasoline in this country. He talks about it conserving energy. Well, if you look at the facts, you will find that you might get a little bit of conservation for a whole lot of inflation.

Even his own best advisers say that it will add three-quarters of a point to 1 percent on the inflation rate. That does not seem to bother the President and his advisers. It did not bother them when they told us if we deregulated the price of natural gas, we had so much more gas and it really would not cost much more than about an 8-percent increase.

Well, I can only say to my friends who voted with the President: Look at the record. You will see that there is not any more natural gas, but there is an awful lot more price.

There is more natural gas in the interstate market coming from those oil companies that were withholding intrastate gas from the interstate market. Charles Curtis, the head of the Federal Energy Regulatory Commission, recently testified that at the end of 1979 there was not any more natural gas.

Then, the President told us we had to deregulate the price of oil. I heard him on the tube tell us about the fact that we had so much inflation that has to do with the OPEC oil prices. Well, I can only suggest to the President that he go back and look at the facts and that he not just gloss over the reality of a situation, because it is the oil companies that have really joined and used the OPEC price increases to enrich their own pockets. Unbelievable price increases.

Where did it come from? It came from decisions of the Department of Energy, so many of which were to help the oil companies in increasing their prices. And that was before the impact of the President's order decontrolling the price of oil.

I read the other day that, I think it was Exxon that said—and decontrol had only been in effect a few months—that it was adding something like $30 million a month to their income by reason of the phased decontrol which has not yet taken full effect.

Mr. President, it is said, it is very sad to see this administration, day in and day out, favoring oil companies, favoring the business community that does not need any help.

I have no problem about helping the business community when they are in trouble. The auto industry is in trouble at the moment. I think we ought to provide some help for them. I think we ought to back off some of those imports that are coming in. I think we ought to give the industry a chance to rectify its errors of the past. But I am said to say that I am not in agreement with the administration here, either, because the administration is not willing to do that. I am concerned that if they do not, the auto industry, much of it, will no longer be able to hold its head above water.

Mr. President, I varied from the subject that is before us today, and I am well aware of that.

Mr. BAYH. Mr. President, will the Senator permit me to interrupt and yield to me to make a comment, without his losing his right to the floor or without it being counted as a second speech for either one of us, on the subject that he has just covered? Since he is returning to the subject matter of his previous speech, I wanted to have the opportunity to congratulate him and comment on the merit of his position.

Mr. METZENBAUM. Mr. President, I have no objection. How much time does the Senator desire?

Mr. BAYH. Just a moment or two.

Mr. METZENBAUM. I have no objection to that.

Mr. BAYH. I will say to my friend from Ohio I could not agree more with the position he has taken on the 10 cent tax. It escapes my rudimentary knowledge of mathematics and economics how one fights inflation by adding 10 cents to the cost of something as basic as gasoline.

In reviewing this with large numbers of my constituents, and my constituents are located very much the same as the constituents of the Senator from Ohio, where many of them have to drive significant distances to get back and forth to work, this imposes a significant burden upon them. I salute him for his concern.

He and I have been shoulder to shoulder in our efforts to try to keep the OPEC pricing mechanism from running the price of our crude oil and our natural gas through the roof. In fact, as I recall the last time the Senator from Ohio was confronted with this particular kind of a parliamentary situation he was doing battle with the Senator from Indiana against those who were trying to keep us from having some influence in keeping the price regulations on the price of natural gas.

Mr. METZENBAUM. The Senator from Indiana is not 10 percent correct but 110 percent correct. Nobody was more helpful in that battle than was the Senator from Indiana. I am very grateful.

Mr. BAYH. I do not want to interrupt the Senator further, but I want to say that I concur with him wholeheartedly. This is a most unfortunate policy. Hopefully, the President might reassess the situation when confronted with this court order. I think we have to fight inflation and you do not fight that by increasing the price of gasoline 10 cents a gallon. I thank my colleague for yielding.

Mr. METZENBAUM. Mr. President, I could speak much longer on this subject. I guess I can speak for hours because I feel so deeply about it. Day in and day out I see what is happening here in the Congress. I see one House battling with the other House as to which one is going to do a better job of dismantling the Federal Trade Commission. In the name of removing the heavy hand of Federal regulators, we will turn the clock backwards. We just do not have a strong consumer agency in the Government any more. Speaking of the one that is there trying to do a job, nobody paid much attention to it until it started to be effective. As soon as that occurred, they descended upon the Congress.

I do not care whether it was the insurance industry, the television industry, Sunkist oranges, any one of a host of others, everybody had a special exemption that they wanted under the Federal Trade Commission regulations.

Most of them got what they wanted, though some did not get it entirely. They will be back. They will keep the lobbyists busy to help with their business PAC's. They will move along. They will not do badly next week or next year, whatever the case may be.

Time and again, Mr. President, this Nation's policymakers have chosen to ignore the ordinary people of this country at a time when just to get by they need all the help they can possibly get.

Mr. President, we must meet the needs of average Americans instead of continuing to cater to the wealthy and the powerful who come here seeking and too often receiving special treatment at the direct expense of the average American.

Mr. President, I believe that failure by the Congress to strengthen the antitrust laws would and will send a very disturbing message to the people of this country, a message that we are not willing to require powerful business interests to play their rightful part in the fight against inflation. Let the hard-working middle-class families of this country cut back. Let the poor become a little poorer. Let the elderly do without. But under no circumstances should this Congress willingly inflict upon business the pain and discomfort that flows inevitably not from governmental regulators, but that flows inevitably from free and open competition.

Where is the spirit of the free enterprise system? The bottlers bill is antifree enterprise. The bottlers bill says, "We do not want to let competitive forces work."

We talk about the free enterprise system. We talk about being probusiness and antibusiness. But I say to my friends in the Senate that the bottlers bill may appear to be probusiness but it is very antibusiness, because when you carve out a portion of the antitrust laws and provide a special exemption, you are not doing the Nation any benefit. You are not helping the economy. You are not saying to the people of this country that you believe in free enterprise.

You believe in free enterprise only when it helps you, not when it hurts you.

The Senate recently approved the first balanced Federal budget in nearly two decades. Today we have the opportunity to strike another blow against inflation by passing an amendment that will enhance competition, by far the most effective tool we have to make our economy more efficient and more productive.

Mr. President, the Senate has a right to vote upon the Illinois Brick amendment, but as we well know it is precluded from doing so because there are amendments in the first and second degree on the floor of the Senate.

Approximately 27 hours ago I urged those who were authors of those two amendments to accept the amendments, to make them a part of the bill. They were engaged in this filibuster by amendment to keep a Member of the Senate from calling up an amendment that he has the right to call up except for the fact that there is an amendment in the first and an amendment in the second degree pending.

Therefore, Mr. President, I again suggest to my friend from Indiana that since it may have been the fact that yesterday we needed more debate on these amendments, I would like to propose and, Mr. President, ask unanimous consent that these two amendments in the first and second degree be adopted.

The PRESIDING OFFICER. Is there objection?

Mr. BAYH. Mr. President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. METZENBAUM. Then I ask unanimous consent that notwithstanding the fact that there is pending an amendment in the first degree and an amendment in the second degree, that the Senator from Ohio be permitted to call up his Illinois Brick amendment.

The PRESIDING OFFICER. Is there objection?

SEVERAL SENATORS. Objection.

The PRESIDING OFFICER. Objection is heard.

Mr. METZENBAUM. Mr. President, I must say that the Senator from Ohio is not taken back by those objections. I assumed that the objections would be made. But I thought that I had to make it clear, not only to the Senate but to the world, that we are engaged in a filibuster to keep a Member of the Senate from calling up an amendment that he rightfully has the privilege of doing under the rules of the Senate, and that what really is taking place, as I previously said, is a filibuster, a filibuster by those who have called up the bill, not a filibuster by those who want to defeat the bill.

I am not filibustering this amendment. The authors, those who support the measure, are filibustering. They are keeping the floor closed from any amendment. Who amongst us have said that there is something so right and so proper about any particular measure, whether it is theirs or someone else's, that no Member of the Senate may be offered an opportunity to call up an amendment? What kind of an absurdity is this? What kind of an aberration of the rules of the Senate is this?

Filibusters and cloture. Cloture has, in the past, been used only—almost only—for the purpose of cutting off debate when somebody was trying to keep a measure from coming to a vote. I am not trying to do that. Let it come to a vote. Let the amendment come to a vote; let the amendment in the second degree come to a vote; accept it by voice vote. Let my amendment come to a vote; let the bill come to a vote. I am willing to agree to stop talking at any point.

But the fact is that this anomalous situation has developed, where cloture and the laying down and calling up of a first- and second-degree amendment are being used to preclude any amendment being offered.

It is a fact that I can call my amendments up after cloture has been invoked. But it is also a fact that if amendments are nongermane, then they will be ruled out of order.

I respect that rule. But I am trying to call the amendment up prior to cloture being invoked and, by a filibuster, I am being filibustered against doing so, and then having cloture used to keep me from calling up an amendment.

There is a right to do so. I am not saying there is no right. I am saying that is not what the rules originally contemplated. That is not what was intended. Cloture was intended for the purpose of cutting off a filibuster. Cloture was not intended to make it possible to filibuster, and that is exactly what has developed.

Mr. President, I am prepared to yield the floor, reserving to myself the right to conclude my remarks at 2:30 this afternoon.

Mr. BAYH. Mr. President, I ask unanimous consent that the speech of the Senator from Ohio not be counted as a first speech under the debate procedure.

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

Mr. METZENBAUM. I appreciate the cooperation of the Senator from Indiana.

The PRESIDING OFFICER. Who yields time?

Mr. HAYAKAWA. Mr. President, I ask unanimous consent to speak for a few minutes on a subject not pertaining to the business at hand and ask that it not be counted as the first speech of the day.

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

(The remarks of Mr. HAYAKAWA at this point in connection with the introduction of legislation are printed under Statements on Introduced Bills and Joint Resolutions.)

Mr. HAYAKAWA. Mr. President, may I proceed to a further discussion of S. 598, which is the topic of our discussion today? I am a cosponsor with about 89 others.

Mr. BAYH. Mr. President, will the Senator yield briefly for an inquiry of the Senator from Ohio about the future this afternoon, without losing his right to the floor or his question or that of the Senator from Indiana being considered as a speech in debate?

Mr. HAYAKAWA. I am glad to do so.

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

Mr. BAYH. Would the Senator from Ohio have any objection if, at about the hour of 2:15, we provided just a bit of leeway for the introduction from committee of the intelligence bill which has been worked on assiduously by the present Presiding Officer, the Senator from Kentucky? It has been reported forth and, apparently, some members of the Intelligence Committee might like to be present when it is reported.

I do not think it would take very much time. But I wanted to be able to alert them to come or not to come.

Mr. METZENBAUM. The Senator from Ohio has no objection.

Could we not come to some unanimous-consent agreement where at the hour of 2:15 we have half an hour to take up the intelligence matter, and that at 2:45——

Mr. BAYH. It may not take more than 5 or 10 minutes.

Mr. METZENBAUM. Well, immediately after the conclusion, not in excess of a half hour, the Senator from Ohio be recognized in the event I wish to take the floor at that time.

Mr. BAYH. Let us check with the majority leader.

I appreciate the courtesy of the Senator from Ohio and the Senator from California.

Mr. HAYAKAWA. I thank the Senator.

Mr. President, I am a cosponsor of this bill and commend the distinguished Senators from Indiana and Mississippi for their hard and persistent work. This act provides that exclusive territorial licenses to manufacture, distribute, and sell trademarked soft drink products shall not be held unlawful under any antitrust law if such products are subject to "substantial and effective competition." "Substantial and effective competition" has been described by the Judiciary Committee to include such factors as the number of brands, types and flavors of competing products available in the territory from which the consumers may choose; the number of retail price options available to the consumers; the degree of service competition among vendors; the ease of entry into the market; and the number and strength of sellers of competing products in the territory.

In 1971, the Federal Trade Commission brought up a series of cases challenging the territorial provisions contained in bottlers' trademark licenses as unfair methods of competition in violation of section 5 of the Federal Trade Commission Act. The Commission conducted a lengthy hearing on the Coca-Cola franchise system to satisfy widespread congressional concern that the soft drink industry should be permitted to present its case in a comprehensive set of hearings. At the end of the hearing, the administrative law judge who heard the testimony ruled that Coca-Cola's franchise system is lawful, and that it positively fosters competition. The judge made extensive findings to the effect that there is intense interbrand competition in this industry in terms of price, product innovation, and marketing techniques.

However, in April 1978, the Federal Trade Commission overruled the administrative law judge and held that the Coca-Cola and Pepsi territorial provisions violated the Federal Trade Commission Act. In doing so, the FTC substantially ignored the massive record of evidence of intense competition between soft drink brands. For example, the FTC never tried to rebut the extensive evidence of intense price competition in the sale of soft drinks; it simply held that without territorial restraints there would be more competition. No attention was paid to the evidence that territories stimulate local bottlers' competitive efforts. Similarly, the FTC minimized the abundant evidence of technological and product innovation in the soft drink industry and assumed that without territories there would be even more innovation. The FTC ruling has been appealed and is pending in the Court of Appeals for the District of Columbia.

Mr. President, this is just another example of bias, fed by usurping power, demonstrated by the FTC. During the hearings and extensive debates of the Federal Trade Commission authorization it became abundantly clear that the FTC needed substantial reform. Not unlike a cancer, this agency of the Federal Government has spread extremedies considered protected, and left its crippling mark. Congress has—if this body approves the conference report on the authorization—found it necessary to forbid the Federal Trade Commission to investigate or promulgate rules in several specific areas. The insurance industry, which had been effectively regulated by the States, came under attack based on a report published by the FTC which the industry has justifiably called fraudulent; the threat of suit by the FTC to make the Formica Corp. change its name because the trademark had become recognized as a generic term; and the list goes on and on.

For the past 75 years the soft drink manufacturers have given their bottlers the exclusive right to manufacture and sell their product within a defined territory. This practice was needed 75 years ago and is just as important today with the impact of inflation and high interest rates hampering the ability of small, independently-owned businesses to invest in this area. By providing bottlers with an exclusive territory, the soft drink manufacturers are able to offer an incentive to those businesses wishing to enter the market but who are wary of making the large initial investment needed. This incentive has yet to have a detrimental effect on competition. In fact, the system of exclusive territories has made market entry easy for new products which are able to use the existing distribution systems of major soft drink bottlers. For example, Nestea, canned iced tea, was able to be in areas serving 90 percent of the people in the United States in 3 years, by entering exclusive territorial licensing agreements with 135 established national brand bottlers.

This system has also kept hundreds of small independent bottlers competitive in the market. If the FTC ruling stands, large bottling firms and warehouse operations would enter and overrun the profitable territories, some of which are currently held by small bottlers, and initially offer a lower price and warehouse delivery to the chain stores. This would force the small bottlers out of the market and could lead to price-fixing by the large bottlers once they have taken over. The small bottlers would lose the most profitable sections of their territory to the large bottlers and would have no choice but to cut back service, raise prices or go out of business, leaving the less populated and therefore less profitable areas, with inadequate service, higher prices or no service at all. The passage of this act would provide protection of small bottlers, who are the foundation of the soft drink industry's marketing structure. In California alone, only 14 of the 113 soft drink plants employ over 100 persons. So this has great relevance to the continued existence of small business.

I appreciate the concerns of some of

my colleagues that this act would hinder the FTC and the antitrust laws, however, I believe it will insure that every soft drink market is competitive and open to new business and innovation. The FTC would be able to study territories on a case-by-case basis and if it determines there to be a lack of effective competition in a particular market, antitrust laws would be enforced.

I feel this act is needed to put an end to the controversy which has surrounded the soft drink industry for 9 years and I give it my full support.

Mr. President, I am thinking about the disappearance within the last 50 years of hundreds and hundreds of local, well-known brands of beer. In Wisconsin alone, if I recall correctly, some 100 brands of beer have disappeared. I do not know how many have disappeared in California. But these are small businesses which needed the protection which the soft drink industry needs.

Therefore, in the interests of the beer business as well as the soft drink business, it seems to me that the small businessman has to be protected.

Mr. President, I ask unanimous consent to have printed in the RECORD a statement by Bob W. Delauter, of the Coca-Cola Bottling Co. of Portland, Ind., before the Subcommittee on Antitrust, Monopoly, and Business Rights of the Senate Committee on the Judiciary.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT OF BOB W. DELAUTER

I am Bob W. Delauter, a Coca-Cola bottler from Portland, Indiana. I serve all of Jay and Blackford and Randolph Counties in Indiana, and most of Darke and Mercer Counties in Ohio, and Grant, Wells and Adams Counties in Indiana. My franchise area covers 128,960 people, in which the largest town is Greenville, Ohio with a population of 13,800.

The history of our plant is one of hope, progress and development.

On November 20, 1917, Orien E. Holsapple and his uncle, Jim Isenhart, launched themselves into a new enterprise. On that date they became the sole owners of Portland Bottling Works, 317 West Main Street, Portland, Indiana.

The start was important because their new soda pop business brought them into contact with Mr. Luther Carson of Paducah, Kentucky, who was owner of the Coca-Cola bottling franchise in Fort Wayne, which included Portland and surrounding towns in its contract area.

Although the soda water business flourished, Mr. Holsapple was impressed with the growth of Coca-Cola on a national basis, and for six years sought a subcontract from Mr. Carson authorizing him to bottle and sell Coca-Cola in Portland. Finally, an agreement was reached between the parties in February, 1923, and the production facilities were moved from Hartford City, Indiana to 317 West Main Street in Portland. He tried to borrow money locally, but was turned down as it was considered a bad risk. Because the previous owner owed money to the Hartford City Bank and was in poor financial shape, his bank agreed to lend Mr. Holsapple the money to buy and move the company out of Hartford City to Portland. The purchase price was a total of $2,200.00.

That first year in business, they sold a total of 240 cases of Coca-Cola, less than the amount of Lemon Pop we sold around the town square in Hartford City. At 80 cents per case, this amounted to a grand total of $192.00, or $3.70 per week. At that time, Coca-Cola retailed at 5 cents per bottle, or .96 cents per ounce. Today in the Ludwig's IGA Store in Portland, Coca-Cola can be purchased for one cent per ounce on sale.

In September 1938 we moved into a new modern building at 510 East Arch Street. I have here copies of the local paper commemorating that big day in the life of our company. On that day we had 265 customers, as listed on the back full-page ad of the paper. We employed eight people and were very proud of our contribution to them and our home town. In 1961 we found it necessary to enlarge our facilities, and added 10,000 square feet, a 40 percent increase in size.

In 1969 we purchased the adjoining franchise at Union City, Indiana, and invested hundreds of thousands of dollars in new bottles, coolers and trucks. On that day we were selling 611,391 cases. Coca-Cola was selling at .75 cents per ounce. By promotion, hard work and efforts of loyal employees and customers, we grew at a rate of 35 percent the first year. We purchased thousands of dollars in coolers over the next ten years, and now are in the process of trying to build a new building to provide Coca-Cola for our 2,200 customers. Our employment has grown to eighty-three, and we sell ten times as much Coca-Cola per day as we did in the entire first year of our company in 1923.

Now I would like to retrace my steps to about July 15, 1971, the day the Federal Trade Commission sued the soft drink franchise companies and several bottlers. I had just purchased Union City Coca-Cola Bottling Company. I owed over a half million dollars, and had just been told, in effect, by the FTC that my purchase was practically worthless, because without franchise lines I could not afford to invest in coolers, signs, trucks and bottling equipment necessary to serve my customers. Although we are in a small, country area, we border some very large bottlers with much deeper pockets than mine, and in a price battle for customers we could not survive. Remember, in 1969 Coca-Cola was selling for .75 cents per ounce, some 22 percent less than when our company started in 1923. Thus, you see, the FTC attempt to assure competition between bottlers of Coca-Cola had a very hollow sound to me. What other product in the world was selling 22 percent cheaper in 1969 than in 1923? Where else could the consumer go and find such bargains?

In Portland, Indiana, we are about 65 percent returnable bottle sales, and the balance in nonreturnable bottles and cans. I am unable to produce some of these NR bottles and cans without investing about one million dollars in new equipment. The uncertainty of the FTC ruling over the last eight years has caused us to delay this investment at an increase in cost to us of about 10 percent per year. Even if I were 100 percent returnables, I would need to enlarge to take care of the 35 percent now served by customer-demanded convenience packaging.

The results of delay, inflation and uncertain legal prospects caused by the FTC ruling has been a major factor in the increased cost of my product to the consumer in Portland, Indiana since 1972. Actually, our price has increased as much since 1972 at it did during the first fifty years we were in business. FTC is not the sole cause of this, but certainly was a major cause. S. 598 will give me a clear understanding of the future where I can plan, build new efficient production, and continue to provide soft drinks at a price still available at about one cent per ounce. In today's world, that is still the best bargain in town.

It was made possible by the wisdom of my predecessors who designed the franchise system to assure a quality product, with wide availability, at a fair price. It was this system that demanded the life's work of several families, and the system that has created the most widely available, widely recognized enjoyed product in the world.

In January we went out to a supermarket in Indianapolis and purchased one each of every type, size, flavor and brand of refreshment available. We found over 395 different competing products and packages, not including milk, tea, coffee, beer or water. We were attempting to convey the tremendous competition for our customers' refreshment dollar. Some of these soft drink products were less than .77 cents per ounce. I would be glad to furnish the Committee a photograph of that display if you desire it.

The point of my story is this: Our system works honestly, fairly and efficiently to the benefit of the consumer, the bottler and the marketplace. This is obvious, as evidenced by the fact that 395 different entries exist in that refreshment market. I know of no other business where the consumer has such a wide choice at such bargain prices.

The average soft drink bottler cannot survive without the franchise system. We are a unique industry with a different delivery system, a reusable package system, and a multitude of package sizes to satisfy any customer's needs. Our products are available in every place we can find, big or small, where thirst might exist. In today's real world, the franchise territories determine whether hundreds of local bottlers like myself will continue to insure availability of hundreds of products to thousands of retailers; or whether the soft drink industry will become a few, national corporations shipping a few major brands to supermarkets only.

Thank you for the opportunity to tell my story. Please promptly consider the proposed bill and pass it. Eight years is long enough. We need your help NOW.

(Mr. METZENBAUM assumed the chair.)

Mr. DECONCINI. Mr. President, yesterday I had the great privilege and pleasure of inserting in the RECORD a statement by Ernest Gellhorn, a distinguished professor of law at the University of Virginia Law School. Unfortunately, I did not have an opportunity to finish that statement.

At this time, I should like to proceed with a continuation of some of the remarks and points that Professor Gellhorn brought out. As the RECORD will indicate, I was one-third through the statement yesterday. For clarity in the RECORD, I ask unanimous consent that the first eight pages of the statement be printed at this point in the RECORD. Those were the pages I did have an opportunity to read aloud yesterday.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

REMARKS BY PROFESSOR GELLHORN

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. DECONCINI. Mr. President, I will take up where I left off.

Subsequent cases established that the "fatal element of agreement" might be found in price discussions with retailers, in their assurance that they could comply with the condition, or in the reinstatement of errant dealers after a disciplinary waiting period.

The Dr. Miles approach to vertical price fixing—that it denied the retailer his "right" to resell his property—led to another exception where the retailer was the manufacturer's agent and, instead of taking title, received the products on consignment. Thus in *United States* v. *General Elec. Co.*, 272 U.S. 476 (1926), the Court held that where it is clear that the arrangement is legitimate and that the manufacturer both retains title and bears substantial risks of ownership, the antitrust laws do not prevent him from dictating the terms of sale, including retail prices. In this circumstance the Court held that vertical price fixing is not illegal.

Here too the exception provided unreliable. First the legitimacy of consignment arrangements was attacked, the question being whether the retailers were in fact the manufacturer's agents. And then in *Simpson Oil* v. *Union Oil Co.*, 377 U.S. 13 (1964), the Court ruled that an oil company supplier had violated the antitrust laws by fixing the retail prices of its service station-consignees because the consignment arrangement was being used as a device to "coerce" nominal agents "who are in reality small struggling competitors seeking retail gas customers." Whether any form of consignment now provides safe passage for resale price agreements is uncertain. They were approved for non-price restraints in *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967), where the consignment provided that "title" dominion and risk" remained with the manufacturer, and this part of the *Schwinn* decision was not overturned in *Sylvania* (discussed below).

The rigidity of the rule against all price-fixing is further shown by the Court's restatement of the rule in *Abrecht* v. *Herald Co.*, 390 U.S. 145 (1968), when it held that a publisher's effort to fix maximum resale prices charged by independent newspaper carriers was illegal per se. The Court was unmoved by the fact that such price fixing seemingly protected the consumer's interest and was justified by the paper's independent interest in keeping prices down (to increase circulation and advertising revenues).

The continued strength of the per se rule against vertical price fixing was further revealed in 1977 in the Sylvania decision. Even though the Court there recognized that vertical restrictions serve different purposes from horizontal cartels, it expressly reaffirmed its earlier commitment to a per se rule against vertical price fixing. 433 U.S. at 51 n.18. On the other hand, the Court did support a different rationale for its early ruling in Dr. Miles prohibiting resale price maintenance, namely that it reduces "price competition not only among sellers of the affected product, but quite as much between that product and competing brands." About all this suggests, however, is that the Court may ultimately back away from its rule against maximum price-fixing. Accord, Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 16 n.59 (1978).

With the opportunity for vertical price restrictions essentially proscribed, especially after the "fair trade" law exception for the states was repealed in 1976, attention has focused on other distribution restrictions and in particular on manufacturer limitations on dealer territories and customers. Until the 1940's these arrangements were not challenged by the government and their lawfulness was upheld in several private actions. Then in 1948 the Department of Justice, relying on a Supreme Court opinion holding vertical territorial restrictions illegal per se if they were an integral part of an agreement to fix prices (*United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944)), announced that it would henceforth treat simple vertical territorial and customer restraints foreclosing intrabrand competition on the same basis. For several years this position went unchallenged; consent agreements negotiated by the Department of Justice enforced this view, but no case supported its position. However, during the past fifteen years the law has swung violently, from uncertainty to per se illegality and more recently to a flexible rule of reason approach, in three very different Supreme Court opinions.

Seemingly overturning the Justice Department's contention, the Court first reversed a summary judgment holding vertical territorial and customer restrictions illegal per se. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963). White Motor had sold its trucks to dealers who agreed to resell them to customers not otherwise reserved to the manufacturer and who had a place of business within the assigned territory. Because of the meager summary judgment record and the Court's admitted inexperience with franchise limitations, the 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. It therefore remanded the case for a trial on the merits. The opinion was widely interpreted, however, as adopting a rule of reason approach to vertical limitations—especially since three dissenters called for a per se rule. In fact the Court carefully held "that the legality of the territorial and customer limitations should be determined only after a trial." Following remand the case was settled, and the Court therefore did not have an opportunity to develop a rule on a full record.

It seemed, nevertheless, that a rule of reason approach would be applied as two Courts of Appeals subsequently upheld territorial restraints, and in each instance the court overturned a stringent Federal Trade Commission decision in order to apply a more flexible test. See *Sandura Co.* v. *FTC*, 339 F.2d 847 (6th Cir. 1964) (territorial restraints used in rebuilding a dealer organization after its market position had deteriorated); *Snap-On Tools Corp.* v. *FTC*, 321 F.2d 825 (7th Cir. 1963) (manufacturer was one of 80 firms in an intensely competitively industry with high dealer turnover). As indicated, each case presented appealing facts to support the territorial restrictions. And in light of subsequent developments, it is particularly noteworthy that neither *White Motor* nor the circuit court cases paid heed to the doctrinal distinctions developed in the vertical price fixing cases, namely, whether the provisions violated property law rights to resell property or whether title was retained by the manufacturer.

When the next case before the Supreme Court four years after White Motor, the government retreated somewhat from its per se position and argued, in its brief, for a rule of presumptive illegality which would have required the defendant to justify any territorial restrictions. It thus came as a surprise to antitrust followers when, in *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967), the Supreme Court adopted a position even more restrictive than that put forward by the government. In condemning nonprice vertical restrictions, the Court ruled that "once the manufacturer has parted with title and risk . . . his effort thereafter to restrict territory or persons to whom the product may be transferred . . . is a per se violation of § 1 of the Sherman Act." Relying on the same rationale used a half-century earlier in Dr. Miles to condemn vertical price fixing, the Court said that such restrictions violate the "ancient rule against restraints on alienation." Thus the Court concluded that "under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."

With this sweeping language the Court "threw into doubt the legality of every sort of post-sale vertical restriction on distributions other than exclusive dealing arrangements, regardless of the type of restriction or the market power of the supplier and dealers." Pitofsky, supra at 6. Not surprisingly, this abrupt change of direction drew a spate of criticism seldom matched in a decade of bitter debate about various antitrust rulings of the Supreme Court. See, e.g., Handler, Twenty-Five years of Antitrust, 73 Colum. L. Rev. 415, 458–59 (1973) (*Schwinn* is "the most egregious error in all of antitrust."); A.B.A. Antitrust Section. Monograph No. 2, Vertical Restrictions Limiting Intra-Brand Competition 9 n.24 (1977) (citing other criticisms).

Nor was all criticism mere hyperbole. As numerous scholars, both lawyers and economists, patiently explained, vertical territorial restrictions serve many useful ends, usually to increase distributional efficiencies and lower costs. While occasional theoretical possibilities may exist for the misuse of such restrictions, primarily to facilitate horizontal cartels by manufacturers or retailers, the risk seems insubstantial where substantial and effective interbrand competition exists. That is, where firms selling different products compete vigorously, efforts by individual firms to achieve market efficiencies should be encouraged. The market will become even more competitive as a result, and in any case no individual firm's marketing strategy can have an adverse effect on competition in that circumstance. Moreover, since other avenues for vertical integration are open—especially by intenal growth—barring integration by contract would be futile, except that it might force a manufacturer to select a less efficient distribution scheme (reducing competitive pressures) and in fact foreclosing opportunities for smaller retail firms.

As this analysis makes evident, whether vertical restrictions on distribution by customer and territory should be allowed is unrelated to the manufacturer retention of title or the dealer's appointment as his agent. Thus it seemed anomalous or worse to have the Supreme Court resolve a question of economic policy by resort to ancient (and unrelated) property law rules governing resale of personal property. The policy question is whether these restraints serve to make product distribution more efficient and interbrand rivalry more vigorous. To allow legal formalisms developed three centuries earlier for another purpose to dominate and decide antitrust law seemed absurd. With such an unstable base, it was only a question of time before the Schwinn per se rule would be distinguished and restricted.

Again, however, the process was not gradual and business was not allowed time to adjust and react. Rather, the law was changed abruptly and without warning by the Supreme Court. In the next case to reach its docket, shortly after the tenth anniversary of the Court's application of a per se rule to vertical territorial restrictions in Schwinn, the Court sharply reversed its direction, directly overruled Schwinn, and applied a rule of reason for every sort of nonprice vertically imposed dealer limitation. Although the case in fact involved dealer store location clauses, the Court's opinion was not so limited and it appeared to suggest that a flexible rule of reason test—balancing the benefits (in particular, business efficiency) against demonstrated costs—was to be applied in almost every circumstances where nonprice vertical restraints are under challenge. The critical factor in Sylvania was the Court's clear recognition that several significant efficiencies could be achieved by distribution restrictions. Among those cited by the Court are retailer investments, promotional activities, and quality controls. In reaching this result, the Court recognized the economic interests of competing suppliers and the value of allowing them almost untrammeled freedom in deciding which distribution system will serve their interests (and those of their customers). And it appeared to hold that the burden was on the government to show that the competitive "costs" overrode those possible gains.

That the Supreme Court announced a broad and flexible rule of reason test for nonprice vertical restrictions in *Sylvania* is indisputable. But as always seems to be the case with legal issues, or at least those involving antitrust, questions remained. The case, for example, involved location clauses which usually have only slight intrabrand effects—but the Court expressly chose not to limit its discussion so narrowly. In addition, the respondent accounted for less than five per cent of the market; thus the clause could not have had a serious interbrand impact. Yet the Court appeared to place no reliance on *Sylvania's* size or market share as long as interbrand rivalry was present. Indeed, the Court specifically indicated that a supplier's market power would not justify reliance on a per se rule. 433 U.S. at 46 n. 12. On the other hand, in a final passage seemingly constructed to assure a solid majority, the *Sylvania* Court carefully reserved the possibility that some vertical restrictions might justify per se prohibition in particular applications and that others might not survive a case examination of their competitive effects. Neither situation, however, was explained, although it seems difficult to image what circumstances the Court has in mind (if any).

These uncertainties were expanded and compounded by the Federal Trade Commission's recent decisions in the *Cola* cases, that the territorial restraints historically required of franchised bottlers are unreasonable and violate Section 5 of the Federal Trade Commission Act. There the Commission's law judge had approved the legality of territorial provisions in trademark licenses to bottle and sell Coca-Cola and Pepsi-Cola. After making over 200 detailed findings of fact, he determined that the effect of the restraint on intrabrand competition among bottlers of these brands was far outweighed by its beneficial effect on competition in the marketplace as a whole. He therefore concluded that on balance the challenged territorial restrictions promote competition.

Two and one-half years later, a two member majority of the FTC, over the dissent of the other Commissioner participating in the decision, ruled that the territorial provisions were illegal because they eliminated intrabrand competition. In order to reach this result the majority first decided, as a matter of law, that the burden was on Coca-Cola and PepsiCo and their bottlers to demonstrate that the business justifications and the effect of the provisions to foster competition with other soft drinks outweighed any loss of rivalry among the bottlers. And this burden, the two person majority held, had not been met by the respondents. Even so, the majority recognized that the territorial provisions were justified when first adopted and all participating Commissioners found that the clause did not involve horizontal collusion or other per se illegal conduct.

Whether the FTC's opinion in the Cola cases has improperly misconceived and misapplied the Sylvania standard for nonprice vertical restrictions such as the territorial provisions common in the soft drink industry—even under the limited judicial review standard applicable to administrative agency decisions—is now before the District of Columbia Court of Appeals and prediction of the legal outcome would be gratuitous. As a matter of antitrust policy, however, affirmance would seem a disturbing backward step and a retreat to the illogic of Schwinn's per se approach. For the essence of the Federal Trade Commission's two member position is that admittedly efficiency enhancing territorial provisions will not be saved if the intrabrand effect is not insignificant. The Commission's rule would place the burden on the respondent—a burden which few seem likely to satisfy—and in direct opposition to settled antitrust doctrine as well as the provisions of the Administrative Procedure Act. See 5 U.S.C. § 556(d).

That this approach misunderstands the Supreme Court's purpose in Sylvania—which has been so highly praised by every commentator (of whatever persuasion)—seems clear. There, it will be recalled, the Court found that the consumer welfare is best served by promoting interfirm competition. And if that competition is substantial and effective, as was undisputed in the Cola cases, then internal efforts to achieve efficiency can only be procompetitive and beneficial to consumer interests (even though intrabrand competition is eliminated). To prohibit such efforts to achieve vertical efficiencies runs the risk that competitive vigor will be diminished and consumer welfare decrease. It also places undue emphasis on the elimination of intrabrand rivalry, an automatic but unusually insignificant casualty of every move toward vertical integration.

The Commission's decision in the Cola cases is also disturbing for the instability it has reintroduced to the rules governing nonprice vertical restrictions just one year after the Supreme Court sought to resettle matters in Sylvania. Instead of focusing its attention on the use of such restrictions where interbrand competition is limited and therefore more deserving of careful scrutiny, the Commission has sought to read the rule of reason standard so as to condemn restrictions which should be of no concern—when competition is substantial and effective.

In reviewing the primary substantive provision of S. 598—Section 2's directive that territorial customer restrictions in trademark licenses for soft drink products are not unlawful under the antitrust laws if substantial and effective interbrand competition exists—three questions need to be addressed: (1) what is the meaning of S. 598? (2) what is the relationship of S. 598 to the Supreme Court's decision in Sylvania? and (3) what will be the likely effect of S. 598 if adopted?

The operative provisions of S. 598 regarding the legality of nonprice vertical restrictions are simple and forthright. The bill is limited, first, to trademarked soft drink products where similar provisions have been relied upon for decades to support a large industry. Second, the proposed legislation only applies to territorial and customer restrictions. It does not involve other vertical restrictions such as price fixing or tie-ins which are usually subject to more stringent legal constraints. Rather it would govern in an area of well accepted territorial and customer restrictions whose purposes have been carefully considered and thoroughly explored, with the result that they are generally viewed as enhancing competition. Finally, and most importantly, S. 598 would protect such contract clauses from antitrust liability only where "substantial and effective competition" exists. That is to say, there must be vigorous rivalry among competing soft drink products before relationships between the syrup manufacturer (and trademark owner) and the bottler are protected by this legislation. The result of S. 598, then, is generally to limit the required inquiry, at least initially, to a determination of whether such competition exists. If that finding can be made, the practice would be upheld. On the other hand, if this level of competitive activity cannot be found, the restrictions would be subject to the Sylvania tests.

Mr. President, I will be glad to yield to the Senator from South Carolina.

The PRESIDING OFFICER (Mr. LONG). The Senator from South Carolina.

Mr. THURMOND. Mr. President, I will now continue the address I began yesterday on the subject of the bottlers bill:

Coca-Cola Company USA does likewise in franchises covering about 14% of the population. These Pepsi-Cola Company-owned franchises include Boston, New York, Newark and almost all of New Jersey, Philadelphia, Detroit, Pittsburg, Dallas, Houston, Los Angeles, Phoenix, Las Vegas and Orlando/Daytona. The Coca-Cola Company-owned franchises include Boston, Chicago, San Francisco, Columbus, Toledo, Baltimore and Bellvue (Seattle). The FTC decision now permits, and indeed seems to require, the syrup manufacturers to compete with their independent bottler franchisees anywhere in the country.

Why will the FTC decision lead to concentration in the industry and with that concentration the demise of the returnable bottle? The reasons are manifold and, in our opinion, relatively obvious. We shall briefly examine a few of the more important ones.

Perhaps the most powerful economic force in accelerating concentration would be the incentive of the large syrup manufacturers to exploit a greatly enhanced opportunity to increase their market share, thereby increasing dual profits.

The syrup companies already realize a significant degree of dual profit, first from the syrup they sell to their independent bottlers and, secondly, from the sale of the finished products manufactured by their company-owned franchised plants. Without territorial restrictions the syrup companies will find the temptation irresistible to expand their company-owned bottling operations and thereby claim a greater share of market and overall profits generated by the sale of soft drinks to the public.[1]

Such expansion will be facilitated by the ease whereby the syrup manufacturer can reap all the profit available by raising the price of the syrup, both to its own bottling subsidiaries as well as its independent franchisees. This classic "price squeeze" has been described by Dr. Jesse W. Markham, professor of Economics at Princeton University and former chief economist of the Federal Trade Commission, in testimony before the House Small Business Committee:

"The vertically integrated firm can use the market power it has in the preceding stage to attain approximately the market share it desires in the subsequent stage by manipulating the prices at which it supplies itself and its customers with which it competes. When it wishes to expand its share of the market at the subsequent stage it simply raises the price at which it supplies both itself and its competitors, but holds the price line at the later stage. Competitors cannot pass on the price increase without driving customers to the integrated firm. The integrated firm, which by strict accounting may be incurring losses at the later stage, is making gains to offset them on its operations at the earlier stage. On its total operations it may be making a satisfactory rate of return. The unintegrated competitors, having no previous stage operations to draw on, simply operate at losses that may eventually drive them out of the business altogether. This stategy is known in the economic literature as the 'price squeeze' . . ." Hearings on the Impact Upon Small Business of Dual Distribution and Related Vertical Integration Before the Subcomm. No. 4 of the House Select Comm. on Small Business, 88th Cong., 1st Sess., vol. 1 at 50 (1963).

We have been told that "price squeeze" conduct of the kind described is unfair competition and probably unlawful, and that independent bottlers injured thereby could sue to prevent it or to recover damages if harmed thereby. However, if artfully employed it would be difficult to apprehend, at least before it was too late to prevent a devastating loss of market share by the affected independents. Moreover, resort to litigation against Coke or Pepsi by an independent bottler is about as attractive as it is for a small computer firm to sue IBM.

Another important factor leading inexorably to concentration in the industry and the disappearance of the returnable bottle is the aversion of the supermarkets to store door delivery and the stocking of returnable bottles. There are a number of reasons why supermarkets do not like returnables. They take up more shelf space, and the process of receiving and redeeming returnables in checkout lanes and storing empties until pickup by the bottler is viewed as an unrewarding nuisance. More important, perhaps, is the fact that supermarkets prefer central warehouse delivery of all inventory so that they can control the flow of merchandise into the retail outlets. One central warehouse may serve all stores in a chain within a radius of 100 to 300 miles located in many different municipalities and counties and several states, and, in the soft drink industry, many different franchise territories. If a large supermarket chain had its preference, it would almost always be to deal with one supply source for each of the soft drinks it opted to stock in its retail stores and to receive delivery at a central warehouse serving many retail outlets. This, of course, virtually impossible under the present exclusive territory system which imposes on each bottler the obligation to limit the sales of the product within the confines of his territory. This is a principal reason for store door delivery.

Exclusive territorial rights and store door delivery are concomitants which make possible the continued high level use of returnable bottles in our industry. Even the FTC recognized that exclusive territories were necessary for returnables, because of the need for a bottler to control his glass "float" within a discrete area when it limited its order invalidating vertical restrictions to non-returnable packages. However, what the Commission failed to recognize is that no independent bottler can continue profitably to use returnables after his supermarket accounts are no longer required to accept store door delivery and have ceased doing business with him in favor of a large supplier (and, most logically, the bottler's own franchisor)

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[1] The point was made in one of the appeal court briefs that: "Ironically, it could be argued that the Commission orders . . . would require such expansion, in that they prohibit The Coca-Cola Company and Pepsi Co. from 'continuing' or 'maintaining' any 'understanding' or 'agreement'—even with their subsidiary bottlers—to limit territories." Brief of Intervenors, Coca-Cola Bottling Company of Los Angeles, et al., p. 8.

shipping cans and non-returnable bottles over long distances to a central warehouse.

The economic and marketing characteristics of our industry are such that a substantial level of returnable bottle sales can be achieved and maintained profitably only in conjunction with a mix of non-returnable package sales. Let's confront reality as consumers. Non-returnables, particularly cans, have various convenience features. They are easier to store, taking up less space in the refrigerator or in the kitchen closet. When used, they can be thrown away and need not be brought back to the store. They are obviously more convenient than bottles on a picnic or camping trip. The returnable bottle can overcome these advantages only through strong promotion utilizing feature price advertising. Earlier in our statement, we noted the result of the Majers study finding carbonated soft drink beverages ranking second in newspaper price promotion ads of 45 leading food store products. Almost three-fourths of these ads feature an attractive price for the returnable bottle.

The survey found that, in 1977, the consumer was paying $0.0079 per ounce of Pepsi in the 16-oz. returnable bottle in contrast with a price of $0.0156 per Pepsi in the 12-oz. can, or 97% more. But this price advantage is made possible only if the bottler can exercise the leverage his exclusive territorial rights give him with the supermarkets in his territory to cause the latter to stock and promote the returnable bottle. The use of the returnable bottle is both capital and labor intensive, considerably more so than non-returnables. The returnable bottles can be sold at a lower price than the competing packaging forms only if volume and velocity are high. When volume and velocity decline through loss of supermarket accounts, the cost to the consumer will rapidly rise. When the price advantage to the consumer disappears so too will the returnable bottle disappear.

Another cause for concern for the returnable bottle posed by concentration in the industry as the result of the FTC decision is that the movement to concentration will most surely be led by the large syrup manufacturers and their wholly-owned bottling subsidiaries, which already control many major markets. At least in the case of PepsiCo, there appears a strong disinclination to use the returnable bottle. Report data by Majers from the year 1977 on Pepsi advertising activity in the north eastern sector of the country—namely, New York-Newark, Philadelphia and Boston markets exclusively controlled by Pepsi-Cola Company-owned franchise subsidiaries—reveal no price ads in the economical 16-oz. returnable bottle.

If one needs further evidence of how availability of non-returnable packaging and lack of territorial restraint combine to result in market concentration, we can look at the beer industry.

The history of the brewing industry since World War II demonstrates the positive relationship between concentration and the decline of the returnable bottle. In 1945, there were 457 breweries, almost all local and regional firms. Eighty-five percent of beer sold was in the returnable bottle. By 1977, the number of breweries had declined to 47 (Exhibit 3), and the use of returnable bottles was down to 12 percent (Exhibit 4). In 1947, the five largest breweries controlled only 20 percent of the market, but, by 1977, the top five had a 70 percent market share (Exhibit 5). Miller and Anheuser-Busch serve the entire country mostly with cans and non-returnable bottles shipped long distances, from a few strategically located plant sites. (Exhibits 6 and 7). At present there are 1833 independent soft drink bottlers. However, PepsiCo and Coca-Cola, and now Seven-Up (recently acquired by Philip Morris, which also owns Miller Beer) are now positioned under the FTC decision to do the same thing in the soft drink industry which the large brewers have done in the beer industry.

If the FTC decision becomes effective, the ease by which our franchisor, Pepsico, can vertically integrate its soft drink operations, beyond its present substantial status, is enhanced because of Pepisco's recent acquisition of a large motor carrier, Lee Way Motor Freight. Lee Way's resources include 5,000 tractor trailer trucks, 85 terminals and service to more than 3,000 cities and towns. For example, look at the State of Ohio where every Pepsi franchise is independently owned.

PepsiCo, through its trucking subsidiary, now owns eleven terminals located throughout the State, including every major population center, and also owns the Pepsi bottling franchises in Detroit and Pittsburgh. Without territorial restraints, PepsiCo can easily serve every chain store central warehouse in Ohio in its own tucks with non-returnable cans from its Detroit or Pittsburgh plants, or, if it desires, from one or more new facilities it could build and operate within the State. How, we ask, is the independent bottler to survive under these circumstances, bearing in mind that our sole supplier of syrup will then be our major competitor?

An exhaustive study entitled "Materials and Energy from Municipal Waste," recently released by the Office of Technology Assessment, Congress of the United States, contains the following comments in support of our views (p. 236):

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

Another commentator, Stephen Breyer, Professor of Law, Harvard Law School, and now Chief Counsel, Senate Judiciary Committee, wrote following the oral argument on the appeal from the FTC Decision:

"The companies' strongest argument is that the Commission, in permitting territorial restrictions for returnable bottles, has acted inconsistently and without adequately examining the evidence. The companies claim that the very fact that the Commission allows territorial restrictions for returnable bottles shows that the Commission accepts the 'returnable bottle' justification as procompetitive and desirable. The Commission wishes to encourage their use, yet the companies claim that unless territorial restrictions for all bottles are allowed, the bottlers will be unable to use returnables. Although both the hearing examiner and the Commission considered evidence related to returnable bottles, *there apparently was no consideration of whether or not returnable bottles could survive under the 'split relief' that the Commission ordered.*" (Italic added.) *Update on the Soft Drink Cases*, Stephen Breyer, Consultant Martin Romm, The First Boston Corporation, December 1978.

In our opinion, the question is not whether the returnable bottle will disappear if the FTC decision becomes effective, but how quickly this will occur. We commissioned Mr. Emanuel Goldman of Sanford C. Bernstein & Co., Inc., New York City, a recognized expert securities analyst specializing in the brewing and soft drink industries, to analyze the question. Mr. Goldman is with me here today and available to answer any questions your may wish to direct to him. We are attaching to this statement his affidavit filed in the litigation commenced by our Florida subsidiary against the FTC (Exhibit 8).

Mr. Goldman finds "that elimination of territorial exclusivity for cans and non-refillable bottles will result in a decline of at least 5 percentage points a year and perhaps as high as 10 percentage points per year in the share of market accounted for by returnable containers. This would result in the elimination of the returnable bottle as a viable form of package in the soft drink industry within four to eight years."

He attributes the disappearance of the returnable bottle primarily to the loss of supermarket accounts by the independent bottlers after territorial rights are no longer enforceable. He estimates the present bottle "float" at approximately four billion bottles with an annual replenishment rate of new returnable bottles at one billion. If there is a 50 percent reduction in rate of replenishment, total exhaustion of the "float" will occur in eight years; with no replenishment, the "float" will be consumed in less than four years.

Mr. Goldman concludes: "If the returnable market share declines at a rate of 5 percentage points per year, we will, by 1982, have added 32.0 billion additional nonreturnable containers to our solid waste stream. In the event of a 10 percentage point decline, the number of additional one-way bottles and cans would be 63.8 billion."

EFFECTS ON THE ECONOMY, ECOLOGY AND ENERGY CONSERVATION

Our statement from this point forward proceeds on the assumption that the returnable bottle will disappear if the FTC decision is implemented. The effect of that occurrence on the economy, our environment, and energy conservation goals is truly shocking.

THE ECONOMY

The carbonated soft drink beverage industry generates $15 billion in annual sales. It is twice the size of the beer industry. Soft drinks are the number one dollar volume sales item in food stores, constituting 4.1 cents of every sales dollar. Based on 1978 food store sales of $164 billion, $6.724 billion was spent on soft drinks of which 41.5 percent were refillable containers. If refillables are eliminated, the minimum cost to the consumer based on Majers survey data, will be an additional 52 percent or an increase of $1.45 billion every year for carbonated soft drinks.

INTERACTION OF BCDL AND THE FTC DECISION

It has been suggested that even without territorial restraints a high level usage of the returnable bottle can be maintained through the enactment of Beverage Container Deposit Legislation (BCDL). Regardless of the merits of BCDL, and whether it will ever achieve widespread enactment, it will not for long prevent the demise of the returnable bottle if territorial restrictions are eliminated.

The OTA, in its previously cited report to Congress, considered the interaction of Beverage Container Deposit Legislation and the FTC decision. Greater use of the refillable container is a stated objective of BCDL and supported by OTA. The report suggests that BCDL could help slow any trend to regional bottling stimulated by the FTC decision. *"BCDL would undercut the economic advantage of centralized bottling, which is limited to nonreturnable containers. (The heavier weight of refillables and the need to back haul empties discourages their centralized bottling.) Thus, BCDL might slow any trend toward elimination of local bottlers,"* p. 234. [Emphasis added.]

It becomes readily apparent that the OTA recognizes the potential for the two disastrous results of the FTC decision we have discussed (concentration and the demise of the returnable bottle), and attempts to project BCDL, not as a solution to the problem, but only as a temporary barrier to an ultimate negative result.

The report states: *"Since BCDL would de-*

crease the economic advantages of centralized brewing, bottling and wholesaling, the current trend toward a small number of large firms in beer and soft drink production might be slowed. By making the refillable bottle more attractive economically, BCDL could help preserve smaller, local bottlers. Legislation now under consideration to preserve the territorial franchise system could help maintain the refillable bottle's current market share," p. 17. [Emphasis added.]

We are pleased, parenthetically, that an arm of Congress recognizes the extremely negative implications of removing territorial restrictions in the soft drink industry.

Granted, as the OTA predicts, BCDL might slow the trend to regional bottling stimulated by the FTC decision. However, without exclusive franchise boundaries in the soft drink industry, concentration will still occur and the refillable bottle will disappear. This is what the experience in Oregon indicates.

THE OREGON STORY

We decided to find out what has occurred in Oregon—the only mature BCDL state. After the enactment of BCDL in Oregon, the brewing industry sales market share was still well in the hands of the two "local" breweries—Blitz-Weinhard and Olympia—and, at the end of 1974, 96% of all sales in Oregon were in refillable containers. At the end of 1978, or 4 years later, concentration by national companies had occurred (Miller Brewing was No. 1 in sales) and refillable container sales had declined by 48.1% down to 49.8% (Exhibit 9). Miller, the No. 1 selling beer, sold no refillables. By June 1979, further concentration occurred after Blitz-Weinhard had sold out to Pabst, and 4 of the top 5 in sales shares were national companies, with a combined 63% market share. By June 1979, the refillable sales share had fallen to 36% of sales in the brewing industry. (Exhibit 10.)

On the other hand, in the soft drink industry, with exclusive franchise territories and the absence of concentration, refillable bottle sales were still at 80% of food store sales at the end of 1978. This proves that exclusive franchise territories inhibit concentration and keeps viable the refillable container, and that without territorial restrictions, BCDL will not save the returnable bottle.

IMPACT ON ENVIRONMENTAL AND ENERGY CONSERVATION GOALS

Franklin Associates, Ltd., consultants in resource and environmental policy and planning, were commissioned by our company to study the energy and environmental impacts associated with the demise of the returnable bottle. A copy of their final report, dated February 14, 1979, accompanies this statement as a part hereof.

In conducting the study, Franklin relied on the scenarios regarding the disappearance of the returnable bottle developed by Emanuel Goldman. Franklin examined the impacts associated with soft drink delivery in the various container types, including all manufacturing operations beginning with raw material extraction, proceeding through processing, manufacturing, use, and final disposal of the container and secondary packaging, and including filling and transportation. This systems analysis is structured to determine all inputs and outputs at each stage of the container's "life cycle." Then, these data condense into several basic impact categories. These categories serve as the basis for determining the overall effect on environmental quality. They are listed below:

Total Energy Consumption.
Energy Source Summary.
Raw Materials Consumption.
Air Pollutant Emissions.
Water Pollutant Discharges.
Industrial Solid Waste.
Postconsumer Solid Waste.
Process Water Requirements.

The Franklin report describes in detail the methodology employed and quantifies in appropriate units of measure the adverse impact on the environment (including depletion of natural resources) and energy sources associated with replacement of the returnable bottle with the other commonly used nonreturnable package forms. The popular equivalency expressions of these impacts or losses are described as follows:

Total energy: Equivalent to the electrical energy consumed by a city of 100,000 in 34 to 69 years; plus

Natural gas: Equivalent to the natural gas requirements for heating 100,000 midwestern homes for 2.4 to 4.9 years; plus

Petroleum: Equivalent to imports of 65 to 129 millions gallons of gasoline; plus

Coal: If placed in a coal train, the train would stretch 331 to 686 miles, or a maximum distance extending from Washington, D.C. to Chicago; plus

Air pollution: Equivalent to 1.2 to 2.4 years of emissions from 1,000 Mw coal-fired power plant; plus

Water pollution: Equivalent to 3.2 to 8.9 years of emissions from a 1,000 Mw coal-fired power plant; plus

Solid waste: Trash Can Volume: Equivalent to 30 to 87 fillings of the Orange Bowl in Miami, Florida; or Landfill Volume: Equivalent to 12 to 30 completely filled medium-sized city landfills; plus

Water consumption: Equivalent to 2.8 to 5.3 years of domestic water use in the City of Washington, D.C.; plus

Raw materials: Bauxite: Equivalent to 7 to 1C percent of bauxite imports in 1976; Iron Ore: Equivalent to 2 to 5 percent of iron ore imports in 1976; Glass Sand: Equivalent to the sand in a beach 100 feet wide and 2 feet deep stretching 6.1 to 12.5 miles long.

S. 598 AND SIMILAR LEGISLATION

We stated earlier our gratitude to the many members of the Senate who have co-sponsored S. 598. We are equally appreciative of the many members who have co-sponsored the identical bill in the House, H.R. 3567. We wish to call attention also to H.R. 3573, introduced by Rep. Luken and Rep. Mica, which has the same purpose as S. 598 and H.R. 3567—to overturn the FTC decision and permit the continued use of exclusive territories in the soft drink industry. Both versions of the legislation seek a common objective—the preservation of competition and the avoidance of concentration in the soft drink industry and the maintenance of a manufacturing and distribution system in the industry that permits a continued high level use of the returnable bottle. The Luken-Mica bill differs only to the extent that it emphasizes the need for the legislation to protect the environmnt, to avoid unnecessary energy consumption, and to make the product available in the lowest cost package form.

It also represents an unambiguous legislative declaration that nothing in the Federal Trade Commission Act or other antitrust laws shall render invalid exclusive territorial agreements in the soft drink industry, unless it is found that within a territory there is an absence of generally available competing products, and further found that the elimination of the territorial rights will not adversely affect the quality of the environment, increase energy consumption, inflate the cost of soft drink products, or lead to concentration of economic power in the industry.

Some opponents of the legislation have described it as an "antitrust exemption" for the soft drink industry. This is both untrue and unfair since all the bills do is permit the continued use of the present franchise contracts, which, in essentially the same form, have been in effect for more than 75 years. The legislation would not, for example, permit such pernicious forms of anticompetitive behavior as collusion among interbrand competitors to fix prices or to eliminate the returnable bottle.

CONCLUSION

We submit the evidence in this matter is overwhelming to the effect that vertical territorial restraints in soft drink franchise agreements are pro-competitive and in the public interest. In fact, there is not an iota of reliable and credible evidence that they operate to the detriment of consumers, or that their elimination would lower the price of the product a penny. All evidence is to the contrary—that without these restraints the returnable bottle will disappear with resulting overall higher prices to the consumer and very serious adverse impacts on our environment and energy conservation goals.

We urge the Congress promptly to enact legislation that will avoid the many evils most certain to follow the implementation of the FTC decision in the soft drink cases.

(The exhibits referred to in the statement are not included in the RECORD.)

Mr. THURMOND. Mr. President, that completes the statement by J. F. Koons, Jr., president of Central Investment Corp., on S. 598, which was given before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, on September 26, 1979.

Mr. President, I now ask unanimous consent that I may yield to the able and distinguished Senator from Mississippi, with the understanding that upon my resuming at a later time, the Chair not consider this a second speech on this legislative day, and that I will not lose my right to the floor when I am ready to resume my address.

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

The Senator from Mississippi is recognized.

Mr. COCHRAN. Mr. President, before I continue my remarks on this subject which begun earlier, I compliment the distinguished Senator from South Carolina on the contribution he is making to a full understanding of the issues presented to the Senate by this bill and these amendments.

Mr. President, this legislation will overturn an erroneous decision by the Federal Trade Commission. That decision, rendered on April 7, 1978, by a vote of 2 to 1, ignored the 195 detailed findings of fact made by the FTC's administrative law judge which served as a basis for upholding the legality of the territorial provisions governing the sale of trademarked soft drinks sold by local bottlers.

The administrative law judge ruled that the net effect of the soft drink territories was to promote competition among bottlers of different soft drink products.

The ALJ 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 as to the accelerated growth of large bottlers."

The ALJ 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" and that private label soft drinks "since the early 1960's have become a substantial competitive force in the soft drink industry."

The ALJ also 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 fact, the judge found that 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 * * * 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 ALJ found that elimination of the territorial provisions was likely to change the industry profoundly. "Without exclusive territories the use of the returnable bottle by bottlers * * * would be substantially reduced, if not eliminated."

He also found that those bottlers which, as a result of elimination of territories, lost chainstore 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."

Finally, he determined that "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."

Mr. President, this legislation is also necessary because the Federal Trade Commission misapplied the "rule of reason" test which the Supreme Court said should apply to all non-price vertical restraints in the case of *Continental TV Inc.* v. *GTB Sylvania*, 433 U.S. 36 (1977). In that case, the Supreme Court overturned an earlier ruling in *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) in part and said that all non-price vertical restraints would have to be judged on a rule of reason; they would not be per se illegal. The rule of reason analysis requires weighing the effects of vertical restrictions in reducing intrabrand competition against possible benefits these restrictions may have on promoting interbrand competition. (Interbrand competition would be promoted if there are efficiencies in distribution, assistance to entry by new manufacturers, and encouragement for promotion and/or service and repair of the product.)

I am convinced that the FTC misapplied the "rule of reason" test in the consideration of the soft drink bottlers case, in part, because of evidence which I discovered during the hearings on this legislation, S. 598.

This evidence came from what has to be an unusual source given their position on this legislation—the U.S. Department of Justice. The Justice Department witness at the hearing in the Antitrust Subcommittee on September 26, 1978 was Richard J. Favretto, deputy assistant attorney general of the antitrust division of the Department. For the record I should say that Mr. Favretto, testifying for the Department of Justice, opposed S. 598. However I suggest here that Mr. Favretto has previously made public statements about the application of the rule of reason test which, if used in connection with the soft drink case, would lead Mr. Favretto to support the legislation pending in this body, the Soft Drink Interbrand Competition Act.

Specifically, in preparing for that subcommittee hearing, we found a speech by Mr. Favretto before the Southwest Legal Foundation Symposium on Antitrust Law given at the Dallas Hilton Hotel on May 12, 1978. The speech was entitled "Vertical Restraints and Other Current Distribution Issues In the Wake of Sylvania."

The speech discusses the impact of the Supreme Court rulings, which I mentioned earlier, United States versus Arnold Schwinn and Continental TV versus GTE Sylvania. I quote from part of Mr. Favretto's speech:

Whether the Court's acceptance in Sylvania of the arguments in favor of vertical restraints is dispositive for future cases is questionable in light of its own express reservations. Stressing the limits of its decision, the Court deliberately left open the possibility that subsequent analysis might identify non-price vertical restrictions which would appropriately be governed by the per se rule. But such a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in Schwinn—upon formalistic line drawing." All that is apparent at this point is that the Court does not want antitrust liability to turn upon the form of the restraint but rather upon its substantive impact.

The true meaning of the Sylvania opinion is going to have to await further clarification by the lower courts and ultimately by the Supreme Court itself. But we cannot wait for such clarification in making our enforcement decisions, so I would like to briefly outline for you how I see the Antitrust Division proceeding under the Sylvania opinion, and what I think some of the relevant considerations will be. From your perspective, I think you can assume that we will continue to view vertical restraints with suspicion.

Sylvania's rule of reason analysis dictates that we weigh the effect of vertical restrictions in reducing intrabrand competition against possible benefits these restrictions may have on promoting interbrand competition. If the benefits outweight the adverse effects, then the restraints are reasonable. In making this analysis, the Antitrust Division is likely to look primarily at three factors: (1) the market power of the company imposing the restraints; (2) the extent to which the restraints impede intrabrand competition; and (3) the justifications asserted for the restraints in terms of promoting interbrand competition.

Market power will be an important factor in our analysis because interbrand competition is the only remaining check on the price of a product subject to intrabrand restraints. If a manufacturer has substantial market power, the anti-competitive impact of the distribution restraints is aggravated. Factors we will consider in arriving at the state of competition in any industry—and the market power of the firm in question—will include the market share of the firm imposing the restraints, the degree of concentration in the industry, and the extent of product differentiation.

Market power primarily turns on the market share commanded by the product in the interbrand market. The larger the market share of the manufacturer, the more likely there will be anticompetitive effects in the overall market as a result of intrabrand restraints. If the overall market is imperfect, there is normally more reason to guard against intrabrand restraints. This is reflected in the Division's concern with the level of concentration in the market where vertical restraints are imposed. The danger of aggravating oligopoly pricing behavior by increased utilization of intrabrand restraints in a concentrated industry would be a critical factor in our assessment of the competitive effect of these restrictions. Conversely, we would have less concern for their impact in an overall market which was not concentrated.

Finally, the existence of significant product differentiation in a market would be relevant to the analysis. Where there is strong brand identification, the power of the manufacturer and its dealers to exact an unwarranted premium price may not be materially restrained by the competition of other products in the market.

After analyzing market power, the next step is to determine the extent to which the vertical restraints impede intrabrand competition. While the majority in Sylvania was unable to distinguish the defendant's location clause from the customer restrictions imposed upon retailers in Schwinn, there do appear to be important potential differences in market impact between the various possible vertical restraints. For example, the effect of a customer restriction on intrabrand competition is normally more threatening than a location clause restriction. Customer restrictions are frequently directed at keeping products out of the hands of discounters and may totally foreclose sales to that type of purchaser. Under a location clause, on the other hand, the dealer retains his right to sell to any customer, albeit only from its franchised location. Similarly, direct territorial restrictions tend to have a greater anticompetitive impact on intrabrand competition than, for example, areas of primary responsibility.

The Department has traditionally treated less restrictive vertical arrangements, such as areas of primary responsibility, profit passover payments, and location clauses, as being subject to the rule of reason. The effect of Sylvania is to equate these restrictions for purposes of analysis to the same standard that applies to direct vertical territorial and customer restrictions. This will lead to no significant change in how the Division has previously viewed these somewhat more ambiguous practices.

In the post-Schwinn era, the courts sought to ameliorate the harshness of the per se rule articulated there by distinguishing areas of primary responsibility, location clauses, and the like from direct customer and territorial restraints. Frequently, these hybrid restrictions were permitted where there did not appear to be any real competitive danger. Now that the per se rule has been eliminated, assessment of the validity of restraints in this entire area will not proceed on the basis of the form that the restriction takes. Thus, a direct territorial limitation or an indirect limitation achieved through use of a location clause will be assessed based on the effect of the limitation in the market involved.

Situations may also arise where a combination of restraints may render a vertical arrangement suspect where the imposition of only one or the other of those restraints would be legitimate. Thus, an exclusive dealing requirement coupled with an exclusive territorial restriction may have an impact in the overall market which may not be warranted to achieve the individual manufacturer's interest. The combination of these two types of restraints has been cited by some commentators as increasing the barriers to entry in an industry and therefore having an anticompetitive impact in the overall market.

After assessing market power and the restrictive impact of the restraints on intrabrand competition, we must proceed with an evaluation of the justifications proposed for the restraints in terms of promoting interbrand competition. One of the first steps in this analysis is a step familiar to rule-of-reason cases, i.e., we must look to the purpose of the restraint in question and whether it is ancillary to a legitimate business objective or imposed for the purpose of restricting competition. As part of this evaluation, we will examine the dimensions of the restraint to determine whether its scope is reasonably necessary to achieve the legitimate business purpose asserted and whether it merely regulates and promotes competition or is excessive in its restrictive effect. A possible inquiry here would be whether or not there are not less restrictive alternatives to achieve the same objectives. For example, would a primary area of responsibility achieve the objective as well as the more restrictive territorial exclusivity provision?

The Supreme Court in Sylvania identified a number of possible justifications for intrabrand restrictions. The Court pointed out that vertical restrictions may promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of its product. As an example of how this could operate in practice, the Court commented that new manufacturers and manufacturers entering new markets can use vertical restrictions as a means of inducing competent and aggressive retailers to make the heavy investment that is often required in initiating distribution of new products. The Court also noted that vertical restrictions can be used by established manufacturers to induce retailers to engage in promotional activities or to provide services and repair facilities necessary to the efficient marketing of the product. The Court was concerned apparently with the fact that the availability of such services may affect the manufacturer's good will and the competitiveness of its product. The Court feared that the so-called "free rider" effect might cause retailers in a purely competitive situation to eliminate services.

Debate has already started regarding the correctness of the Court's assumptions on these points. For example, some commentators have questioned the scope of the theory that by preventing a free rider, vertical restraints encourage dealers to undertake intense sales efforts, thereby furthering interbrand competition. This reasoning may not have application in some industries and solutions to the "free rider" problem may be available without imposing vertical restrictions.

Mr. METZENBAUM. Mr. President, will the Senator from Mississippi be good enough to yield to the Senator from Ohio for about 3 minutes just to make a statement on this subject without interfering with his speech?

Mr. COCHRAN. I would be happy to yield to the Senator without losing my right to the floor nor should my resumption be considered a second speech.

Mr. METZENBAUM. No problem.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. The Senator from Ohio asked the Senator from Mississippi to yield only for one purpose. Inquiry has been made of me and suggested that if I wanted to clear the floor in order to call up the Illinois Brick amendment, I might move to table the Bayh amendment or the Cochran amendment or the Bayh and Cochran amendment.

I am not rising to offer any motion to table. In effect, I am rising for the purpose of saying that I do not intend to offer a motion to table, it being my view that the Bayh and Cochran amendments are good amendments. I do not think they ought to preclude my calling up the Illinois Brick amendment. I addressed myself to that subject previously, but I wanted to make it clear that that to me would not serve any useful purpose to offer a motion to table amendments that have merit.

I think so well of them I wish they would be adopted immediately. But I also addressed myself to that subject previously, and I thank the Senator from Mississippi.

Mr. BAYH. Mr. President, if the Senator from Mississippi will yield to the Senator from Indiana on the same terms——

Mr. COCHRAN. I would be happy to yield to the Senator from Indiana on the same terms.

Mr. BAYH. I would just like to express my appreciation to the Senator from Ohio. As usual, he is extremely cooperative. Unfortunately, we cannot resolve this minor difference of how we can proceed here. Perhaps we will have a chance to discuss it further.

As I said earlier, the Senator from Indiana is in a very difficult position since he is a cosponsor of the very amendment the Senator from Ohio wants to bring up at this time. I hope after the Senator from Mississippi has concluded to, perhaps, put the reservation that the Senator from Indiana has to bring it up at this time in a little different perspective than that presented by his friend from Ohio earlier this morning in a very cogent argument presenting his side on this matter. But I want to thank him for helping us to proceed here.

I thank my friend from Mississippi.

Mr. COCHRAN. Mr. President, to continue:

Also, the dangers of disguising fundamentally horizontal restriction as vertical and potentially lawful restraints have been noted, as has the tendence of vertical restraints to permit retailers of highly differentiated products to capture a "retail monopoly profit." Only time will tell the extent to which the possible justifications discussed in broad-brush fashion by the Sylvania Court are truly accepted as defenses to vertical restraints.

In our future enforcement activity involving vertical restraints, I believe we will explore the appropriateness of seeking either per se treatment or the application of a rule of presumptive illegality in particular factual settings. Under a rule of presumptive illegality, once the Government proves certain facts—the existence of a vertical restraint plus something more about its competitive impact—then the burden of proof would shift to the defendant to justify the restraint on competitive grounds. For example, it has been suggested that a rule of presumptive illegality would be appropriate for vertical exclusive territorial arrangements where either the manufacturer or the dealer was shown to have market power or where the arrangement was shown to be directed against price cutting.

To summarize, I think the Division is not likely to challenge non-price vertical restraints being used by new entrants or by marginal competitors like Sylvania who may be akin to the failing company found in merger law. It seems to be generally accepted among economists and businessmen that vertical restraints can facilitate the entry and continued market presence of small manufacturers by permitting them to secure the services of capable dealers and to build a favorable image. This promotes interbrand competition while imposing limitations on intraband competition that are not particularly significant.

Mr. President, if we take the legal analysis which Mr. Favretto makes in that speech and apply it to the specific facts found by the administrative law judge on those points, I believe we would inevitably come to the conclusion that the exclusive territories which are governed by contract in the soft drink bottling industry are procompetitive.

Let us take those three points in the speech in order. First, do the vertical restrictions promote interbrand competition by helping the manufacturer achieve certain efficiencies in the distribution of its product?

On October 3, 1975, the administrative law judge for the Federal Trade Commission found as follows:

Around the turn of the 20th century syrup companies were largely small operations typically owned by pharmacists or their families. In order to provide the necessary inducement for local entrepreneurs to supply the capital required and to make the necessary effort to promote consumer acceptance of a new bottled soft drink product, soft drink licensors included exclusive territorial provisions in trademark licenses.

Territorial restrictions encouraged greater development of marketing and distribution efforts since exclusive licensees knew that their licensors and other licensees could not obtain a "free ride" on their efforts; they made possible the licensor's maintenance of quality control, thereby insuring uniform application of his common law trademark; they facilitated the licensor's production planning by enabling greater accuracy in calculating the forthcoming demand for syrup in a territory; they reduced the selling cost of the product by avoiding duplication of sales effort in a territory; and they encouraged the bottler to develop the potential of his territory to the fullest, thereby maximizing sales of the trademarked product.

The system of exclusive territorial licenses consistently has been widely employed in the manufacture and distribution of bottled soft drinks. There are over 50 syrup companies who have licensed local bottlers, 36 of them nationwide. These companies market more than 150 different soft drink brands through 7,500 agreements with local bottlers. These agreements for the local production and sale of trademarked products are unique when compared with the traditional organizational structure of American manufacturing and marketing.

One unique feature of the soft drink trademark licensing system is that a nationally advertised product is manufactured locally by independent businessmen who are required to make substantial and continuing investments in plant, equipment, packaging and warehouse space. No other industry could be identified where a single national brand owner sells an ingredient to hundreds of independent licensees who manufacture a finished product from that ingredient and others under a trademark license.

The soft drink industry is also unique in that it sells a refreshment product which is an "impulse item," whose most important characteristic is a distinct taste. Constant sampling is necessary to maintain demand for a brand and total availability of a brand at a multiplicity of outlets is essential to provide constant sampling necessary to successful marketing of that brand. The soft drink industry is also different from other industries in the broad range of flavors and package sizes and types required to be made available to satisfy consumer demand, in the need for frequent local store-door service, the importance of in-store merchandising, and the requirement of a store-door delivery system to sustain the use of a returnable container. Soft drinks are the only major product still available in food stores in returnable containers.

Those findings of fact show conclusively that the territorial restrictions encourage greater development of marketing and distribution, thereby achieving maximum market penetration—and, I might add, greater consumer choice.

Turning to the second point in Mr. Fauretto's speech: Do the vertical restrictions promote interbrand competition by inducing retailers (or distributors) to make new investment or new entry? The administrative law judge for the Federal Trade Commission made these findings:

Over the last two decades, there has been vigorous and increasing competition from the entry of new types and brands of soft drink products. After losing market position, The Coca-Cola Company was forced to abandon its single product philosophy around 1960 and to introduce a line of flavors and various allied products.

Entry of new firms and brands into the soft drink industry is easy. There are numerous flavor houses from which a company entering the soft drink business can purchase syrups or concentrates. There are also a large number of facilities available for the manufacture of soft drinks in bottles and cans which can be purchased, leased, or which will produce flavored carbonated soft drinks on a contract basis. Competition among contract bottlers or canners is very tough. There is no problem in obtaining an adequate supply of cans or bottles in which to package a new brand of soft drinks. Personnel with experience are available in the industry. Many new companies have entered the packaged soft drink business in the last 10 years, such as A&W Root Beer.

Many brands of soft drinks have been able to enter new markets and obtain immediate distribution in such markets at virtually no expense by entering into exclusive territorial license agreements with established bottlers already manufacturing and distributing other national brand soft drinks. By this "piggybacking" on the products of an established national brand bottler, a brand attempting to enter a market capitalizes on the bottler's existing production facilities, vehicles, vending machines, sales force, and good will in a market and can obtain substantial distribution in a market in a very short time.

By entering into exclusive territorial license agreements with established national brand bottlers and expanding the number of its bottlers from 395 in 1961 to 512 in 1971, Dr Pepper Co. has been able to enter a substantial number of new markets and expand the geographic areas in which Dr Pepper is available from those containing 114 million people to areas with 198 million people or almost 98 percent of the population. During this period, Dr Pepper's national share of the flavored carbonated soft drink market grew from 2 to 2½ percent to nearly 4 percent, and is about 5 percent today. In 1971, about 70 percent of the bottlers of Dr Pepper were licensed to sell other brands. During the 1961 to 1971 period, 70 percent of Dr Pepper's growth came from the multi-brand plants, and Dr Pepper grew at a rate 2 to 3 times the rate of the industry.

Thus, these findings of fact, supported by the evidence, show that entry into the market is easy and that territorial license agreements helped Dr. Pepper enter the market.

Turning to Mr. Fauretto's third point: Do the vertical restrictions promote interbrand competition by inducing retailers (or distributors) to engage in promotional activity?

The administrative law judge for the FTC made findings on that point as follows:

The evidence here shows that focusing the bottlers' attention on their own territorial markets stimulates their competitive effort.

There is keen interbrand pricing and also packaging competition (Findings 103–109, 149–153) and there are many brands of soft drinks available (Findings 92–102). In the last few years in particular, many new brands of soft drinks have successfully been introduced into the territorial markets of bottlers (Findings 154–162). The bottlers also compete intensely in having their brands available at a multitude of outlets and in obtaining both desirable shelf space and display locations in food stores (Findings 137–140, 141–144). And it is worth repeating that the prices of Coca Cola and allied products are determined by the bottlers individually and that those prices are sensitive to the prices of other brands and types of soft drinks (Findings 66, 103–109, 127–131).

Thus, under all three tests, the territorial provisions have been found procompetitive.

Mr. President, I think this analysis proves my point, that the FTC misapplied the rule of reason and that S. 598 is needed to correct that error so that the soft drink industry can continue to serve its customers and do business in an atmosphere of stability and certainty.

Mr. President, I ask unanimous consent that the remarks I have just made not be considered as a second speech on the same legislative day on this issue under the rule.

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

● Mr. SIMPSON. Mr. President, I am pleased to be one of the principal cosponsors of the Soft Drink Interbrand Competition Act. I firmly believe that this legislation will reintroduce some degree of realism into the Federal Trade Commission's interpretation of the antitrust laws.

Far from being an anticonsumer bill—as is depicted by its opponents—this legislation is clearly pro-competitive. It allows for the existence of franchise operations in the soft drink industry. Without this legislation, and in light of the FTC's recent misguided efforts to eliminate competition in this industry by its hasty and ill conceived attacks on franchise arrangements, it becomes obvious that there would, if the FTC were successful, actually be a reduction in competition, and a concurrent increase in the prices charged for soft drinks throughout the United States.

There is nothing in this legislation that runs contrary to the letter, or the spirit, of the antitrust laws. In 1967 the Supreme Court handed down one of its most ill-conceived and construed decisions rendered in the complex field of antitrust law. The net result of the Schwinn decision was to throw into doubt the legality of all territorial franchise contracts, on the assumption that they constituted an impermissible vertical restraint of trade.

With that one decision, the legality of some of the most successful, procompetitive, and pro-consumer business operations, including MacDonald's, Carvels, Pizza Hut, and Dunkin Donuts were placed in doubt. And for what reason? Merely, in my judgment, as an academic exercise of placing form over fact. It would no longer matter that by guaranteeing to a franchisee a protected territory, the franchisor would be bringing to consumers a host of new products and services at lower cost. It would no longer matter that franchise arrangements were providing perhaps the most readily available means for Americans with limited capital resources to become their "own bosses," and own their own business, thereby increasing overall competition in the marketplace. All of these pro-competitive advantages would disappear from the marketplace, because of an arcane attempt by the FTC to engraft this vague view of antitrust analysis to these types of contracts.

Eventually the Supreme Court recognized the inherently anticompetitive nature of the Schwinn decision. In 1977, it, in effect, reversed Schwinn. In GTE-Sylvania, Inc. against Continental Television, Inc., the Supreme Court held that, in a wide variety of circumstances, the allocation of protected territories among competing retailers—for distributors—by a manufacturer might well be a procompetitive, pro-consumer policy, that would be sanctioned by the antitrust laws.

This proposed legislation is within the confines of the Court's decision in the GTE Sylvania case. The record before the Federal Trade Commission failed to disclose any injury to competition by this practice. In fact, expert testimony, before congressional committees, from reputable industrial organization economists disclosed that there was little likelihood that this territorial allocation system within the soft drink bottling industry was causing any increase in the retail cost of soft drinks. These same witnesses also testified that in any event, it would be virtually impossible to calculate such costs, even if they did exist; and the accusation that this system was raising the price of soft drinks by 5 cents a bottle was without foundation.

Finally, I would remind this committee that the history of this matter before the FTC was, to say the least, a checkered one. At no time did an absolute majority of the FTC ever rule that territorial francises were anticompetitive. Only three members of the Commission even heard the case. Moreover, only two of them thought that the administrative law judge's decision, which favored the bottlers, ought to be overturned. The third Commissioner ruled in favor of the bottlers. The U.S. Court of Appeals has yet to rule on the matter.

In short, S. 598 is, in fact, as well as in theory, a pro-competition, pro-consumer bill, and it should be approved.●

Mr. COCHRAN. Mr. President, I suggest the absence of a quorum without losing my right to the floor.

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

The clerk will call the roll.

The assistant 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.