AMENDMENT NO. 1759 Calendar No. 687

Purpose: To exempt licensees from suits by indirect purchasers.

IN THE SENATE OF THE UNITED STATES—96th Cong., 2d Sess.

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.

May 13 (legislative day, January 3), 1980

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. METZENBAUM

Viz:

On page 3, lines 3 through 15, strike everything after the word "under" and insert in lieu thereof the following: "(1) section 4 of the Clayton Act, (2) section 4A of the Clayton Act, and (3) section 4C of the Clayton Act. Notwithstanding any other provision of law, no State, nor the United States, nor political subdivisions thereof, nor a State on behalf of natural persons shall be precluded from recovering under section 4, 4A, or 4C, respectively, of the Clayton Act against any defendant other than a licensee referred to in section 2 of this Act, on the grounds that the State, or United States or the political subdivisions thereof, or the natural persons did not deal directly with the defendant: *Provided,* That in any action under sections 4, 4A, or 4C of the

Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, in order to avoid duplicative liability to it, that the plaintiff has passed on to others, who are themselves entitled to recover under sections 4, 4A, or 4C of the Clayton Act, some or all of what otherwise would constitute plaintiff's damage: *Provided further*, That in any class action under section 4 of the Clayton Act and rule 23 of the Federal Rules of Civil Procedure, and in any action under section 4 of the Clayton Act by or on behalf of any government, the amount of the plaintiff's attorney's fees, if any, shall be determined by the court.

"SEC. 4. (a) Section 4 of the Clayton Act is amended by inserting '(a)' after '4' and by adding at the end of that section the following:

"'(b) That suits under this section brought by foreign sovereign governments, departments, or agencies thereof, shall be limited to actual damages.

"'(c) That no foreign sovereign may maintain an action in any court of the United States under the authority of this section unless its laws would have forbidden the type or category of conduct on which the action is based if that conduct had occurred within its territory at the time it occurred in the United States, and unless its laws allow the Government of the United States to recover damages caused by such con-

duct through the judicial or administrative processes of the foreign sovereign.'

"SEC. 5. Section 1407(h) of title 28, United States Code, is amended by striking out 'section 4C of'.

"SEC. 6. Section 4 of the Clayton Act is amended by adding the following additional sentence: 'The court may, in its discretion, award reasonable attorney's fee to a prevailing defendant upon a finding that the plaintiff has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'

"SEC. 7. (a) The amendments made by this Act, except as provided in section 7(b), shall apply to any action under section 4, 4A, or 4C of the Clayton Act which is pending on the date of enactment of this Act or which is commenced on or after the date of enactment of this Act: *Provided, however,* That when any such case is pending on the date of enactment of this Act, the Federal courts shall take all steps necessary to avoid duplicative liability for the same injury, including preclusion of subsequently filed actions not consolidated with previously filed actions seeking damages for the same injury: *Provided further,* That where such actions are consolidated, the court shall apportion damages according to actual injury.

"(b) Section 3 of this Act, shall apply to any action under section 4 or 4A of the Clayton Act which is commenced on or after the date of enactment of this Act.

"SEC. 8. As used in this Act, the term 'antitrust law' means the Sherman Act, approved July 2, 1890, the Federal Trade Commission Act, approved September 26, 1914, the Clayton Act approved October 15, 1914, and all amendments to such Acts and any other Acts in pari materia.".