96TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 96-1118

SOFT DRINK INTERBRAND COMPETITION ACT

JUNE 20, 1980.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. RODINO, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING, ADDITIONAL, AND SUPPLEMENTAL VIEWS

[To accompany H.R. 3567]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3567) 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, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. This Act may be cited as the "Soft Drink Interbrand Competition Act".

SEC. 2. Nothing contained in any antitrust law shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in the manufacture (including manufacture by a sublicensee, agent, or subcontractor), distribution, and sale of a trademarked soft drink product of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: *Provided*, That such product and licensee are in substantial and effective competition in the relevant market or markets.

SEC. 3. Nothing in this Act shall be construed to legalize the enforcement of provisions described in section 2 of this Act in trademark licensing contracts

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or agreements described in that section by means of price fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful.

SEC. 4. In the case of any proceeding instituted by the United States described in subsection (i) of section 5 of the Clayton Act (realting to suspension of the statute of limitations on the institution of proceedings by the United States) (15 U.S.C. 16(i)) which is pending on the date of the enactment of this Act, that subsection shall not apply with respect to any right of action referred to in that subsection based in whole or in part on any matter complained of in that proceeding consisting of the existence or enforcement of any provision described in section 2 of this Act in any trademark licensing contract or agreement described in that section.

SEC. 5. As used in this Act, the term "antitrust law" means the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), and the Federal Trade Commission Act (15 U.S.C. 41 et seq.).".

I. PURPOSE

H.R. 3567 provides a restatement of the application of the antitrust laws to territorial restrictions contained in licenses to manufacture, distribute, and sell trademarked soft drink products. In clarifying application of the law to the soft drink industry, the bill addresses issues central to a still unresolved antitrust proceeding brought by the Federal Trade Commission in 1971. The Commission's 1978 decision, still on review in the United States Court of Appeals for the District of Columbia, found the soft drink industry's territorial restrictions to be in violation of the antitrust laws.

This legislation restates the rule of reason approach followed by the Supreme Court in *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The clarification eliminates uncertainty in the law that has plagued the industry, particularly smaller bottlers, during the last decade. It does not grant antitrust immunities. Indeed, the legislation will apply only in situations in which there is "substantial and effective competition" among soft drink bottlers and among their syrup manufacturers in the relevant product and geographic markets.

II. BACKGROUND

THE SOFT DRINK INDUSTRY

The soft drink industry has long operated with trademark licensing agreements that grant a local bottler the exclusive rights to produce and market a brand of soft drink in a specified geographic area. Though long-standing, the propriety of such restrictions has been in doubt at least since 1967 when the Supreme Court declared similar restrictions to be *per se* violations of the antitrust laws. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Although the *Sylvania* decision overruled this aspect of *Schwinn* ten years later, *Sylvania* still requires that vertically imposed territorial restrictions withstand scrutiny under the "rule of reason test."

The conditions under which the soft drink industry operates have changed markedly in the years since the industry began operating through exclusive territories. Large multiplant bottlers have now come to dominate the industry, controlling an estimated 70% of total soft

drink sales.[1] From the over 6,000 bottling plants in 1950, there remain today only 2,000 plants run by around 1,700 companies.[2] In 1972, the largest 50 bottling firms had 45% of the total domestic soft drink sales.[3]

Along with the decline in the number of bottlers has come technological changes in production and marketing. For example, whereas virtually all soft drink containers sold prior to 1950 were refillable bottles, by 1978 the National Soft Drink Association calculates that only 37 percent of the containers were refillable. In many major metropolitan markets such as Boston, New York, and Philadelphia, refillable bottles have virtually disappeared.

According to testimony of industry witnesses, by clarifying the law, H.R. 3567 will halt trends that might otherwise lead to the demise of small bottling firms and the disappearance of the refillable bottle. These witnesses also testified that the soft drink industry is innovative and competitive. They cited the ability of new syrup manufacturers to rapidly enter the marketplace through "piggybacking," the practice by which local bottlers acquire licenses to produce soft drink products from more than one syrup manufacturer. For example, in 1971, 438 of the 726 domestic Coca-Cola bottlers distributed at least one soft drink licensed by another company.[4] One industry witness also indicated that the per ounce price of Coca-Cola sold in 32-ounce containers today is comparable to that sold in 6½-ounce bottles in 1900.[5]

Witnesses opposing the legislation urged that, at least in the form it was introduced, H.R. 3567 would preserve inefficiencies inherent in the existing territorial system and would have an inflationary impact on soft drink prices. They suggested that competition in many market areas is limited by the piggybacking practice, which could increase the concentration of brands controlled by the strongest bottlers in a territory.[6]

THE FTC PROCEEDING

The Federal Trade Commission filed complaints against seven soft drink syrup companies in July 1971. In 1975, the Administrative Law Judge issued the initial decision, concluding that the territorial restraints served to promote interbrand competition and dismissing the complaint against the syrup manufacturers. In April 1978, the FTC reversed and held that the territorial restrictions constitute unreasonable restraints of trade. The FTC found that the exclusive territories had virtually eliminated intrabrand competition and had diminished the vigor of interbrand competition.[7]

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[1] Pepsi Cola reported to the Subcommittee on Monopolies that 50 of its bottling franchises (among 426 bottling appointments) were multiplant bottlers. These 50 firms, however, controlled 70 percent of Pepsi soft drink sales in 1979. A marketing study of the soft drink industry based upon 1967 data showed that large or multiplant bottlers controlled 62.5 percent of total industry sales. The authors believe the percentage has increased considerably "in view of the significant number of mergers and acquisitions in the industry since 1967." Stern, Agodo & Firat, "Territorial Restrictions in Distribution: A Case Analysis," 40 J. of Marketing 69, 71 (1976).

[2] Soft Drink Interbrand Competition Act. S. Rept. No. 96–645, at 4.

[3] Information supplied by the National Soft Drink Association.

[4] *Coca Cola, et al.*, 91 F.T.C. 517, 638 n. 40 (1978).

[5] Testimony of J. Lucian Smith, Member, Board of Directors, Coca Cola Company, before the Subcommittee, Mar. 19, 1980.

[6] According to evidence presented in the FTC proceeding, the Pepsi Cola bottler in Albany, N.Y., in addition to bottling Pepsi Cola and other Pepsi allied brands, also controlled Hires Root Beer, Orange Crush, Schwepp's carbonated soft drink line, and canned Lipton Tea (91 F.T.C. at 638, n. 40).

[7] *Coca Cola Co., et al.*, 91 F.T.C. 517 (1978).

The respondents in the FTC proceeding immediately sought judicial review of the FTC's decision.[8] Oral argument in the United States Court of Appeals for the District of Columbia was heard in October 1978. Some 20 months later, the Court of Appeals has yet to render a decision. Because of the likelihood of a remand to the FTC or further review in the Supreme Court, litigation is likely to continue for additional months beyond the appellate court's decision. Although the FTC decision has yet to be enforced, the long period of this litigation has resulted in financial uncertainty in the industry, particularly to small bottlers confronted with investment decisions.

According to a number of industry witnesses, the FTC erred in emphasizing the effect of territorial restrictions in eliminating intrabrand competition, and failed to adequately acknowledge potential benefits of territorial restrictions on interbrand competition.[9] The *Sylvania* decision, they urge, requires that primary attention be given to the effects on interbrand competition.

LEGISLATIVE HISTORY

After weighing these concerns, the Committee decided to report this legislation affirming the application of the rule of reason test, as set forth in *Sylvania*, to the exclusive territorial limitations set forth in soft drink trademark licensing agreements. The Committee, however, adopted an amendment in the form of a substitute. The amendment narrows the original bill (identical to S. 598) and ensures that no antitrust exemptions are created.

The amended bill merely codifies the *Sylvania* decision. Section 2 provides that the antitrust laws will continue to apply with full force where there is not substantial and effective competition in the relevant markets. Nor is there any intent to exempt conduct that constitutes a per se violation of the antitrust laws.[10] Underlining this concern, Section 3 of the bill, added by the Committee amendment, ensures that traditional per se violations will not be exempted under the guise of attempts to enforce otherwise lawful territorial restrictions. The bill, however, responds to the bottlers' concerns of prolonged antitrust damage liability by ensuring that the decade-long Commission proceeding will not toll the statute of limitations for subsequent private or state actions brought against industry members.

The Subcommittee on Monopolies and Commercial Law held five days of intensive hearings on this legislation.[11] The Subcommittee reported H.R. 3567 by voice vote with no amendments. The Committee on the Judiciary adopted an amendment in the nature of a substitute and, by voice vote, favorably reported H.R. 3567. The Committee recommends its adoption by the House.

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[8] *Coca Cola Co.* v. *FTC*, Docket Nos. 78–1364, 78–1544, 78–1545 (D.C. Cir., filed Apr. 24, 1978).

[9] Commissioner Clanton, in dissent, argued for a remand to the Commission to obtain more evidence concerning the effectiveness of interbrand competition. 91 F.T.C. at 589.

[10] The antitrust counsel for The National Soft Drink Association, Mr. Charles Ruttenberg, wrote to the Subcommittee that H.R. 3567 "is not intended to immunize any per se violations of the antitrust laws. . . . I can categorically state that nothing in the bill is intended to protect agreements among bottlers or syrup companies with regard to pricing, with regard to the allocation of territories or with respect to joint refusal to deal."

[11] The hearings were held Oct. 24 and Nov. 15, 1979; Mar. 19, Apr. 24 and 29, 1980.

III. Section-by-Section Analysis

Section 1 establishes the title of H.R. 3567 as the "Soft Drink Interbrand Competition Act."

Section 2 of the Act provides a restatement of existing antitrust laws applicable to licensing agreements granting a licensee exclusive rights to manufacture, distribute and sell trademarked soft drink products in a defined geographic area. It is the intent and purpose of the Committee that the territorial agreements used in the soft drink industry shall be lawful and may be judicially enforced when the requirements of this bill are met.

The standard adopted in the amended Section 2 is a legislative restatement of the standard announced by the Supreme Court in *Sylvania* as it applies to the soft drink industry. The Committee substitute amendment adds the words, "in the relevant market or markets" to the end of the proviso of section 2.[12] Professor Gellhorn, who testified in favor of the bill, wrote the Subcommittee that relevant market "is the economic test for product (and geographic) market definition that has been used in antitrust cases for generations. It has a well-developed meaning and has been applied in a sensitive and sophisticated fashion in recent years."

Thus, the Supreme Court has established criteria to be considered in defining the relevant markets (e.g., *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 37, 391–404 (1956); *International Boxing Club* v. *United States*, 358 U.S. 242, 249–252 (1958)) and these criteria have been applied in court cases involving the soft drink industry (e.g., *Sulmeyer* v. *The Coca-Cola Co.*, 515 F. 2d 835, 848–49 (5th Cir. 1975)).

Substantial and effective competition requires competition above a threshold level. During Committee debate, several Committee members who are also members of the reporting Subcommittee, stressed their concern that the legislation not be interpreted to permit anti-competitive pricing.

Thus, Congressman McClory indicated that the legislation should not be interpreted to permit increases in prices beyond those that "would be determined by competition." Congressman Harris agreed, as did Congressman Hughes, who stated: "I hope this Committee will indeed make it clear that we expect the court to look at all relevant factors in determining whether the marketplace is competitive."

The courts may weigh a number of factors in deciding whether or not there is substantial and effective competition with "other products of the same general class in the relevant market or markets": the number of brands and types of flavors of available soft drinks; the persistence of long-run anti-competitive profits; the number of retail price options available to consumers; the existence of inefficiency and waste; the degree of service; ease of entry into the market; the number and strength of sellers of directly competing products in a relevant market; and the availability of various forms of containers or

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[12] In commenting on the amendment in the nature of a substitute, Congressman Hall (the principal sponsor of the bill) indicated that "it takes care of the problems that might have been raised yesterday in the Subcommittee. I think that it does nothing at all to stifle competition in any way. As a matter of fact, I think it promotes competition and it does not take away the jurisdiction of any court in the future to determine what competition is or what might be an absence of competition."

Congressman Hughes agreed that the amended bill intends "to put in place the rule of reason and eliminate the per se rule with regard to franchise arrangements of bottlers."

packaging. The Committee believes that this restatement of *Sylvania* is necessary because the decade-long FTC proceeding has contributed to a state of uncertainty harmful for the small bottler.

In *Sylvania*, the Supreme Court stressed the importance of benefits to interbrand competition that may accrue from vertically imposed territorial restrictions. The Court recognized that the existence of interbrand competition is the "primary concern of antitrust law." 433 U.S. at 52 n. 19. Thus, while a Court applying the rule of reason must examine other circumstances impacting upon the overall competitive situation,[13] that analysis cannot ignore the touchstone of antitrust theory and law—the vitality of interbrand competition.

In restating the law applicable to vertically imposed territorial restraints in the soft drink industry, the Committee in no way seeks to address or alter existing proscriptions in the antitrust laws governing territorial restraints that are horizontally inspired or imposed. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972). The fact that a particular restraint may appear vertical on its face would not preclude a court from closer analysis revealing hidden horizontal restraints. *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). Nor should a court overlook the fact that territorial restrictions initially vertically imposed by a manufacturer on his franchisees may with the passage of time take on a dominant horizontal character that brings them within the purview of the per se rule. See *United States* v. *General Motors Corp.*, 384 U.S. 127, 136 (1966).[14]

Section 3 of the bill ensures that actions constituting per se violations of the antitrust laws are not authorized under the guise of enforcing otherwise valid territorial restrictions. It underlines the Committee's intention that the bill not be used to legalize price fixing agreements, horizontal restraints of trade or group boycotts.

At the Subcommittee hearings, at least one witness testified that the language of H.R. 3567 as introduced might legalize certain horizontal boycotts or other per se violations of the antitrust laws.[15] Section 3 addresses this problem and makes certain that the bill will not legalize per se violations of the antitrust laws. Several examples of per se conduct are listed—price fixing agreements, horizontal restraints of trade, and group boycotts. It is the Committee's intent that other conduct deemed by the courts to be per se unlawful also not be authorized by this bill.

The term horizontal restraints of trade is intended to include both primary boycotts and secondary boycotts. The courts have traditionally pierced the veil of supposed vertical restraints that were actually horizontal agreements. Section 2 of this bill in no way protects such agreements.

Section 4 of the bill protects the soft drink industry from potential 13-year antitrust liability that otherwise might ensue from the FTC proceeding brought in 1971. Section 5(i) of the Clayton Act, 15, U.S.C. 16(i), provides that during the pendency of an antitrust action brought by the United States, and for one year thereafter, the running of the

[13] *First Beverages Inc. of Las Vegas* v. *Royal Crown Cola Co.*, 612 F. 2d 1164, 1170 n. 8 (9th Cir. 1980).

[14] The amendment is, however, in no way intended to inhibit enforcement by a franchise company of the territorial provisions contained in its bottler contracts to the extent consistent with existing law.

[15] Testimony of Ronald Reagin, Nov. 15, 1979.

statute of limitations will be tolled for every private and state cause of action arising out of the same matter.

The Committee intends to eliminate the 13-year-plus potential damage liability that could be imposed on the industry. Section 3 limits the liability to a four-year period by eliminating the tolling provision in section 5 of the Clayton Act for any action brought by the United States that is pending on the date of enactment of this bill.

The unamended provision would have unreasonably deterred any private damages actions because it would have eliminated damage liability for any period prior to a court determination that the conduct in question was unlawful.[16]

Section 5 defines the words "antitrust laws" to mean Sherman Act, the Clayton Act, the Federal Trade Commission Act. It eliminates the reference to Acts "in *pari materia*" contained in the original bill.

The Committee intends that H.R. 3567 provide necessary relief without granting antitrust immunity and without establishing any precedent that would weaken our beleaguered antitrust laws.

IV. Information Submitted Pursuant to Rules

A. BUDGET STATEMENT

Clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not provide new budgetary authority or increased expenditures.

B. COST

The Committee concurs with the estimate provided by the Congressional Budget Office and adopts that estimate as the cost estimate of the Committee for the purpose of clause 7 of House Rule XIII.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., June 19, 1980.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 3567, the Soft Drink Interbrand Competition Act, as ordered reported by the House Committee on the Judiciary, June 17, 1980.

This bill exempts from antitrust law the territorial soft drink franchise system, provided there is substantial and effective interbrand competition in the relevant market or markets. It specifically excludes from the exemption, however, price fixing agreements, horizontal restraints of trade, or otherwise unlawful actions. These provisions impose no additional enforcement burden on the Department of Justice or the Federal Trade Commission and therefore it is expected that no additional cost to the government would be incurred as a result of enactment of this bill.

Sincerely,

Alice M. Rivlin, *Director.*

[16] See testimony of Richard Favretto, Deputy Assistant Attorney General, Oct. 24, 1979.

C. INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that this bill will not have an inflationary impact on prices and costs in the operation of the national economy.

D. OVERSIGHT STATEMENT

The Subcommittee on Monopolies and Commercial Law of this Committee exercises oversight responsibilities with respect to Government and private enforcement of the Federal antitrust laws. The favorable consideration of this bill was recommended by the Subcommittee. The Subcommittee will closely monitor the application of this legislation in antitrust proceedings involving the soft drink industry.

No findings or recommendations of the Committee on Government Operations were received as referred to in rule XI, clause 2(1)(3)(D).

V. Executive Communications

U.S. Department of Justice,
Assistant Attorney General,
Legislative Affairs,
Washington, D.C., October 15, 1979.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice on H.R. 3567, the "Soft Drink Interbrand Competition Act." This bill would establish a new standard for the legality of exclusive territorial arrangements used in the distribution or sale of a trademarked soft drink product. It would also eliminate damage liability for any such arrangement unless the defendants continued to use it after a final adjudication of its illegality.

This bill is one of the most recent of a series of bills introduced in the last few years that would modify for the soft drink industry the normal antitrust rules concerning exclusive territories. The Department of Justice opposed the passage of those earlier bills. In our letter of June 4, 1979, to Chairman Metzenbaum of the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, we recommended against enactment of S. 598, which is substantially identical to H.R. 3567, and we have also recommended against enactment of other bills currently pending before the House of Representatives designed to establish special standards for the soft drink industry. The Department of Justice continues to oppose this kind of special interest legislation.

In recent years, Congress has consistently refused to narrow the application of antitrust law by creating special exemptions. Indeed, far from being favorably disposed to narrowing its application, Congress has exhibited in the past few years an increasing commitment to strengthening the enforcement of antitrust law. In this context, the continuing attempt by some industries to obtain special treatment under the antitrust laws must be viewed with great skepticism. As the

National Commision to Review Antitrust Laws and Procedures recently concluded, proponents of any form of antitrust immunity should have the burden of overcoming a strong presumption against such immunities by producing clear and convincing factual evidence that the characteristics of a particular industry make the application of usual antitrust standards unwarranted.[1] In our opinion, this burden has not been satisfied by the proponents of legislation such as H.R. 3567.

Section 2 of H.R. 3567 would provide that territorial agreements in any trademark licensing contract or agreement involving soft drink manufacturers, distributors, and sellers are legal under the antitrust laws provided that the products covered by such agreements are in "substantial and effective competition with other products of the same general class." We believe that this proposed modification of the current legal standard would introduce an unnecessary and uncertain element into the law of vertical restraints, and would unfairly tip the scales in favor of the soft drink industry at the expense of the consuming public.

Under a recent Supreme Court decision,[2] vertical nonprice restraints between a manufacturer and its distributors or sellers, including territorial arrangements, are tested under the rule of reason to determine whether, under all the circumstances of the case, they constitute a reasonable or an unreasonable restraint of trade. The Supreme Court left open the possibility that particular applications of vertical restrictions might be held illegal *per se* under the antitrust laws, but only upon a showing of a demonstrable anticompetitive economic effect.[3] The Federal Trade Commission has applied this rule of reason analysis in a proceeding under Section 5 of the FTC Act involving vertical restraints in the soft drink industry.[4] Thus, existing law permits soft drink manufacturers and bottlers to present any claimed economic justification for a particular territorial restriction.

In light of present case law on vertical restraints there does not appear to us to be any justification for this proposed legislation. H.R. 3567 would replace the comprehensive rule of reason analysis, which allows consideration of all of the circumstances and is designed to determine whether on balance a restraint is anticompetitive, with an approach which focuses exclusively on the existence of interbrand competition. There is no reason to believe that this approach distinguishes between procompetitive and anticompetitive vertical restraints with greater precision than the existing antitrust standard applicable to all vertical restraints. Under existing law, the courts place great weight on the vigor of interbrand competition, which the Supreme Court called "the primary concern of antitrust law." [5] The Federal Trade

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[1] Report of the National Commission for the Review of Antitrust Laws and Procedures, 186-87 (1979).

[2] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[3] Id. at 58–59.

[4] *The Coca-Cola Co.*, 91 F.T.C. 517, 615–16 (1978), appeal docketed, No. 78–1364 (D.C. Cir. Apr. 24, 1978). This bill, if enacted, would alter the precise legal standard under which the *Coca-Cola* case was decided, and thus the case, now on appeal, would probably have to be at least partially relitigated under the standards set forth in this legislation. It would be inappropriate for the Department of Justice to comment on the merits of a case currently on appeal. We do note that the FTC conducted a lengthy and thorough inquiry, affording representatives of the soft drink industry ample opportunity to present any relevant evidence in support of their position, and that the United States Court of Appeals for the District of Columbia Circuit has heard argument on the case, which is now awaiting decision. We believe that the normal administrative and judicial process should be allowed to run its course, and that congressional action at this time would be premature.

[5] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, supra, at 52 n.19.

Commission carefully considered the vigor of interbrand competition in its decision concerning vertical restraints in the soft drink industry.[6] We perceive no significant advantage in adopting a standard which excludes all other factors from consideration, especially since the proposed standard is of uncertain meaning and scope.[7]

The risks inherent in a standard which permits vertical restraints whenever there is substantial interbrand competition are real and substantial. Most of the arguments suggested in favor of vertical restrictions are based on an asserted need to assure bottlers of greater revenues by insulating them from intrabrand competition. These additional revenues, proponents claim, would benefit consumers by allowing bottlers to make greater capital investments and to provide superior products and service. Such claimed benefits would accrue, however, only if consumers were denied the benefits of competition—lower prices and the opportunity to choose among competing suppliers. Moreover, there is no guarantee that bottlers would voluntarily devote any of their artificially inflated revenues to providing consumer benefits that would not be profitable under a system of free competition. Nor is there any assurance that bottlers would perform as efficiently or innovate as readily in such areas as service and packaging without the spur of intrabrand competition. Normally consumers will pay for the services and products they desire and, absent special circumstances, they should not be forced to pay higher prices for services they would prefer to forego. As the National Commission for the Review of Antitrust Laws and Procedures has recently concluded, free and open competition is generally the surest guarantee of consumer welfare.[8]

The Department of Justice recognizes that many proponents of legislation to legalize territorial restrictions in the soft drink industry are motivated by a desire to encourage the use of returnable bottles, in order to conserve energy and protect the environment. H.R. 3567, however, contains no provision which requires, or even encourages, bottlers to use returnable bottles. This proposed legislation offers bottlers and manufacturers immunity from the antitrust laws for their vertical territorial agreements whether or not they make any effort to offer returnable bottles. Special legislation may be necessary where the market process is not fully able to take into account the total costs imposed on society by the sale of particular commodities, as in the case of evironmental or safety hazards. Such legislation, however, should deal directly with the problem. Affording manufacturers and bottlers an unrestricted license to eliminate intrabrand competition in

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[6] The *Coca-Cola Co.*, supra, 91 F.T.C. at 634–44.

[7] A somewhat similar standard to the "substantial and effective" standard of this bill was employed in the "fair trade" legislation repealed by the Consumer Pricing Act of 1975, Public Law No. 94–145, 89 Stat. 810. The Miller-Tydings and McGuire Acts, which legalized resale price maintenance sanctioned by state law, limited the resale price maintenance authorizations to products that were in "free and open competition with commodities of the same general class." The courts interpreted the "free and open" competition standard very broadly to include all circumstances where another product existed that consumers purchased for the same purpose as the product subject to the resale price maintenance agreement. See *Brown v. New York News, Inc.*, 366 F. Supp. 651, 661–662 (S.D.N.Y. 1973), aff'd on this ground, rev'd on other grounds, 552 F.2d 1242, 1249 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976). The vagueness and unworkability of the "free and open" standard was strongly criticized. Herman, "Free and Open Competition," 9 Stan. L. Rev. 323, 327–32 (1957). The protection afforded by the "substantial and effective" standard which this bill would apply to territorial restrictions in the soft drink industry may be equally illusory.

[8] Report of the National Commission for the Review of Antitrust Laws and Procedures, supra, at 177–189.

the hope that some of them may voluntarily choose to offer returnable bottles is not an efficient solution to energy or environmental problems.

The Department of Justice agrees with proponents of H.R. 3567 that nonprice vertical restraints may in some circumstances foster competition by helping small but highly efficient and aggressive firms to enter the market and compete effectively.[9] Current law does in fact recognize that vertical restraints may have these positive effects, and it takes them fully into account in evaluating the overall legality of a particular restraint. Current law also recognizes, as H.R. 3567 does not, that manufacturers can often achieve these benefits without completely eliminating intrabrand competition. H.R. 3567, however, would legalize the most extreme form of territorial restraint, the categorical prohibition on sales outside the assigned area, even when only a more limited restraint would be justified in the circumstances of a particular case. In many instances, we believe, less restrictive arrangements, such as area of primary responsibility clauses designed to encourage effective market penetration, would offer ample protection for the industry's legitimate needs. H.R. 3567 thus affords bottlers and manufacturers a license completely to deprive consumers of the benefits of intrabrand competition even where less restrictive measures would suffice.

Moreover, to the extent this bill may be interpreted as applying to licensing agreements between competing manufacturers, distributors or sellers of soft drinks, it would substitute the vague protection of the "substantial and effective competition" standard for the current presumption against horizontal market division agreements.[10] Existing law takes account of the special dangers they present, but does not bar consideration of special economic justifications for certain territorial agreements among competitors.[11]

In sum, the standard of legality incorporated in H.R. 3567 would unfairly tip the scales in favor of the soft drink industry. Current law strikes a fair balance between the need for an orderly and efficient marketing system and the benefits of robust and uninhibited competition. Private plaintiffs, the FTC, and the Department of Justice now must bear the burden of proving that a particular vertical territorial restraint is unreasonable under the circumstances. H.R. 3567 would make that burden even heavier by creating a new and vague standard for illegality without any showing that the current standard is deficient. Congress has refused in previous years to impose higher prices on consumers for the benefit of the soft drink industry, and it should continue to do so.

H.R. 3567 also would remove the possible damage liability of any drink manufacturer or bottler who enters into territorial restrictions later determined to be illegal. Section 3 of H.R. 3567 provides that the existence or enforcement of such territorial agreements "prior to any final determination that [they] are unlawful shall not be the basis for

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[9] See, e.g., *Continental T.V.* v. *GTE Sylvania, Inc.*, supra, at 54–57.

[10] In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), competing distributors who jointly owned a trademark agreed among themselves to allocate exclusive territories for sales of the trademarked goods, and the Supreme Court held this horizontal division of markets illegal per se under the Sherman Act.

[11] See the final lower court order in *Topco*, accepted by the Supreme Court, which permitted such arrangements as "areas of primary responsibility." *United States* v. *Topco Associates, Inc.*, 1973–1 Trade Cas ¶ 74,391 (order and ¶ 74,485 (amendment and opinion) (N.D. Ill. 1973), aff'd., 414 U.S. 801 (1973).

recovery under section 4" of the Clayton Act. Section 4 of the Clayton Act imposes treble damage liability on persons that violate the antitrust laws. Under this provision victims would be prevented from recovering damages for their actual injuries, much less treble damages, even if soft drink manufacturers or bottlers not faced with substantial and effective interbrand competition agreed to territorial restrictions for the sole purpose of restraining competition and raising prices, unless the defendants continued to use the restricitons after the specific agreements had been determined to be illegal. Even then any recovery would appear to be limited to damages inflicted after the adjudication of illegality. The practical effect of this limitation would be virtual immunity from any damage liability for anticompetitive and unjustified territorial restrictions in this industry. By restricting damage liability so drastically even for vertical restraints illegal under the modified standard of section of H.R. 3567, section 3 would defeat both the compensatory and the deterrent functions of private damage actions under the antitrust laws. The implication limitation of relief to injunctions against the continuation of illegal restraints deprives the victims of these conspiracies of the monetary incentive to sue which has long been recognized by the Congress as necessary for effective private enforcement of these laws. We see no justification for a provision which would cripple private enforcement in this manner.

Proponents of H.R. 3567 claim that it would be unfair to subject the soft drink industry to possible treble damage liability because of authority suggesting territorial agreements in this industry were legal. For example, proponents point to *Coca-Cola Bottling Co.* v. *Coca-Cola Co.*, 269 F. 796, 813–14 (D. Del. 1920), wherein the district court held certain territorial restrictions to be legal in the context of an attempt by Coca-Cola to void one of its own contracts as contrary to law. However, it would be unjustified for the defendants in any of these cases, much less for other members of the industry, to rely in perpetuity on such authority for the absolute legality both of types of restrictions that were the subject of litigation and of other types as well. As the industry is well aware, the legal standards under which those cases were decided have been modified over the years,[12] and changing conditions may alter the effect of territorial restrictions on competition from what it was when those cases were decided.[13] Proponents of the legislation have shown no surprise or unfairness that justifies singling out the soft drink industry for the damage immunity which H.R. 3567 would create.

We can see no reason to modify for a particular industry the already extremely flexible law on exclusive territories. Such a move can only encourage other industries to demand equal treatment. H.R. 3567 does not represent a constructive attempt to clarify the law on exclusive territories. It represents an effort by special interests to remove themselves from the application of antitrust rules designed to

[12] See, e.g., *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), overruled by *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, supra.

[13] In this connection, it is important that any damage liability would be limited to the period of time which a territorial restriction was proven unreasonably to restrain trade.

maximize competition and preserve efficiency. The Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ALAN A. PARKER,
Assistant Attorney General.

DISSENTING VIEWS OF MESSRS. EDWARDS, CONYERS, AND DRINAN

The purpose of H.R. 3567 is to create a special antitrust exemption for the soft drink industry. It is truly legislation of the industry, by the industry, and for the industry.

The purely special interest nature of this legislation is dramatized by the nature of the testimony during five days of Subcommittee hearings. The only witnesses to testify in favor of the legislation were industry representatives or persons whose testimony was financially supported by the industry. Though not as well financed and orchestrated, opposition to the bill is much more broadly based. Presidential Inflation Adviser Kahn, the National Association of Attorneys General, the Department of Justice, the Federal Trade Commission, Consumers Union, Consumers Federation of America, independent marketing specialists and law professors, customers of soft drink bottlers, and even a small bottler are among those who have stated their opposition to H.R. 3567. And even a business-oriented publication, has recently editorialized against the bill.

Only last year, the National Commission for the Review of Antitrust Laws and Procedures said that exemptions from the basic American scheme of open competition should be granted only when " there is compelling evidence of the unworkability of competition or clearly paramount social purpose." [1] The industry has not met that burden. The only attempt to add a socially redeeming aspect to this legislation—a partial requirement for refundable containers—was fought off by the industry supporters of the bill.

This is not a struggling industry; in fact large multiplant bottlers, many of them owned or controlled by conglomerates, dominate this industry. Thus, although there are said to be around 1700 bottling companies in the industry, the largest 50 bottlers in 1972 sold over 45 percent of all soft drinks sold in this country.[2] That percentage has assuredly increased substantially during the last eight years. Pepsi Cola Company reported that in 1979, 50 of its multi-plant bottling franchises (among 426 bottling appointments) accounted for 70 percent of all sales of Pepsi soft drinks.

H.R. 3567 is special interest legislation in its worst form. One independent study has concluded that "the principal effect" of territorial restrictions in the soft drink industry is increased prices and costs, and the protection of inefficiency.[3] The Department of Justice agrees. In an October 1979 letter to Chairman Rodino, the Department concluded that "H.R. 3567 does not represent a constructive attempt to clarify the law on exclusive territories. It represents an effort by

[1] Report to the President and the Attorney General of the National Commission For The Review of Antitrust Laws and Procedures. Jan. 22, 1979, at p. 177.
[2] Material submitted to Subcommittee by National Soft Drink Association.
[3] Tarner, The Economics of Territorial Restrictions in the Soft Drink Industry, 22 Antitrust Bull. 145, 153 (1977).

special interest to remove themselves from the application of the antitrust rules designed to maximize competition and preserve efficiency." [4] Congressman Stark, who has steadfastly opposed this legislation, has quite correctly renamed it the "Bottlers' Charity and Subsidy Act." [5]

The obvious special interest favoritism and the concomitant costs to the consumer are not the only harms of H.R. 3567. This bill will disrupt the orderly judicial review process created by the Congress for agency decisions. The ABA Antitrust Section recently passed a resolution which urged Congress *not* to reverse Federal Trade Commission decisions until administrative and judicial review are complete. If we pass this legislation, we are inviting countless other litigants before our agencies and courts to run to the Congress each time they are dissatisfied with an interim result of litigation.

The industry alleges this legislation is absolutely necessary to save the small "Mom and Pop" bottlers from being wiped out. Testimony before the Subcommittee included descriptions of third and fourth generation family corporations that would be severely damaged without this legislation. Yet the FTC found that some small bottlers were among the most efficient in the industry—it is the present system of artificial restraints that prevents such bottlers from growing to their competitive limits.

The facts show that, in any event, a restructured industry is inevitable. The large multiplant firm, not the small bottler, will be the primary beneficiary of this legislation. The industry has gone from 6000 bottlers in 1950 to less than 2000 bottlers today. Coca Cola-owned franchises sell 15 percent of the Coca Cola brands sold nationally; for PepsiCo, a conglomerate, the figure is 20 percent. IC Industries, formerly the Illinois Central Railroad, boasts in a recent Wall Street Journal advertisement that their franchises for one brand alone serve over 18 million people. Coca Cola of New York, a Fortune 500 company, recently spent $85 million on an acquisition program. Other giants, such as General Cinema, General Tire and Rubber, Wotemco, Liggett (formerly Liggett and Myers), Warner Communications, also own bottlers, This is not a list of corporations in need of special treatment from Congress. Nonetheless, the industry vigorously resisted amendments attempting to limit the scope of this law to the small bottler.

The industry claims that intense interbrand competition (e.g., between Coke and Pepsi) obviates the need for any intrabrand competition (e.g., between two Coke bottlers in neighboring districts). This "intense" competition has created an oligopolistic industry in which the trademarks of the four largest soft drink makers constitute 73.1 percent of national soft drink sales.[6]

In addition, the boundaries of territories developed 75 years ago are ill suited to modern marketing conditions. Changes in population and transportation make the small territories (basically defined by the distance a horse and wagon could deliver and return in one day) inefficient. Limited by the system of air-tight territorial restrictions, a bottler seeking a larger more efficient territory must rely on con-

[4] Department of Justice letter of Oct. 15, 1979.
[5] Testimony at Hearing on H.R. 3567 before Subcommittee on Monopolies and Commercial Law, on Apr. 24, 1980.
[6] National Soft Drink Association response to follow up question by the Subcommittee, citing Beverage Industry, a publication covering soft drinks, beer, and wine.

solidations or acquisitions. Recently, a group of investors acquired the Coca Cola bottler of Richmond and later acquired the Baltimore Coca Cola bottler. These investors now control all Coca Cola products bottled in a territory that runs from Richmond to Baltimore, including the District of Columbia area. Such acquisitions only underline the economic inefficiency of the old territories that this legislation would protect.

We welcome the amendment adopted by the full Committee intended to bring this legislation back within the terms of the antitrust laws. The amendment added the words "in relevant market or markets" to the proviso to Section 2 of the bill. This addition establishes a two-part test for determining both the geographic and product markets within which competition will be assessed. This dual test ensures that the court limit its inquiry to products in the same general class within the broader product market, as the court did in *Sulmeyer* v. *The Coca Cola Co.*, 515 F. 2d 835, 848–49 (5th Cir. 1975).

During debate in full Committee, proponents urged that the bill does not create an exemption from the antitrust laws. Congressman Mazzoli expressed his concern that the legislation not apply "unless there is competition among and between Cola products, among and between non-Cola products, among and between fruit-based drinks, and among and between all of the specific kinds of trademarked and non-trademarked products." Mr. Mazzoli further said, "I want to make sure that we are going to preserve this antitrust exemption only where there is lively and maybe even cut-throat competition among and between these products . . ." Mr. Hall, the principal sponsor of the legislation stated, "We are not doing anything to eliminate competition. We are not. There is nothing by virtue of this substitute which would be . . . that in any way eliminates competition." Mr. Hall further said, "This does nothing to stymie competition and I think the entrance of the language 'in the relevant market or markets' will certainly take care of the question the Gentleman has raised."

By codifying the Supreme Court's decision in *Continental TV* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1979), the Committee's amendment also ensures that the Court may consider the competitive effects of territorial restrictions on intrabrand as well as interbrand competition. Although describing interbrand competition as the "primary" concern of antitrust law, *Sylvania* does not preclude consideration of intrabrand competition.[7]

We are also pleased with the addition of a new Section 3 of the bill, which indicates the Committee's intention not to authorize per se violations of the antitrust laws. It is significant that he Supreme Court in *Sylvania* expressly left open the possibility that certain types of vertical territorial restrictions could, because of their economic effect, still fall within the per se rule (433 U.S. at 58–59). At least one respected commentator analyzing *Sylvania* has indicated his view that air-tight territorial restraints of the type utilized by the soft drink industry should be per se violations of the antitrust laws: "Almost all imaginable legitimate business reasons can be achieved by more

[7] *First Beverage Inc. of Las Vegas* v. *Royal Crown Cola Co.*, 612 F. 2d 1164, 1170, n. 8 (9th Cir. 1980).

moderate vertical restrictions or alternative techniques that involve no intra-brand restrictions at all." [8]

The Federal Trade Commission's decision, should it be upheld in the Court of Appeals, will result in substantial cost savings for American consumers, H.R. 3567, even in its amended form, could well threaten those gains. If the industry succeeds in overturning the Commission holding, the winner will be the soft drink industry, and particularly the large multiplant firms that dominate that industry. The American public will be the loser.

While we welcome the constructive changes worked on H.R. 3567 by the Committee, such legislative slight-of-hand cannot obscure the special interest nature of this legislation. The Commission and the parties to the Commission's proceeding have diligently pursued the administrative and judicial processes intended to ensure that our antitrust laws are fully and fairly applied to the soft drink industry. Those processes are not complete. There is no justification here for a legislative interruption of a case which could carry substantial public benefits for the consumer. Even if this were the right bill, this is the wrong time.

JOHN CONYERS.
ROBERT F. DRINAN.
DON EDWARDS.

[8] Robert Pitofsky, "The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions," 78 Columbia Law Review 1, 22, 28 (1978).

ADDITIONAL VIEWS

This statement of additional views on H.R. 3567 is intended to make as clear as possible the purpose and intent of the bill. Therefore, to the extent that these views and the views expressed elsewhere in this Report are inconsistent, we intend that the views set forth herein shall be controlling.

In our view, the Report of the Committee on the Judiciary of the United States Senate on a bill identical to H.R. 3567 as introduced, S. 598 (Senate Report No. 96–645 (March 26, 1980)), fully and accurately describes the purpose and intent of H.R. 3567. We, therefore, concur with the Senate Report with the observation set forth below.

As pointed out in the Senate Report on S. 598, the several courts which have considered the legality of the territorial restrictions which have been used in the soft drink industry for more than three-quarters of a century have ruled in favor of their legality. The Administrative Law Judge who heard the Federal Trade Commission proceedings made numerous findings to the effect that interbrand competition in the soft drink industry is intense. The only adverse finding has been the two-to-one decision of the Federal Trade Commission issued in April, 1978, which reversed the Administrative Law Judge. The hearings on H.R. 3567 have been extensive and, in our view, fully support the proposition that interbrand competition in the industry is intense and that the industry currently meets the competitive standards of the bill. Thus, the clear weight of authority, both legal and economic, favors the upholding of these territorial provisions. The cases brought by the Federal Trade Commission against the soft drink companies have been pending for nine years with no end in sight; the resulting uncertainty has severely damaged the soft drink industry. In the interest of preventing further injury to the industry, we urge that the litigation be concluded promptly.

Section 2 of H.R. 3567 sets forth the standard of legality to be applied to the territorial arrangements covered by the bill. If a plaintiff cannot establish that there is an absence of substantial and effective competition within the territory, then the existence and enforcement of such arrangements would not violate the antitrust laws. In making its analysis, the reviewing court should consider the factors relevant to the determination of whether there is substantial and effective interbrand competition as described in the reports on the Senate and House bills. However, the absence of intrabrand competition should not be a factor in such an analysis.

During the consideration of H.R. 3567 by the Committee on the Judiciary, several amendments were approved by the Committee. We believe it would be helpful to describe the scope and purpose of these amendments.

The first amendment adds the words, "in the relevant market or markets." at the end of section 2 of the bill. That amendment is a

clarifying amendment to make it clear to the courts that it is up to the courts to determine the relevant geographic market as well as the relevant product market. This additional phrase is not intended in any way to limit the scope of the language contained in section 2 of the bill as introduced and as described in the Senate report.

The second amendment approved by the Committee is the inclusion of a new section 3 which reads as follows:

> Nothing contained in this Act shall be constructed to legalize enforcement of the territorial provisions described in this Act by means of price fixing agreements, horizontal restraints of trade or group boycotts which would otherwise be unlawful.

Here again, the intent of the amendment is to clarify the bill. Its purpose is to make clear that specified activities, which have been held to be illegal per se, such as price fixing, cannot be used to enforce the territorial provisions. We do not believe that H.R. 3567, as introduced, did, in fact, permit such activities; the amendment has been included, however, in the interest of satisfying any concerns in this regard. The amendment is in no way, however, intended to inhibit enforcement by a franchise company of the territorial provisions contained in its bottler contracts, including enforcement on the basis of complaints to it by one or more affected bottlers claiming violations of the territorial provisions by other bottlers.

The treble damage provision of H.R. 3567, formerly section 3 of the bill, has been renumbered as section 4 and provides:

> In the case of any proceeding instituted by the United States described in subsection (i) of section 5 of the Clayton Act (relating to suspension of the statute of limitations on the institution of proceedings by the United States) (15 U.S.C. 16(i)) which is pending on the date of the enactment of this Act, that subsection shall not apply with respect to any right of action referred to in that subsection based in whole or in part of any matter complained of in that proceeding consisting of the existence or enforcement of any provision described in section 2 of this Act is any trademark licensing contract or agreement described in that section.

The purpose of the amendment of the treble damage provision of the legislation is to permit the applicability of the normal four-year statute of limitations specified in the Clayton Act but to preclude the possibility of the tolling of the statute of limitations by the pending FTC proceedings. This is appropriate because otherwise industry members could be liable for treble damages for a period commencing with the year 1967 even though these territorial arrangements have been utilized in good faith for more than three-quarters of a century and have been universally upheld by the courts.

Finally, section 4 of the bill has been renumbered as section 5 and has been amended to delete the words, "and all amendments to such Acts and any other Acts in pari materia." The Committee believed that the stricken language was unnecessary to the section.

Conclusion

Passage of H.R. 3567, as amended, would rectify a manifest injustice and provide a clear and legally sound standard to be followed by the soft drink industry with respect to the continuance of these long-standing business arrangements. In our view, the territorial arrangements used in the soft drink industry promote, rather than lessen, competition. The Industry, therefore, should be permitted to continue to use such arrangements and to enforce them in accordance with their contractual rights.

Sam B. Hall, Jr.
Jack Brooks.
Harold L. Volkmer.
Mike Synar.
Dan Glickman.
Billy Lee Evans.
Hamilton Fish.
M. Caldwell Butler.
Henry J. Hyde.
Thomas N. Kindness.
Harold S. Sawyer.
Dan Lungren.
F. James Sensenbrenner, Jr.

SUPPLEMENTAL VIEWS OF MR. McCLORY

I support the reported version of H.R. 3567. Earlier I had harbored some doubts about the wisdom of this legislation because it might have permitted soft-drink bottlers to collect monopoly overcharges with impunity, interfered with the rights of vendors to carry on their businesses, and generally granted an exemption from the antitrust laws. However, the legislative history of this bill in the Committee on the Judiciary as well as the significant changes in the language of the bill which the Committee adopted have made clear the very limited effect of this legislation.

First, the record made by proponents is unequivocal that the purpose of this legislation is not to exempt exclusive territorial arrangements between syrup manufacturers and their bottlers from the antitrust laws but merely to insure the application of the Rule of Reason standard to such arrangements. Although this standard is today the law of the land since the Supreme Court's decision in *GTE-Sylvania*, the legislation does accomplish some limited changes in the law.

As I read the legislation, it changes the burden of proof. In my opinion, the Federal Trade Commission incorrectly placed the burden of proof on the respondents to show that they satisfied the Rule of Reason standard. But the general rule is that the plaintiff carries the burden of proof that an antitrust violation has occurred. The legislation thus corrects this procedural error.

In addition to changing the burden of proof, the legislation changes the formulation of the Rule of Reason standard without changing the substance of the standard. The purpose of this linguistic change without substantive change is to require the appellate courts to re-analyze the FTC decision. But since the bill does not exempt exclusive territorial arrangements, it will not end litigation but may postpone even longer, unfortunately, the final settlement of this controversy.

While proponents long claimed that the legislation merely codified the Rule of Reason, I feared that the proviso might be of negligible significance much as the proviso of the now repealed fair trade laws or that of the Capper-Volstead Act relating to farmers' co-operatives. This might have been the result had the Committee not required that the substantial and effective competition required by the proviso be found "in the relevant market or markets." The prior language may merely have required only that several brands of soft drinks be available to consumers. Thus, it may have found inconsequential that all such products in a given area were bottled by the same bottler. It may have found inconsequential that a given bottler was collecting monoply overcharges from vendors, grocery chains, and other retailers. And thus, such considerations might have been deemed outweighed by the mere availability to the consumer of several brands of soft drinks.

But this is no longer true. The language "in the relevant market or markets" refers to traditional antitrust principles. It adopts a flexible judicial standard for assessing the state of competition. It includes both geographical markets and product markets. Geographic markets may not necessarily coincide with the exclusive territories. The product market aspect refers to not only the same product but to other naturally fungible products.

Whether the existence of product A is "relevant" in a product B case is a matter for the court to determine. In my opinion, the suggestions we heard in testimony that, for example, Coca-Cola and Perrier water, even tap water, "compete" will not pass the "relevant market" test. Rather, I would expect judges to exercise common sense—to be "reasonable"—in determining what is the relevant product market. Thus I would conclude that Coca-Cola, for example, competes with other colas but not with water, iced tea, or Kool-Aid.

The phrase "products of the same general class" is not inconsistent with this conclusion. And even if it were, it would be immaterial inasmuch as the proviso requires that the product in question must compete, first, with other products of the same general class and, second, with those products in the relevant product market. Whether the first test is met is immaterial if the second is not. Thus the phrase "products of the same general class" is meaningless unless it is more restrictive than the relevant product market test. Since the canons of construction require the abhorrence of meaningless language, that phrase must be narrowly construed as a matter of logic.

Moreover, to be relevant the markets examined by the court must include those in which the defendant acts. The original proviso tried to substitute competition among syrup manufacturers and among retailers for competition among bottlers. But in a case where a bottler is challenged, the most relevant question is the nature of the defendant's conduct. Those with whom he deals create the most relevant market of all. Since *Illinois Brick* teaches us that only direct purchasers can be injured as a matter of law, it seems clear that the judge must examine the state of competition for those who deal directly with the bottler—the vendors, the grocery chains, and other retailers.

How do we measure whether they are getting the benefits of substantial and effective competition? In the absence of statutory direction, it will be done in the traditional way. Thus the existence of monopoly overcharges cognizable under section 2 of the Sherman Act or the refusal of an authorized monopolist to deal as in *Otter Tail* would clearly signal the lack of substantial and effective competition for those who deal with the defendant bottler in what must be the most relevant market of all. Again, it is evident that very little substantive change is effectuated by the reported bill. But this is natural when the legislation is introduced to codify current law as enunciated by the Supreme Court and is amended in Committee to perfect that purpose.

One of the major issues both in the Subcommittee and in the full Committee mark-ups was the impact of this legislation on the vendors. We have received letters and telegrams from vendors across the land, both large and small, protesting this legislation. I would have thought it wise to give statutory assurance by indicating that this legislation does not affect their normal, legitimate business practices. While there may be some fear on their part since their livelihood is at stake, it is my opinion that this legislation is not drafted to affect them even

though some bottlers may hope that it does. But some obvious points should make the scope of this legislation clear.

This legislation does not purport to establish exclusive territories. Rather, it says that the antitrust laws shall not upset certain contracts between syrup manufacturers and licensed bottlers provided that certain competitive requirements are met. It says further that these contracts can be enforced. But it is well-established law that a contract—no matter what it claims to accomplish—can be enforced only against those who are parties to, and bound by, the contract. In sharp contrast, statutes can be generally enforced. But since this bill does not itself establish territories, there can be no general enforcement. Rather, it establishes a legal standard by which to test the validity of such contracts. And since these licensing contracts do not involve vendors, vendors are not obligated by such contract cannot be enforced against vendors. If licensed bottlers refuse to deal with vendors unless they waive their rights to move their own merchandise in interstate commerce except to approved localities, *Otter Tail* sanctions may apply. Since this legislation does not, as the Committee Report states, legalize any previously illegal conduct, the prohibitions of *Otter Tail* cannot be said to be impliedly repealed. In sum, a contract between A and B is not enforceable against C and is enforceable against A or B only if certain competitive requirements of the proviso have been met. Therefore, it seems clear that vendors and other customers of soft-drink bottlers are left where this legislation finds them.

This bill—as amended—is not an exemption from the antitrust laws. That is why the Committee was so careful to revive treble damage suits which would have been virtually precluded under the bill as introduced. Thus, lawsuits are anticipated both by private parties and by the government for violations of the anti-trust laws. Since no substantive change has been made in the antitrust laws but only a procedural change in who bears the burden of proof, lawsuits that could have been brought yesterday may still be brought tomorrow. The Rule of Reason as enunciated by the Supreme Court still governs. It requires a balancing of the advantages of existing interbrand competition against the disadvantages of restrained intrabrand competition. Interbrand competition may be the primary concern for consumers. It may or may not be for vendors and retailers. Restraints on intrabrand competition may be reasonable in markets dominated by vigorous interbrand and intrabrand competition. However, such restraints may be unreasonable where they are the rule and not the exception. And it may be one thing when such restraints are inspired vertically and quite another when they are inspired horizontally. All these issues remain open under present law and under the amended bill.

Exclusive territorial arrangements are not without their benefits. They promote the use of refillable bottles which in turn saves on energy consumption, protects our environment, and offers the consumer appreciable cost savings. The imprecision of the bill originally introduced raised the spectre of serious harm to the public interest. But, as I have indicated, the legislative history and the significant changes in language in the Committee substitute have alleviated those concerns. I am confident that the advantages of exclusive territorial arrangements will be made available without harm to the public, as I have outlined in these views. I urge the adoption of the bill as amended.

ROBERT MCCLORY.

SUPPLEMENTAL VIEWS OF MR. RAILSBACK ON H.R. 3567

This legislation would not be necessary but for the fact that the Federal Trade Commission misapplied the *GTE-Sylvania* standard when it decided the *Cola* cases. This has resulted in great uncertainty within the soft-drink industry generally and among small independent bottlers in particular.

In *GTE-Sylvania*, the Supreme Court applied the Rule of Reason, requiring the party challenging the vertically imposed non-price restriction to bear the burden of proving that the restraint was unreasonable under all the facts and circumstances. Its decision carefully weighed any benefits to interbrand competition and the other efficiency gains derived from territorial restraints against the harm to intrabrand competition, and concluded in the particular circumstances of that case that the vertical restrictions on intrabrand competition served actually to promote interbrand competition, which the Court said is the primary concern of antitrust law.

In reaching its own decision, the Federal Trade Commission relied essentially on the negative effects on intrabrand competition caused by the vertical non-price restriction. It placed on the respondents the burden of showing that they met the Rule of Reason by establishing that their business justifications and the procompetitive effects of their restraints outweighed any loss of rivalry among the bottlers resulting from the elimination of intrabrand competition. As the burden of proof was shifted, the result almost inevitably followed.

For nine years, the FTC litigation has cast a long shadow over the industry. The territorial franchises held by the smaller bottlers, in which family owners and other small businessmen have very substantial capital investments, have been placed in particular jeopardy. Their value has been brought into question because of their vulnerability to market penetration and takeover by the large bottlers and syrup manufacturers if the franchise system is ultimately held to be illegal. I have heard compelling testimony on this point from the small independent businessmen in my own Congressional district.

The great merit of this legislation is that it insures the proper application of the *GTE-Sylvania* Rule of Reason standard to the soft-drink industry. The burden of proof is placed clearly on the party seeking to establish that a vertical non-price restraint in the soft-drink industry constitutes an antitrust violation, and the primary focus is returned to where the Court said it properly should be, on the existence of substantial and effective interbrand competition.

TOM RAILSBACK.

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