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SENATE

BILL	DATE	PAGE(S)
S. 598	Mar. 8, 1979	S2412-2414

ACTION
Introduced by Mr. Bayh, et al.

By Mr. BAYH (for himself, Mr. COCHRAN, Mr. ARMSTRONG, Mr. BAKER, Mr. BAUCUS, Mr. BELLMON, Mr. BENTSEN, Mr. BOREN, Mr. BOSCHWITZ, Mr. BURDICK, Mr. CANNON, Mr. CHILES, Mr. CRANSTON, Mr. DANFORTH, Mr. DECONCINI, Mr. DOMENICI, Mr. EAGLETON, Mr. FORD, Mr. GARN, Mr. GOLDWATER, Mr. GRAVEL, Mr. HART, Mr. HATCH, Mr. HAYAKAWA, Mr. HEFLIN, Mr. HELMS, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. HUMPHREY, Mr. INOUYE, Mr. JACKSON, Mr. JEPSEN, Mrs. KASSEBAUM, Mr. LEAHY, Mr. LUGAR, Mr. MAGNUSON, Mr. LAXALT, Mr. MATHIAS, Mr. MATSUNAGA, Mr. MCCLURE, Mr. MCGOVERN, Mr. MELCHER, Mr. MORGAN, Mr. MOYNIHAN, Mr. NUNN, Mr. PERCY, Mr. PRESSLER, Mr. PRYOR, Mr. RANDOLPH, Mr. RIEGLE, Mr. ROTH, Mr. SCHMITT, Mr. SIMPSON, Mr. STENNIS, Mr. STEVENS, Mr. STEWART, Mr. STONE, Mr. TALMADGE, Mr. THURMOND, Mr. TOWER, Mr. WARNER, Mr. WILLIAMS, and Mr. YOUNG):

S. 598. A bill to clarify the circumstances under which terirtorial provisions in licenses to manufacture, distribute and sell trademarked soft drink products are lawful under the antitrust laws; to the Comimttee on the Judiciary.

SOFT DRINK INTERBRAND COMPETITION ACT

● Mr. BAYH. Mr. President, today I, along with 62 of my colleagues are introducing legislation designed to preserve a unique industry practice—the manufacture, bottling, and distribution of trademarked soft drinks by local companies operating under territorial licenses. Sometime ago Senator COCHRAN and I

drafted and circulated the Softdrink Interbrand Competition Act and it is significant to note that almost two-thirds of our colleagues have seen fit to express support for this measure prior to its introduction.

For over 75 years the soft drink industry has used territorial franchise agreements with smaller bottlers to provide services to a wide variety of its customers. These restrictions limit the geographical territory in which a bottler may manufacture and distribute soft drink products and have been the basis of the industry's structure.

In 1971, the Federal Trade Commission (FTC) instituted a proceeding to bar as unlawful these restrictions in trademark licensing. The Soft Drink Interbrand Competition Act will simply clarify the circumstances under which territorial license provisions are lawful. The bill specifically sets out that there must be the presence of "substantial and effective competition with other products of the same general class" as a prerequisite for the continuation of territorial franchises.

We believe that the antitrust laws should not be used to restructure an industry, especially where there is an acknowledged high level of interbrand competition. Such a restructuring might change the nature of an industry in which the franchises are, by and large, small family-owned businesses. We are concerned that, should territorial licenses be prohibited, we would find these small businesses swallowed up by large bottlers. In the long run, the FTC ruling would, therefore, be anticompetitive. The industry will be transformed from one with many components to an oligarchical industry. In 1979, over 2,000 bottling plants were operating throughout the United States. Over 1,500 of these plants employ fewer than 50 employees. Although the distribution of bottling plants tends to parallel the distribution of population, they are generally located in small cities. The end result of the FTC ruling, in our opinion, will be not only detrimental to the industry but, therefore, costly to the consumer.

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

Mr. President, I ask unanimous consent that the text of the bill, together with a section-by-section analysis, be printed in the RECORD.

There being no objection, the bill and summary were ordered to be printed in the RECORD, as follows:

S. 598

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

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 is in substantial and effective competition with other products of the same general class.

SEC. 3. The existence or enforcement of territorial provisions in a trademark licensing agreement for the manufacture, distribution and sale of a trademarked soft drink product prior to any final determination that such provisions are unlawful shall not be the basis for recovery under section 4 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," approved October 15, 1914.

SEC. 4. As used in this Act, the term "antitrust law" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (the Sherman Act), approved July 2, 1890, the Federal Trade Commission Act, approved September 26, 1914, and the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" (the Clayton Act), approved October 15, 1914, and all amendments to such Acts and any other Acts in pari materia.

SECTION-BY-SECTION ANALYSIS

Section 2 of the bill provides that the exclusive territorial arrangements used in the soft drink industry shall not be held unlawful under the antitrust laws if the soft drink products subject to such arrangements are in substantial and effective competition with other products of the same general class. The arrangements covered by Section 2 are those contained in soft drink trademark licensing agreements which limit the territory within which the licensee may manufacture, distribute and sell the trademarked soft drink product, and which prohibit sales outside the territory, whether such sales are made directly or indirectly.

The provisions of the bill are applicable to such arrangements only where there is "substantial and effective competition" with other products of the same general class. The words "substantial and effective competition" are intended to be flexible, but it is the intent of the legislation that if vigorous interbrand competition is found to exist, the fact that intrabrand competition has been foreclosed will not preclude the application of the bill. Some of the factors to be taken into account in determining whether or not substantial and effective interbrand competition exists are: the number of brands, types and flavors of competing products available in a licensee's territory; the number and strength of sellers of competing products; the degree of service competition among vendors; ease of entry into the market; the persistence of inefficiency and waste; the failure of output levels to respond to consumer demands; and failure to introduce more efficient methods and processes.

The "substantial and effective" test is intended to express a more specific standard for evaluating these practices. Since the territorial provisions have been in effect for more than 75 years, they should not be cast aside without careful scrutiny of their merits. This is exactly what the Federal Trade Commission did in the Coca-Cola and Pepsico cases when it ignored the findings of the Administrative Law Judge that there was vigorous interband competition among soft drinks and that these arrangements promote, rather than lessen, competition. Section 2 would compel the Commission to make a careful examination of the effects on interband competition rather than relying simply upon the intraband effects of the territorial provisions.

Section 3 of the bill is intended to eliminate the possibility of treble damage exposure as a result of the inclusion of territorial provisions in a soft drink licensing agreement prior to any final determination in a particular case that such provisions are unlawful. Territorial provisions have been utilized in the soft drink industry for more than 75 years on the clear understanding that they were legally permissible. Such arrangements were held lawful by a Federal court as early as 1920, and on several recent occasions. Moreover, the legality of such territorial arrangements was not challenged by the Federal government until 1971, after the industry practice had been openly engaged in for decades. Of course, if particular territorial arrangements are found to be unlawful because of the absence of substantial and effective competition, treble damage suits would not be barred in the event such arrangements are continued after a final determination of their illegality.

Section 4 of the bill defines the term "antitrust law" as used in the bill. In includes the Sherman Act, the Federal Trade Commission Act, the Clayton Act, and all amendments to such acts, together with any other acts which have historically been considered to be antitrust laws.●

● Mr. COCHRAN. Mr. President, I am pleased to join with my colleague from Indiana (Mr. BAYH) in introducing legislation designed to preserve a unique industry practice—the manufacture, bottling, and distribution of soft drinks by local, independent companies. It is most gratifying that over 60 Senators have agreed to join in sponsoring this legislation.

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

According to all the key indicators of competition, there is today intense competition in the soft drink industry. This competition has been a major factor in keeping consumer cost down. The cost per ounce of Coca-Cola in the 6½-ounce bottle in 1939 was seventy-seven one hundredths of 1 cent per ounce. The cost today in the 16-ounce returnable bottle is seventy-nine one hundredths of 1 cent per ounce. This is only a 2.6-percent increase in over 28 years.

Vigorous competition is also demonstrated by advertising. Heavy advertising demonstrates heavy competition. In the last few years, advertising in the industry has increased 132 percent, rising much faster than the 84-percent increase in sales during the same period. The only explanation for this growth in advertising is competition with the industry for a share of existing markets.

Notwithstanding this strong evidence of competition, the FTC instituted a proceeding against the bottlers in which it alleged the territorial licenses violated the antitrust laws. After 7 years, the Commission ruled 2 to 1 to overturn an

administrative law judge's decision and conclude the licensing agreements were unlawful.

If this legislation is not adopted, and the FTC decision against the territorial licenses is allowed to stand, there will be a short spurt of intrabrand competition, after which many of the small independent bottlers will be swallowed up by large regional bottlers. In the long run, the FTC ruling will be anticompetitive. Another serious consequence of the FTC ruling is that returnable bottles which cannot, as a practical matter, be distributed by large regional operations, will be discontinued. The alternative nonreturnable containers are more expensive for the consumer, use more energy in production, and simply create an additional waste problem.

If this legislation is adopted, we will protect the livelihood of the small independent companies which can best serve their local customers. In addition, these local bottlers would be able to continue to use returnable bottles, thereby keeping down costs and saving energy.

Mr. President, this legislation will preserve the high level of competition which exists in the soft drink industry, it will help fight inflation by keeping prices down and will help encourage the continued use of energy-saving and environmentally sound returnable bottles. I urge all my colleagues who have not yet given full consideration to this bill to join us in this effort.●

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