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REMARKS: by Mr. Luken

SOFT DRINK ENERGY CONSERVATION AND INTERBRAND COMPETITION ACT

HON. THOMAS A. LUKEN

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Tuesday, April 10, 1979

● Mr. LUKEN. Mr. Speaker, today my colleague DAN MICA and I are introducing the Soft Drink Energy Conservation and Interbrand Competition Act. The purpose of this bill is to overturn a decision of the Federal Trade Commission involving the soft drink industry which, if allowed to stand, will have serious adverse effects on our environment, our national energy goals, our efforts to combat inflation and hundreds of small business concerns.

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

The soft drink industry structure described has permitted the development of vigorous competition among the many popular brands, to the benefit of all consumers. There is intensive price advertising competition among brands seeking to increase their market shares. The effectiveness of competition within the industry is proven by the fact that by 1977 the price per ounce of Coke in the 16-ounce returnable bottle had increased less than 3 percent over the 1939 cost of the product, despite a rise in the Consumer Price Index during those years of 344 percent. Nevertheless, in 1971, the FTC filed a complaint against the syrup manufacturers, alleging that the exclusive territorial provisions in the franchise agreements were unlawful because they prevented intrabrand competition among the bottlers.

After many delays and a lengthy 6-week trial, the administrative law judge, in a 91-page initial decision containing 195 detailed findings of fact, upheld the legality of the territorial provisions and dismissed the complaint. Undertaking an extensive rule of reason analysis, the administrative law judge concluded that the effect of the restraint on intrabrand competition is outweighed by its effect on competition in the marketplace as a whole—interbrand competition—and that on balance the challenged territorial restrictions promote competition.

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

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

Virtually everyone with knowledge of the soft drink industry agrees that, if the FTC order is allowed to become effective, there will be a rapid movement to concentration within the industry, resulting in the major markets falling under control of the syrup manufacturers. Pepsi-Cola Co., a subsidiary of the conglomerate PepsiCo., Inc., which manufactures the Pepsi concentrate, now owns Pepsi franchises covering 25 percent of the population. These markets include Boston, New York, Philadelphia, Detroit, Pittsburgh, Dallas, Houston, and Los Angeles. The Coca-Cola Co., U.S.A., owns franchises covering 14 percent of the population. These include Boston, Chicago, San Francisco, and so forth. The FTC decision now permits, and indeed seems to require, the syrup manufacturers to compete with their independent bottler franchisees anywhere in the country. Mindful that these independent bottlers would be forced to compete with their syrup suppliers in the sale to consumers of the processed beverage, the following comments from one of the briefs in the court of appeals address the outrageously unfair competitive situation the bottlers would confront:

> In the absence of the territorial system, the Coca-Cola Company and other major syrup companies would be subject to a variety of economic pressures that would promptly force a significant expansion of syrup company owned bottling and canning operations. Syrup companies would almost certainly accelerate their vertical integration and under-

take dual distribution, and the bottling industry would undergo substantial concentration. The enormous power of the companies in their first stage as syrup producers would necessarily be transferred to the second stage (bottling), where they would be able to overwhelm competing independent bottlers.

The inevitable concentrate in the soft drink industry that will rapidly occur under the FTC decision not only will have a ruinous effect on hundreds of small business firms, jeopardizing substantially their entire net worth, but also will lead to the near total disappearance of the returnable, refillable glass bottle in which more than 40 percent of soft drink products are now sold. These bottles will be replaced by a vastly larger quantity of throwaway containers with disastrous adverse effects on the environment. Since each returnable bottle is used, on the average, 20 times, its removal from the stream of commerce requires the addition of 20 throwaway bottles and cans to deliver the same quantity of soft drink.

The addition of this vast new quantity of throwaway containers will tremendously increase our solid litter waste and will impact adversely on our energy conservation goals and our battle with inflation, since the manufacture of the additional containers will require enormous quantities of energy, and the price of soft drinks will increase because of the need to purchase the container.

The current high level use of the returnable, refillable beverage bottle is possible to maintain only with an exclusive territory franchise system. It is profitable to ship returnable bottles only within a relatively short distance from the processing plant, and then only if the bottler can control his own substantial investment in his bottle "float." The present system, in which the bottler delivers the product from the plant to each retail outlet, recovering the returnable bottles in the process, is the only distribution system which will permit the continued use of this most desirable package form.

Even the FTC recognized the need for and desirability of protecting the returnable bottle in its decision by upholding the validity of exclusive territorial rights for its continued use. However, it will be impossible for the small, independent bottler to survive with returnable bottles in competition with his giant syrup supplier who will be able to flood any territory with cans or nonreturnable bottles shipped from large processing plants located at distances many hundreds of miles away. The local bottler will soon lose his best accounts in the territory—the supermarkets—to his syrup manufacturer-bottler. The large supermarket chains strongly prefer cans and nonreturnable bottles which are easier to stock, take up less store space, and avoid problems associated with deposits and refunds.

At present, because of territorial exclusivity, independent bottlers, particularly major brand bottlers, have considerable leverage to encourage the supermarkets to handle returnable bottles despite their aversion to doing so. Since the supermarket has only one bottler to deal with, for a particular brand, it is an essential requirement to accept the bottler's package mix in order to stock his highly desirable product. The removal of exclusive territories will shift this leverage dramatically in favor of the supermarkets. They will then be able to order their requirements in throw away containers from distant suppliers, either large bottlers or sirup manufacturers, who will lack any incentive—indeed the very ability—to supply returnable bottles.

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, and the use of returnable bottles was down to 12 percent. 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. Miller and Anheuser-Busch serve the entire country mostly with cans and nonreturnable bottles shipped long distances, from a few strategically located plantsites. At present there are 1,833 independent soft drink bottlers. However, PepsiCo and Coca-Cola and now Seven-Up (recently acquired by Phillip Morris, which also owns Miller Beer) are positioned to do the same thing in the soft drink industry under the FTC decision which the large brewers have done in the beer industry.

A recent study done by Franklin Associates, Ltd., research consultants in resource and environmental policy and planning, projects truly alarming consequences from the disappearance of the returnable bottle in the soft drink beverage industry. Remember that returnable bottles are used an average of 20 times so that each one that disappears and is not replaced in kind must be replaced by 20 cans or other nonreturnable package forms to deliver the same amount of soft drink. The Franklin Associates' study projects the effects of the complete disappearance of the returnable bottle, now accounting for 40 percent of the beverage product sold, an eventuality which other industry experts agree is probable. The resulting increase in energy consumption over the first 4 years is expressed in the following equivalencies:

First, the total energy impact equals the supply of electricity for a city of 100,000 persons for 69 years;

Second, an increase in natural gas consumption equal to the amount necessary to heat 100,000 midwestern homes for 4.9 years;

Third, an increase in petroleum consumption equal to the amount of fuel requirements for 100,000 passenger cars (based on 14 miles per gallon and 12,000 miles per year, per car);

Fourth. An increase in coal consumption equal to the amount of coal that could be carried by a train 686 miles long.

The equivalent expressions of the impact of the FTC decision on solid waste generation is equally alarming. The study finds that the increase in solid litter waste, resulting from the replacement of the returnable bottle by cans and other nonreturnable package forms, would fill the Orange Bowl in Miami, Fla., 37 times.

These equivalencies for increased energy consumption and solid waste generation cover only a 4-year period beginning this year and ending in 1982. Other substantial adverse environmental consequences are found in the increased air and water pollution emissions inherent in the manufacturing process of cans and other nonreturnable package forms.

Finally, there is the direct increase in cost to the consumer that will result from the disappearance of the returnable bottle. A study of feature price advertising in 106 markets by the Majers Corp. for the year 1977 reveals that the consumer paid an average 97 percent more per ounce for soft drink products in a 12-ounce can than in the 16-ounce returnable bottle. This is not surprising when you remember that the returnable bottle is used on an average 20 times in contrast to the once only use of the expensive can or nonreturnable bottle.

Many other Members of Congress recognized the need for a legislative approach to avoid the numerous and dangerous consequences of the FTC decision. More than 70 Senators and 161 Members of this House have introduced or cosponsored bills on the subject. We all share a common objective—the protection of small business firms; 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. My bill differs only to the extent that it emphasizes the need for the legislation to protect the environment, 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 the 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.●