The District of Columbia Bar

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Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

Re: S. 412, the "Beer Bill"

Dear Mr. Chairman:

Division 2 (Antitrust, Trade Regulation and Consumer Affairs) of the District of Columbia Bar 1/ opposes the "Malt Beverage Interbrand Competition Act" because it is special-interest legislation that creates an unjustified exemption from the antitrust laws. The bill would grant beer brewers an antitrust exemption in order that they might grant a territorial monopoly on distribution to a certain beer wholesaler. Industries should be granted antitrust exemptions only "where there is compelling evidence of the unworkability of competition or a clearly paramount social purpose."2/ The burden of proof should be on

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1/ The views expressed herein represent only those of Division 2 of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors.

2/ Report of the President's Commission for Review of the Antitrust Laws and Procedures at 177 (January 1979). The antitrust laws were enacted as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade" in the United States. They are based on the principle that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." Northern Pacific Railway Co. v. United States, 356 U.S. 114 (1958).

the industry asking for the exemption. The beer industry has not shown that competition is unworkable or that any paramount social purpose justifies the enactment of this bill.

The Sherman Act, section 1, prohibits "every contract combination ..., or conspiracy, in restraint of trade...." In determining whether an industry practice entailing non price vertical restraints violates this statute, the courts use the "rule of reason" test. Under the "rule of reason" test, the court "weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on trade...." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) including "the actual impact of these arrangements on competition.." United States v. White Motor Co., 372 U.S. 253, 262 (1967). Thus, current law applicable to the beer industry is that trade practices are lawful if they have a legitimate business purpose and the overall effect is not anticompetitive. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

The "beer bill" proposes to permit beer brewers to grant a monopoly to one of their wholesale distributors within a certain geographical territory, so that a single distributor would sell to all the retail stores in the territory, if the the beer was in "substantial and effective competition" with other brands.[3]

The meaning of "substantial and effective competition" in the bill is a legal unknown. It is not defined in the bill. Unlike the current "rule of reason" test, it has not been interpreted in a body of court opinion. Its vagueness as a standard for conduct will cause confusion in the industry and require a substantial expenditure of industry money in litigation to develop a clear definition.

The Federal Trade Commission and the Justice Department have testified that the "substantial and effective competition" standard is likely to be interpreted as more permissive of trade restraints than the Sylvania "rule of reason" test,[4] and that

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3/ The Malt Beverage Act, Section 2.

4/ See Malt Beverage Interbrand Competition Act: Hearing on S. 410 Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. (May 14, 1985).

the beer industry is particularly susceptible to anticompetitive effect from exclusive distribution territories. See "Vertical Restraints in the Brewing Industry: Is the Malt Beverage Interbrand Compeition Act the Answer?" 50 Brooklyn Law Review 143, 184-85 (1983).

The beer industry is characterized by a high level of concentration at the brewer level. Recent statistics indicate that the four largest brewers constitute 79.9% of the national market. Furthermore, the two largest brewers, Anheuser-Busch and Miller, control 57.1% of the national market. Modern Brewery Age Blue Book 171 (1985).

The brewers have become increasingly concentrated in recent years. In 1962, the top six brewers had 40.4% of the market, whereas in 1983 they controlled 89.5% of the market. "Vertical Restraints" at 151. Wholesale distribution of beer has also become more concentrated, with 4551 wholesale distributors in 1982, down from 6020 in 1958. Id.

At the present time, some states permit territorial monopolies for beer distributors. The data show that these monopolies hurt consumers. Beer prices fell between 8% and 20% when territorial monopolies were abolished in Indiana.[5] In December 1982, two major brewers, Anheuser-Busch and Miller, initiated private contracts in New York requiring their distributors to operate in an exclusive monopoly. Data collected from the beginning of 1983 indicate that beer prices have risen as much as 31% since the institution of exclusive distributorships.[6] The following chart summarizes the rise in beer prices in New York State since the institution of territorial monopolies in the beer industry and compares those increases to the increase in soda prices during the same period.

5/ See minutes of the Indiana Alcoholic Beverage Commission Study Committee, September 16, 1981 at 4; statement of Bruce Jaffee, Associate Professor of Business Economics, Indiana University, before the Monopolies Subcommittee, House Judiciary Committee, November 3, 1983.

6/ See testimony and accompanying data presented by Lloyd Constantine, Assistant Attorney General, Antitrust Bureau, State of New York Department of Law, to the Senate Judiciary Committee, May 14, 1985.

Year	Percentage Increase in Price 7/ Soda	Beer	Percentage increase in beer prices over soda prices 8/
1983 9/	.91%	10.26%	+ 9.35%
1984 10/	2.28%	24.54%	+22.26%
1985 11/	10.05%	31.14%	+21.09%

The pattern of inflated beer prices associated with territorial monopolies will recur on a national level if the beer bill is enacted. These figures show that competition between distributors keeps beer prices down.

The beer industry argues that competition among wholesale distributors of a beer brand is unnecessary because there is price competition among distributors of different brands. Even if interbrand price competition were healthy, we nonetheless believe that intrabrand price competition would help to lower prices. However, there is some doubt as to the vigor of interbrand competition on a local level, since, at the present time, most beer wholesalers are wholesaling a number of brands, not just one. See 1984 MBA Blue Book, passim. A wholesaler who has an exclusive territory to distribute Budweiser, Miller, Heileman, and Schlitz has little incentive to cut the prices of any one brand.

Brewers argue that exclusive territories are necessary to enforce the quality control of their products, such as proper refrigeration. In cases where quality control is delicate and relies on wholesaler care -- and where the brewer is capable of

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7/ Ratio computed using 1982 as the base year. 1982 figures are based on 23 market basket weeks (1/3-11/04 and 12/20-12/31).

8/ This column takes into account the price increase in beer resulting from New York's bottle bill.

9/ 1983 figures are based on 26 market basket weeks (1/3-12/30).

10/ 1984 figures are based on 16 market basket weeks (1/3-12/28).

11/ 1985 figures are based on 4 market basket weeks (12/31/84-4/26/85).

supervising only one wholesaler -- the courts have upheld the legality of exclusive territories under the traditional "rule of reason" test. See Del Rio Distributing, Inc. v. Adolph Coors Co., 589 F.2d 176 (5th Cir.), cert. denied, 444 U.S. 84 (1979). However, in most cases, the quality of the beer can be ensured by open-dating, used routinely by the food industry for other perishable products. In general, beer does not require special care by a wholesaler.

Not only does the beer bill lack either a solid economic or legal justification, it also lacks any positive social value. Passage of the beer bill will more than likely increase market concentration. A concentrated industry provides more opportunity for collusion between brewers or wholesalers, direct or indirect, and concentration will likely cause a rise in the price of beer.

The Congress has resisted enactment of other recent attempts at special interest relief from healthy, old fashioned competition, requested by doctors, lawyers, and shipping companies. Instead of protecting the beer industry from ordinary market forces and antitrust law, Congress should continue the course it has charted with deregulation in the bus, airline, truck, and railroad industries: it should strengthen reliance on free market competition enforced by the antitrust laws.

Sincerely yours,

Steering Committee
of Division 2

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