

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

VERRAZZANO TRADING CORPORATION, ET AL.

*Docket 9038. Interlocutory Order, Mar. 17, 1978*

Order directing the filing of a memorandum and answer thereto setting forth further arguments as to unconstitutionality of certain provisions of the Wool and Textile Acts.

## ORDER WITH RESPECT TO BRIEFING OF CONSTITUTIONAL ISSUES

In preparation for oral argument in this matter, the Commission has noted that respondents take the position in their appeal brief that certain provisions of the Wool Products Labeling Act, 15 U.S.C. 68 and the Textile Fiber Products Identification Act, 15 U.S.C. 70 are unconstitutional insofar as they may require posting of a bond as a condition of continued importation by an importer found to have violated the Acts.

Respondents contend that they did not argue the constitutional issue before the administrative law judge because of his alleged position that the constitutional issue was not a proper one for consideration by the agency, a position that complaint counsel have maintained in their reply brief. Respondents contend that this matter should be remanded to the administrative law judge to consider their constitutional arguments.

While the Commission has made no final determination with respect to the contentions raised by the parties in their briefs regarding whether or not the Commission should review the constitutionality of laws it enforces, the Commission does believe that the constitutional issue is a question of law and can be adequately considered by the Commission if it determines to take it up, upon written briefs, without the need for further proceedings before an administrative law judge.<sup>1</sup> Accordingly, respondents should submit within 20 days from the date of this order a memorandum setting forth their constitutional arguments, if they desire that such further arguments be considered by the Commission. Complaint counsel shall respond within 15 days. Therefore,

*It is ordered,* That if respondents desire that the Commission consider further arguments as to the unconstitutionality of certain provisions of 15 U.S.C. 68 and 15 U.S.C. 70, they shall file a

<sup>1</sup> In reaching this determination the Commission has reviewed respondents' Motion received May 17, 1976; complaint counsel's "Reply to Respondents' Motion for a Subpoena Duces Tecum" received June 2, 1976; complaint counsel's "Motion to Strike" received May 18, 1976; respondents' reply thereto received June 14, 1976; respondents' "Reply to Complaint Counsel's Reply. . ." dated June 21, 1976; and Judge Teetor's "Ruling on Motion to Strike" of July 14, 1976.

504

Interlocutory Order

memorandum within 20 days of service of this order setting forth such further arguments. Complaint counsel shall thereupon file an answer within 15 days of receipt of respondents' memorandum.

Modified Order

91 F.T.C.

IN THE MATTER OF

## JOHNSON PRODUCTS COMPANY, INC.

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF SECS.  
5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2788. Complaint, Feb. 10, 1976 — Modified Order, Mar. 20, 1978*

This order modifies a consent order issued February 10, 1976, 41 FR 11172, 87 F.T.C. 206, which was remanded to the Commission for reconsideration by the Court of Appeals for the Seventh Circuit. Modifications in the order exclude references to the advertising firm, restrict provisions of the order to hair straightening products, and are designed to eliminate the significant differences between the original order and that of a competitive company (*Revlon, Inc.*).

## ORDER MODIFYING ORDER TO CEASE AND DESIST

On February 10, 1976 the Commission rejected an attempt by respondent Johnson Products Co., Inc. to withdraw from an executed consent order agreement and, on that date, the Commission entered a final cease and desist order. Thereafter, respondent petitioned the Court of Appeals for the Seventh Circuit to review and set aside the order, contending, *inter alia*, that the Commission patently abused its discretion by refusing to permit respondent to withdraw from the consent agreement in the face of its claim that the Commission had engaged in an "unfair and arbitrary discrimination between similarly situated competitors. . ." (*i.e.*, *Revlon, Inc.* and respondent). The Court stayed enforcement of the order and remanded the matter to the Commission, noting the prospect that the proceeding might be reopened and modified to eliminate some or all of the critical disparities between the *Revlon* and *Johnson* orders.

After extended negotiations, the parties executed an agreement, which will be treated as a petition to reopen this proceeding, containing an order to cease and desist. The modifications contained in this agreement substantially eliminate the significant differences between the *Revlon* and *Johnson* orders.

The Commission has duly considered the modifications encompassed in the agreement and has determined that the order should be so modified. Accordingly,

*It is ordered*, That the proceeding be, and it hereby is, reopened.

*It is further ordered*, That the order to cease and desist, as it applies to respondent Johnson Products Company, Inc., be, and it hereby is, modified by striking the section entitled "Order" and substituting therefor the following:

## ORDER

I. *It is ordered*, That respondent Johnson Products Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Ultra Sheen Creme Relaxer (Ultra Sheen Relaxer) or any hair care product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication, that:

1. Any hair straightening product is comfortable, gentle or safe.
2. Any hair straightening product is easy to use or to apply.
3. Any hair straightening product feels cool to skin or scalp.

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondent has in its possession a reasonable basis, consisting of competent and reliable controlled tests to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondent has in its possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation. For purposes of this provision, failure to disclose facts shall not constitute a representation.

D. Disseminating or causing to be disseminated any advertisement of Ultra Sheen Relaxer or any hair straightening product of similar composition, which fails to disclose, clearly and conspicuously, with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury.

II. *It is further ordered*, That respondent Johnson Products Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection

with the advertising, offering for sale, sale, or distribution of Ultra Sheen Relaxer or any hair care product, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect on commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

III. *It is further ordered.* That respondent Johnson Products Company, Inc., a corporation, its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the offering for sale, sale, or distribution of Ultra Sheen Relaxer or any hair straightening product of similar composition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on the information panel of the product package (*i.e.*, the package containing the immediate container of the professional or home use hair straightening product), on the package insert, and on the label of the relaxer container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING:

1. This product contains sodium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.

506

## Modified Order

6. If the relaxer gets into eyes, rinse immediately and consult a physician.

*Provided, however,* that if such hair straightening product is offered for sale, sold or distributed without a neutralizing shampoo, respondent will disclose the following in place of Warning No. 5 above:

5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with a non-alkaline shampoo (ph below 7). If irritation persists, or if hair loss occurs, consult a physician.

*Provided further, however,* that respondent may use existing retail product packages, package inserts, and container labels if such packages, inserts and labels conform to the order entered in this matter on February 10, 1976.

IV. *It is further ordered,* That respondent shall distribute a copy of this order to its present and future officers, directors, and operating division and that respondent secure from each such person a signed statement acknowledging receipt of the order.

V. *It is further ordered,* That respondent maintain complete business records relative to the manner and form of its continuing compliance with the terms and provisions of this order. Each record shall be retained by respondent for at least three years after it is made.

VI. *It is further ordered,* That respondent notify the Commission at least thirty days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, a change in the corporate name or address, or any other change in the corporation which may affect compliance obligations arising out of this order.

VII. *It is further ordered,* That the respondent herein shall, within sixty (60) days after service of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order; *provided, however,* that such compliance report need not contain materials or information previously submitted to the Commission to demonstrate compliance with the order entered in this matter on February 10, 1976.

Complaint

91 F.T.C.

IN THE MATTER OF  
FERRARA IMPORTS, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS  
LABELING ACTS

*Docket C-2918. Complaint, Mar. 24, 1978—Decision, Mar. 24, 1978*

This consent order, among other things, requires a New York City importer and manufacturer of men's clothing to cease misrepresenting, or failing to affix to their products, required fiber disclosure labels. The firm is additionally required to furnish affected customers with a copy of the order.

*Appearances*

For the Commission: *Jerry R. McDonald.*

For the respondents: *Melvin Kynter, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ferrara Imports, Ltd., a corporation, and Louis Ferrara, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it now appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ferrara Imports, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 655 Madison Ave., New York, New York.

Respondent Louis Ferrara is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Respondents are engaged in the business of manufacturing men's clothing, including but not limited to men's suits, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce,

sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" as defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were samples, swatches or specimens used to effect sales of certain wool blend men's suits stamped, tagged, labeled or otherwise identified by respondents as "35% wool, 50% polyester and 15% other fibers," whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely samples, swatches or specimens used to effect sales of wool blend men's suits, with labels on or affixed thereto, and wool blend men's suits, with no labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber is 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, under the Federal Trade Commission Act, as amended.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption

hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ferrara Imports, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Madison Ave., New York, New York.

Respondent Louis Ferrara is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

#### ORDER

*It is ordered,* That respondents Ferrara Imports, Ltd., a corporation, its successors and assigns, and its officers, and Louis Ferrara, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through and corporation, subsidiary, division or any other device, in connection with the introduction or importing for introduction, or manufacture for introduction, into commerce, or the offering for sale, sale,

transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products.
2. Failing to securely affix to or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

*It is further ordered,* That respondents mail a copy of this order to each of their customers that purchased the wool products which gave rise to this complaint.

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

## JIM WALTER CORPORATION

*Docket 8986. Interlocutory Order, Mar. 30, 1978*

Denial of respondent's petition for reconsideration of final order and accompanying opinion, for reopening the proceeding for issuance of an environmental impact statement, for tolling statutory time for filing petition for review, and for oral argument.

ORDER DENYING PETITION FOR RECONSIDERATION AND OTHER  
RELIEF

Respondent, Jim Walter Corporation ("Jim Walter") has filed a petition for reconsideration of the Commission's Final Order and accompanying Opinion, for reopening the proceeding to receive certain affidavits, for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review in the court of appeals, and finally, for oral argument on these issues.

Jim Walter's petition for reconsideration seeks modification of the Commission's Final Order so that it may retain Carey-Canadian Mines, Ltd. ("Carey-Canadian"), a Canadian subsidiary of Panacon Corporation ("Panacon"), engaged in the mining of asbestos fiber, as well as the Philip Carey Division plant at Elizabethtown, Kentucky, which is engaged in the manufacture of urethane foam insulation.

The threshold question which must be faced in connection with a petition for reconsideration filed pursuant to Rule 3.55 is whether the petition raises issues which petitioner had a prior opportunity to address before the Commission. Respondent has been on notice since the commencement of this proceeding that, if liability were found, effective relief might encompass divestiture of all of the Panacon assets acquired by the Celotex Corporation.<sup>1</sup> Allowing respondent yet another opportunity to suggest an appropriate remedy in this case would serve to bifurcate the Commission's adjudicative proceedings into a liability phase, concluding upon issuance of a final order, and a remedy phase, commencing with a petition for reconsideration. Hence, for reasons of administrative efficiency and fairness to all parties, respondent's petition for reconsideration and for reopening of the record may be denied as not in accordance with Rule 3.55.

<sup>1</sup> The Administrative Law Judge's order would have required respondent to divest all of the assets of the Philip Carey Division of Panacon, including the Elizabethtown plant. I.D. P. 64-65. Although the Law Judge did not order divestiture of Carey-Canadian, complaint counsel urged on appeal that the Commission order divestiture of Celotex's new Goldsboro plant, as well as all Panacon assets, including Carey-Canadian. CAB at 26-27. Thus, respondent has been on notice from the onset of this litigation that Carey-Canadian might be divested and of possible obstacles to such divestiture, stemming from Canada's Foreign Investment Review Act, 21-22 Eliz. II, c. 46 (Can.), which was enacted on September 12, 1973, more than ten months prior to the issuance of the complaint.

Even considering the merits of respondent's petition, our decision remains the same. Only restoration of a viable competitive entity can mitigate the substantial harm to competition brought about by respondent's acquisition. As we have recently emphasized in a related context, the Commission must typically rely upon an inference that the acquired firm, which was a viable entity prior to its acquisition, is likely to be an effective future competitor after divestiture. *Fruehauf Corporation, Inc.*, Dkt. No. 8972 (Slip Op. at 35-36) (Feb. 22, 1978 [91 F.T.C. 132]); *RSR Corporation*, 88 F.T.C. 873, 894 (1976). Since the passage of time might weaken this inference, it is essential that divestiture incorporate all additions and improvements made to the original assets. That the Elizabethtown plant was under construction by Philip Carey at the time of the acquisition and had not yet begun operations is therefore of little consequence. Its value to a healthy, independent Philip Carey must be presumed in the absence of convincing proof to the contrary.

With respect to Carey-Canadian, Jim Walter highlights in its petition the percentage of Carey-Canadian sales to Philip Carey roofing plants. While such data is clearly material to formulation of an effective remedy, (see Commission Opinion at 49), it only represents part of the picture. As we noted previously, the Philip Carey division has purchased as much as 40 to 55 percent of its fiber needs from Carey-Canadian. Since most of this asbestos is apparently utilized for production of asphalt and tar roofing products, divestiture of Carey-Canadian is necessary to insure Philip Carey's ready access to supply of an essential raw material in addition to its successful reinstatement as a vigorous competitor in the product market found relevant in this case.<sup>2</sup>

Petitioner further argues that divestiture of Carey-Canadian cannot be accomplished without the approval of the Canadian Government and that political developments in the Province of Quebec, including the threat of nationalization, will be a "substantial negative factor" for prospective purchasers. We do not understand Jim Walter to contend that divestiture of Carey-Canadian is impossible, only that it cannot be accomplished in a facile manner. It is clearly inappropriate at this time to prognosticate on the likelihood of finding a Canadian purchaser for the subject assets or on the possibility of obtaining Canadian approval in the event a non-Canadian purchaser is found. Any insurmountable difficulties which do arise are best considered in the context of compliance.

<sup>2</sup> Even if the percentage of Philip Carey's output attributed to asphalt and tar roofing products utilizing asbestos is relatively small, the contribution to profit may be proportionately greater. And, of course, that does not take into account Carey-Canadian's own substantial contribution to the viability of Panacan prior to the acquisition by Jim Walter. (See CX-39-0)

Jim Walter has also petitioned the Commission for issuance of a detailed environmental impact statement or a statement as to why an environmental impact statement is not required. In support of its petition, respondent argues that the Commission's order could result in violation of antipollution laws in the event respondent divests to a "notorious polluter." At the outset, we do not believe an environmental impact statement need be prepared in connection with an order issued in an adjudicative proceeding. See Rule 1.82(d). Even were that rule inapplicable, we find nothing here to justify the filing of an impact statement.

Respondent's argument necessarily requires several difficult assumptions. We are required first to assume that potential purchasers will violate the law and second that Federal, state, and local environmental agencies are powerless to prevent transgressions of the law. We are also asked to assume that Jim Walter would divest to such a purchaser and that the Commission would concur in the transaction.

Further, a review of the case law confirms our view that the Commission's order cannot by any stretch of the imagination be characterized as a "major Federal action significantly affecting the quality of the human environment" 42 U.S.C. 4332(2)(c)(1970). The order here represents a partial return to the status quo existing prior to the acquisition. And like divestiture orders generally, the order affects only the ownership of existing plants and facilities; it does not necessarily entail the creation of new capacity or the consumption of additional environmental resources. See *Gifford-Hill & Co., Inc v. FTC*, 389 F. Supp. 167, 175 (D.D.C. 1974), *aff'd*, 523 F.2d 730 (D.C. Cir. 1975); *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1229-30 (D.D.C. 1976); *Duke City Lumber Co. v. Baty*, 382 F. Supp. 362, 375 (D.D.C. 1974), *aff'd in part*, 539 F.2d 220 (D.C. Cir. 1976).

*It is ordered*, therefore, that respondent's petition for reconsideration of the Final Order and accompanying Opinion in this proceeding for reopening the proceeding for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review, and for oral argument is hereby denied.

Chairman Pertschuk did not participate.

IN THE MATTER OF  
THE COCA-COLA COMPANY, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 8855. Complaint, July 15, 1971 — Final Order, April 7, 1978*

This order, among other things, requires an Atlanta, Ga. soft drink manufacturer and three parent bottlers to cease imposing in any manner territorial limitations or class of customer restrictions on its licensed Coca-Cola or allied product bottlers, in connection with the sale or distribution of soft drink products sold in other than refillable containers. The firm is additionally required to provide protection for confidential information submitted by its bottlers.

*Appearances*

For the Commission: *Raymond L. Hays, Martin A. Rosen, Duncan J. Farmer, Michael J. Bloom and Jeffrey F. Shaw.*

For the respondents: *Gordon B. Spivack, Harry G. Sklarsky and Thomas D. Brislin, Lord, Day & Lord, New York City.*

*J. Guy Beatty, Jr., Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse, Chattanooga, Tenn. for Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas), Inc.*

For the intervenors: *Willis B. Snell, William M. Hames, Michael L. Denger, Stephen S. Cowen and Robert W. Clark, III, Sutherland, Asbill & Brennan, Washington, D.C. for The Coca-Cola Bottlers' Association, The Scioto Coca-Cola Bottling Company, Roddy Manufacturing Company, Elberton Coca-Cola Bottling Company, Westminster Coca-Cola Bottling Company, Inc. and Texas Coca-Cola Bottling Company.*

*Thomas Matthews, Wald, Harkrader & Ross, Washington, D.C. for Coca-Cola Bottling Company of Los Angeles, Quaker State Coca-Cola Bottling Co. and Detroit Coca-Cola Bottling Company.*

*Bartlett H. McGuire, Davis, Polk & Wardwell, New York City for The Coca-Cola Bottling Company of New York.*

*Theodore Kleinman, Zuckert, Scoutt & Rasenberger, Washington, D.C. for Associated Coca-Cola Bottling Co.*

*John P. Gaither, Witt, Gaither, Richardson, Henniss & Whitaker, Chattanooga, Tenn. for Consolidated Coca-Cola Bottling Co.*

*Robert N. Nanovic, Nanovic & McKinley, Jim Thorpe, Pa. for Coatesville Coca-Cola Bottling Works, Inc.*

*William H. Sanders, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo. for The Coca-Cola Bottling Company of Mid-America.*

*Joe A. Walters, O'Conner & Hannan*, Minneapolis, Minn. for Coca-Cola Bottling Midwest, Inc.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof, each of which is hereby made and is sometimes hereinafter referred to as respondent(s), have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in this respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) Bottler – any individual, partnership, corporation, association, or other business or legal entity which purchases respondents' concentrate for use in the manufacture and sale, primarily at wholesale, of respondents' pre-mix or post-mix syrups or soft drink products, or who purchases respondents' pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing – a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

(c) Concentrate – the basic soft drink ingredient sold to bottlers by respondent, usually as a syrup, and which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) Consignment – a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) Place of business – the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup – soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a tank, usually having about a five-gallon capacity, and mixes it at the point of sale with five ounces of carbonated water to produce approximately 600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup – although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a tank, usually having about a five-gallon capacity, a finished serving of soft drink product containing both syrup and carbonated water, “pre-mixed,” to produce a 100 six-ounce soft drink servings per tank; and

(h) Soft drink products – nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and non-flavored, sold in bottles and cans, or through pre-mix and post-mix systems or the like.

PAR. 2. Respondent The Coca-Cola Company, sometimes hereinafter referred to as Coca-Cola, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 310 North Ave., N.W., Atlanta, Georgia. The Coca-Cola Company and subsidiaries had net sales of \$1,185,808,864 (approximately 45 percent of which is accountable to foreign operations), and assets of \$802,100,548 in 1968. In 1968, Coca-Cola made sales to over 900 domestic bottlers located throughout the United States. [3]

Respondent Coca-Cola Bottling Co. (Thomas), Inc., sometimes hereinafter referred to as Thomas Company, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Thomas Company made sales to over 196 bottlers located principally in Indiana, Maryland, Mississippi, New Jersey, New York, Ohio, Pennsylvania, Virginia and West Virginia.

Respondent Coca-Cola Bottling Works (Thomas), Inc., sometimes hereinafter referred to as Thomas Works, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Thomas Works made sales to over 65 bottlers located principally in the States of Kentucky and Tennessee.

Respondent Coca-Cola Bottling Works 3rd, Inc., sometimes hereinafter referred to as Works 3rd, is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Works 3rd made sales to over 25 bottlers located principally in the States of Pennsylvania and New Jersey.

PAR. 3. Respondent Coca-Cola, through its Coca-Cola U.S.A. division, is engaged principally in the manufacture and sale of soft drink products and concentrate which it sells to over 900 bottlers who

purchase the concentrate under a license to produce and sell soft drink products under such trade names of respondent Coca-Cola as "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba." Bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling soft drink products and concentrate to its bottlers, Coca-Cola operates bottling plants in 27 areas of the United States and sells soft drink products to retailers. [4]

Respondent Thomas Company has operated for many years as a parent bottler under an agreement with Coca-Cola by which Thomas Company was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Thomas Company is engaged principally in the purchase of concentrate from Coca-Cola for resale by Thomas Company to numerous bottlers which have obtained licenses from it to bottle and resell certain specified trade name soft drink products of Coca-Cola.

Respondent Thomas Works has operated for many years as a parent bottler under an agreement with Coca-Cola by which Thomas Works was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Thomas Works is engaged principally in the purchase of concentrate from Coca-Cola for resale by Thomas Company to numerous bottlers which have obtained licenses from it to bottle and resell certain specified trade name soft drink products of Coca-Cola.

Respondent Works 3rd has operated for many years as a parent bottler under an agreement with Coca-Cola by which Works 3rd was granted certain rights from Coca-Cola with respect to the sale of Coca-Cola soft drink products in certain designated territories. Works 3rd is engaged principally in the purchase of concentrate from Coca-Cola for resale by Works 3rd to numerous bottlers which have obtained licenses from it to bottle and resell certain specified trade name soft drink products of Coca-Cola.

PAR. 4. Respondents are engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between their headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of their businesses, respondents, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, have been and are now in competition with other corporations, firms, partnerships and persons engaged in

517

Complaint

the manufacture, processing, distribution and sale of concentrate and soft drink products in commerce.

PAR. 6. Respondents have hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products [5] sold under their trade names by restricting their bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreement between respondents and their bottlers.

A typical license between respondent Coca-Cola and its bottlers provides that as to a specifically described geographic territory:

. . . COMPANY agrees to furnish to BOTTLER, and only to furnish for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of BOTTLER in the territory herein described.

\* \* \* \* \*

. . . COMPANY does hereby select BOTTLER as its sole and exclusive customer and licensee for the purpose of bottling the Bottlers' bottle syrup, COCA-COLA, in the territory described.

[BOTTLER agrees] . . . not to use trade-marks COCA-COLA or COKE, nor bottle nor vend said product except in the territory herein referred to. This limitation, however, is not to prevent BOTTLER from acquiring similar rights for other territory.

\* \* \* \* \*

[BOTTLER agrees] . . . not to use said distinctive [COCA-COLA] bottle for any other purpose than the bottling of COCA-COLA, and not in any territory except as herein referred to.

A typical license between respondents Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas), Inc. and the bottlers of each provides in part that licensor, wishing to assign to the bottler certain rights as to a specifically described geographic territory which has been received by approved transfer from The Coca-Cola Company, agrees:

. . . to obtain and furnish to party of the second part [bottler] and only to obtain, for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of party of the second part in the territory herein described, provided [6] party of the first [licensor] can obtain the delivery to it of such syrup from The Coca-Cola Company under the contract existing between party of the first part and The Coca-Cola Company.

\* \* \* \* \*

[To select bottler] . . . as its sole and exclusive customer and licensee for the purpose of bottling Bottlers' Coca-Cola syrup, and using the name Coca-Cola thereon in the territory herein described.

In consideration therefor, bottler agrees:

. . . Not to use the name Coca-Cola nor bottle nor vend said product except in the territory herein referred to without the written consent of party of the first part and The Coca-Cola Company. This limitation, however, is not to prevent party to the second part from obtaining such rights from parties authorized to use the name Coca-Cola and to bottle and vend said product.

\* \* \* \* \*

. . . To order, for the purpose of bottling Coca-Cola, the distinctive bottle, and none other, adopted or that may be adopted by party of the first part; to use said distinctive bottle and none other, in bottling Coca-Cola, and not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as herein referred to without the written consent of party to the first part and The Coca-Cola Company.

The license restrictions between Coca-Cola Bottling Works 3rd, Inc. and its bottlers are substantially similar to that of Coca-Cola, Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas) Inc. Coca-Cola is a party to the agreement between Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. and their bottlers.

PAR. 7. The aforesaid agreements used by respondents have had, and may continue to have, the following effects:

(a) Competition between and among respondents' bottlers in the distribution and sale of "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba" brands of soft drink products has been eliminated; [7]

(b) Competition between and among Coca-Cola's bottling operations and its bottlers in the distribution and sale of Coca-Cola soft drink products at the wholesale level has been eliminated;

(c) Competition between and among Coca-Cola's bottling operations and bottlers licensed by Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. in the sale and distribution of Coca-Cola's soft drink products at the wholesale level has been eliminated;

(d) Competition between and among bottlers licensed by Coca-Cola and bottlers licensed by Coca-Cola Bottling Co. (Thomas), Inc., Coca-Cola Bottling Works (Thomas), Inc. and Coca-Cola Bottling Works 3rd, Inc. in the sale and distribution of Coca-Cola soft drink products at the wholesale level has been eliminated;

(e) Innumerable retailers and other customers have been deprived of the right to purchase "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta" and "Simba" brands of soft drink products from the bottler of their choice at competitive prices; and

(f) Consumers of "Coca-Cola" ("Coke"), "TAB," "Sprite," "Fresca," "Fanta," and "Simba" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted market and at competitive prices.

PAR. 8. Respondents' contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of pre-mix, post-mix and soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW  
JUDGE

OCTOBER 3, 1975

PRELIMINARY STATEMENT

In a complaint dated July 15, 1971, the Commission charged respondents with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). The crux of the charges was that the territorial exclusivity provisions in trademark licensing contracts The Coca-Cola Company (hereinafter "Coca-Cola") enters with its bottlers impose an illegal restraint on competition. The provision limits the geographical territory in which a bottler may manufacture and sell "Coca-Cola" products.

It was alleged that the illegal effects of the provision were that competition had been eliminated:

- (a) between independent bottlers of "Coca-Cola" products;
- (b) at the wholesale level between independent bottlers of "Coca-Cola" products and "Coca-Cola's" own bottlers;
- (c) at the wholesale level between "Coca-Cola's" own bottling operations and bottlers licensed by the other respondents; and
- (d) at the wholesale level between bottlers licensed by "Coca-Cola" and those licensed by the other respondents.

It also was alleged that retailers and other customers had been deprived of the right to purchase "Coca-Cola" products from the bottler of their choice at competitive prices.

Lastly, it was alleged that consumers of "Coca-Cola" products have been deprived of the opportunity of obtaining "Coca-Cola" products in an unrestricted market and at competitive prices. [4]

In their answers, "Coca-Cola" and the three other respondents (Coca-Cola Bottling Co. (Thomas), Inc. (hereinafter Thomas Company), Coca-Cola Bottling Works (Thomas), Inc. (hereinafter Thomas Works), and Coca-Cola Bottling Works 3rd, Inc. (hereinafter Works 3rd)) admitted that they are "in commerce" within the meaning of the Federal Trade Commission Act. They denied that the territorial exclusivity provisions have any illegal anticompetitive effects.

As an affirmative defense, respondents stated that in *The Coca-Cola Bottling Co. v. The Coca-Cola Co.*, 269 F. 796 (D. Del. 1920), the District Court held in an opinion which has not been rescinded, vacated or modified, that the restraints included in the contracts between respondents and the bottlers are lawful and valid under federal and state antitrust laws and not in unreasonable restraint of trade.

They also asserted the defense that the Commission had failed to include indispensable parties, the bottlers, who were the other parties to the contracts, and that to the extent the Commission's proceeding sought to eliminate or abridge the respondents' and bottlers' contractual property rights, the proceeding would impose a penalty or forfeiture barred by the statute of limitations (28 U.S.C. 2462).

Lastly, in summary, they asserted (1) that a Commission order would place them in the position of violating either that order or the District Court's order, depending on which they complied with; (2) that the effect of a Commission order would be unfair to consumers and small businessmen bottlers and anticompetitive by increasing prices and accelerating the demise of small grocers; (3) that respondents' constitutional right to due process would be violated; and (4) that there is no public interest in the proceeding.

Because of the time which has elapsed since the complaint issued, it is appropriate to set forth a listing of significant events which have taken place in this proceeding since July 15, 1971. These were: [5]

1. On July 30, 1971, a Motion for Consolidation of this case with Dkts. 8853-8859, which pertain to exclusive territory provisions in the bottler licensing contracts used for other national brands of soft drinks, was filed by complaint counsel. That Motion was denied by the administrative law judge on September 28, 1971.

2. On August 27, 1971, September 8, 1971, and December 14, 1971, motions to dismiss the complaint for non-joinder of indispensable parties (*i.e.*, all of the licensee bottlers) were filed by "Coca-Cola," the other respondents, and the intervenors participating in the proceedings at that time. These motions were denied by the administrative law judge on January 7 and 12, 1972.

3. On April 21, 1972, the respondents filed a complaint for injunctive relief and a declaratory judgment against the Commission

in the United States District Court for the Northern District of Georgia. The Court dismissed the complaint on May 22, 1972. That dismissal was appealed to the United States Court of Appeals for the Fifth Circuit on June 6, 1972. The appellate court affirmed the decision of the District Court on February 20, 1973. On May 8, 1973, respondents sought *certiorari* to the Supreme Court; however, the Court denied the writ on October 9, 1973 (*Coca-Cola Co. v. Federal Trade Commission*, 342 F. Supp. 670 (N.D. Ga. 1972), *aff'd*, 475 F.2d 299 (5th Cir. 1973), *cert. denied*, 414 U.S. 877 (1973)).

4. On July 31, 1972, former complaint counsel filed a motion for partial summary decision. That motion was denied by the administrative law judge on April 5, 1973.

5. On March 15, 1974, intervenors Association, Scioto, Elberton, Roddy, Westminster, and Texas filed a motion to require complaint counsel to file an environmental impact statement and to stay the proceedings until such a statement is filed. The administrative law judge denied that motion on April 2, 1974. The intervenors then filed a motion to reconsider or to certify the motion to the Commission on April 10, 1974. That motion was denied by the administrative law judge on May 30, 1974. [6]

6. On July 30, 1974, complaint counsel filed a motion to authorize disclosure of documents containing nonpublic business information to be used at the hearings. On October 3, 1974, the administrative law judge authorized the disclosure.

7. On August 12, 1974, respondents and intervenors filed a motion for issuance of a subpoena duces tecum to the Secretary of the Commission to have him produce materials in the Commission's nonpublic files. Briefs in support and opposition were filed on December 9 and 10, 1974. The subpoena was quashed by order of the Commission dated March 4, 1975.

It also should be pointed out that in addition to the intervenors identified above a number of petitions to intervene were filed by a variety of other, small and large Coca-Cola bottlers beginning on September 3, 1971, with the last filed on March 11, 1975. All such petitions were granted. As a result, there were 14 individual bottler intervenors plus the Coca-Cola Bottlers' Association. In early 1971, 99 percent of the domestic bottlers of Coca-Cola, accounting for about 815 productive facilities, were members of the Association.

The adjudicative hearings were held in Washington, D.C., from May 5 through June 11, 1975. The record was closed for the reception of evidence on July 7, 1975.

The findings of fact following are based on a review of the allegations made in the complaint, respondents' answers, stipulations

entered by counsel, the evidentiary record and upon a reading of the transcript record of the testimony and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions and orders, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial. [7]

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX - Commission's Exhibit, followed by number of exhibit being referenced.

RX - Respondents' Exhibit, followed by number of exhibit being referenced.

Tr. - Transcript preceded by the name of the witness and followed by the page number.

#### FINDINGS OF FACT

##### *The Coca-Cola Company*

1. In 1886 Mr. John S. Pemberton invented a formula for a soft drink syrup and first prepared and sold a soft drink made pursuant to that formula under the trademark Coca-Cola (Stipulation No. 1, RX 1A, Tr. 555; Smith Tr. 677).

2. In 1891 Mr. Asa G. Candler acquired Mr. Pemberton's rights to the secret formula for Coca-Cola and to the trademark Coca-Cola. In 1892 Mr. Candler formed The Coca-Cola Company, a Georgia corporation, predecessor in interest to the respondent "Coca-Cola" (Smith, Tr. 678; Stipulation No. 1, RX 1A-B, Tr. 555). [8]

3. Respondent, "Coca-Cola," is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. "Coca-Cola" maintains an office and its principal place of business at 310 North Ave., NW., Atlanta, Georgia. "Coca-Cola" and its subsidiaries in 1968 had consolidated net sales of \$1,185,808,864 and consolidated assets of \$802,100,548. Approximately one-third and more of the sales are accountable to foreign operations. In 1968 "Coca-Cola" sold or shipped syrup or concentrates to

approximately 900 domestic bottlers located throughout the United States. (Admitted in Answer; Stipulation No. 2, CX 1243A-B, Tr. 465.) When the complaint issued in July 1971, there were 726 bottlers operating 804 bottling plants (Smith, Tr. 687).

#### Respondents' Business

4. "Coca-Cola," through its Coca-Cola U.S.A. division, is engaged principally in the manufacture and sale of syrup (a mixture of ingredients in liquid form which, when properly mixed with pure carbonated water, becomes the finished soft drink product (Smith, Tr. 569)) and concentrates (a mixture of basic ingredients to which sugar must be added by the bottler to prepare a syrup (Smith, Tr. 570)). The syrup and concentrate are used in the processing and sale of soft drinks under one or more of the trade names Coca-Cola or Coke, TAB, Sprite, Fresca, Fanta, Simba, Santiba, and Mr. PiBB. (Admitted in Answer; Smith, Tr. 584-586.)

5. Coca-Cola is a cola type drink. TAB is a low calorie cola drink. Fresca is a citrus base, low calorie drink. Sprite is a lemon-lime drink. Fanta is a trademark which is applied to a line of flavored drinks including orange, root beer, gingerale, and strawberry. Simba is no longer on the market. Santiba is a trademark which is applied to a line of mixers such as carbonated water, gingerale and Tom Collins mix. Mr. PiBB, a relatively new product, is a pepper type drink. Products other than Coca-Cola are referred to as "allied products" (Smith, Tr. 584-586). [9]

6. Beginning in 1955, "Coca-Cola" from time to time authorized its licensed bottlers to bottle and sell Coca-Cola and allied products (as they were introduced) in an increasingly wide variety of sizes and types of containers. Coca-Cola and allied products currently are offered in returnable bottles, non-returnable bottles, and cans. Package sizes include 6 1/2-ounce, 10-ounce, 12-ounce, 16-ounce, 32-ounce, 48-ounce, and 64-ounce containers. It is being test marketed in a 72-ounce size (Smith, Tr. 714).

7. "Coca-Cola's" Foods Division manufactures other beverage products, including Maryland Club coffee, Hi-C fruit drinks, Minute Maid orange juice, Snow Crop orange juice, and other citrus products (Smith, Tr. 573, 580). Its Temco subsidiary produces private label spray and freeze dried instant coffee (Smith, Tr. 573) and its Aqua-Chem, Inc., subsidiary manufactures steam boilers and water purification equipment (Smith, Tr. 573).

8. In July 1971, "Coca-Cola" had 8 subsidiaries which operated 27 bottling plants in various cities of the United States and sold soft drink products to retailers in the areas thereof (Smith, Tr. 687-688).

9. The bottler subsidiaries of "Coca-Cola" today are:

The Coca-Cola Company of New England (Dedham, Mass.);  
 The Coca-Cola Bottling Company of Baltimore (Maryland);  
 The Coca-Cola Bottling Company of Ohio (Columbus, Ohio);  
 The Coca-Cola Bottling Company of Michigan (Lansing, Mich.);  
 The Coca-Cola Bottling Company of Wisconsin (Milwaukee, Wis.);  
 The Coca-Cola Bottling Company of Chicago (Illinois);  
 The Coca-Cola Bottling Company of California (San Francisco);  
 and  
 The Pacific Coca-Cola Bottling Company (Bellevue, Wash.).

In 1971, these companies served areas containing approximately 14 percent of the population of the United States (Ogden, Tr. 828, 844).

[10]

10. Most of the subsidiary bottling plants were acquired years ago to assure the availability of Coca-Cola in territories when bottlers in those territories had to sell out or did not have the financial resources and independent firms with money and know-how were unavailable in those areas (Susong, Tr. 913, 922). The policy of the company for over a decade has been that such a subsidiary bottler is to be sold when the company acquires one so that the number of subsidiaries remains stable (Susong, Tr. 914, 921).

11. Another subsidiary, Cannery of Coca-Cola Bottlers, Inc. (hereinafter Cannery), constructed canning plants in the 1960's to provide Coca-Cola and allied products in cans to bottlers under agency agreements in areas where there was inadequate canning capacity (Ogden, Tr. 825, 837).

12. Cannery's plants are located at Nashua, New Hampshire; Baltimore, Maryland; College Park, Georgia; Columbus, Ohio; Alsip, Illinois; and San Leandro, California (Ogden, Tr. 824). As independent bottlers in some areas desire to invest in them, the company has sold canning plants, *e.g.*, in Salt Lake City, Utah; Plymouth, Florida; Greensboro, North Carolina; Houston, Texas; and Phoenix, Arizona (Ogden, Tr. 825-826).

13. Total dollar sales of soft drink syrup by "Coca-Cola" to bottlers in the United States for the indicated years were as follows:

1964	\$173,961,477
1965	184,959,054
1966	211,629,426
1967	227,844,768
1968	246,962,024

517

Initial Decision

(CX 4F). [11]

14. Total dollar sales and total assets of "Coca-Cola" for the indicated years were as follows:

	Sales	Assets
1968	\$1,185,808,864	802,100,548
1969	1,365,443,068	802,100,548
1970	1,606,401,160	1,005,777,214
1971	1,728,827,572	1,107,873,472
1972	1,876,192,397	1,231,612,887

(CX 51 - CX 54).

15. In July of 1971, "Coca-Cola" produced its full line of soft drink syrups and concentrates in plants at the following locations which supplied all of the licensed Coca-Cola and allied product bottlers in the United States:

Atlanta, Georgia  
 Baltimore, Maryland  
 Chicago, Illinois  
 Columbus, Ohio  
 Dallas, Texas  
 Ewa Beach, Hawaii  
 Houston, Texas  
 Kearny, New Jersey  
 Los Angeles, California  
 Nashua, New Hampshire  
 New Orleans, Louisiana  
 Plymouth, Florida  
 Portland, Oregon  
 St. Louis, Missouri  
 San Francisco, California

(Ogden, Tr. 811-815). [12]

*The Other Respondents*

16. In 1899 "Coca-Cola" granted to Mr. B. F. Thomas and Mr. Joseph B. Whitehead the exclusive right to bottle Coca-Cola and to sell Coca-Cola in bottles throughout the United States with the exception of the six New England States and the States of Mississippi and Texas where local jobbers were already bottling Coca-Cola on a very small scale, with the permission of "Coca-Cola" but without a contractual agreement. The sale of fountain syrup was specifically reserved to

"Coca-Cola" (Smith, Tr. 679-680; Stipulation No. 1, RX 1B, Tr. 555; CX 4A).

17. Lacking sufficient capital or time to build sufficient plants expeditiously to bottle Coca-Cola and to create consumer demand throughout the area covered in the 1899 contract with "Coca-Cola," Messrs. Thomas and Whitehead divided their territory between them. Mr. Thomas' interest was termed *The Coca-Cola Bottling Company* (Stipulation No. 1, RX 1C, Tr. 555).

18. The Coca-Cola Bottling Company was soon succeeded in interest by Coca-Cola Bottling Co. (Thomas), Inc. Coca-Cola Bottling Co. (Thomas), Inc., transferred part of its territory to a sister company, Coca-Cola Bottling Works (Thomas), Inc. It also licensed Coca-Cola Bottling Works 3rd, Inc., to act as licensor with respect to certain designated territory (CX 4B; Tr. 488).

19. *The Coca-Cola Bottling Company*, under Mr. Whitehead and his new partner John T. Lupton, also formed several Parent Bottling Companies to whom the right to act as licensor with respect to certain territory was conveyed (CX 4B, Tr. 488). [13]

20. Beginning in 1900, Coca-Cola Bottling Company (Thomas) and *The Coca-Cola Bottling Company* (Whitehead) initiated a program aimed at granting exclusive licenses to local bottling companies throughout their respective territories. By 1920, they and the Parent Companies which they had formed had licensed over 880 local bottling companies to produce and sell Coca-Cola in bottles (Smith, Tr. 680; Stipulation No. 1, RX 1D, Tr. 555).

21. Respondent Thomas Company is a corporation organized, existing and conducting its business under and pursuant to the laws of The State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee 37402. In 1968, Thomas Company made sales to 122 bottlers located principally in Alabama, Delaware, Indiana, Maryland, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia. These bottlers had contracts with 45 sub-bottlers in Illinois, Maryland, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia (Stipulation No. 2, CX 1243B, Tr. 465, 467; Susong, Tr. 491).

22. Respondent Thomas Works is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Thomas Works made sales to 38 bottlers located principally in Alabama, Georgia, Kentucky, and Tennessee. These bottlers had

contracts with 13 sub-bottlers in Alabama and Kentucky (Stipulation No. 2, CX 1243B-C, Tr. 466, 467; Susong, Tr. 491). [14]

23. Respondent Works 3rd is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its office and principal place of business at 1600 American Bank Building, Chattanooga, Tennessee. In 1968, Works 3rd made sales to five bottlers located principally in Pennsylvania and New Jersey. (Admitted in Answer; Stipulation No. 2, CX 1243C, Tr. 466.)

24. Thomas Company and Thomas Works contract with bottlers pursuant to agreement with "Coca-Cola" under which the bottlers bottle and sell Coca-Cola soft drinks in their territories. Works 3rd contracts with Thomas Company for the same purpose. These three respondents engage principally in the purchase of Coca-Cola syrups for sale to numerous bottlers they have licensed in the various States of the United States. (Admitted in Answer; Stipulation No. 2, CX 1243D-E, Tr. 465-467.)

25. Since 1923, "Coca-Cola" has acquired all of the original Parent Bottling Companies with the exception of the three Thomas Companies. In doing so, "Coca-Cola" has acquired all of their rights and assumed all of their obligations. "Coca-Cola" presently deals directly with those bottlers not under contract to the three Thomas Companies in connection with bottled Coca-Cola and deals directly with all bottlers, including the Thomas bottlers, in connection with the bottling of all allied products (Susong, Tr. 538).

#### *Interstate Commerce*

26. Each of the respondents is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44). (Admitted in Answer.) There is a regular and continuous flow in interstate commerce of syrups and concentrates produced by "Coca-Cola," between syrup and concentrate manufacturing facilities located in various states, and production facilities of "Coca-Cola" located in other states (Ogden, Tr. 812-17). [15]

#### *History of the Soft Drink Industry*

27. The bottling of flavored carbonated soft drinks did not begin in the United States on a significant scale until the latter half of the nineteenth century. Prior to 1850 such soft drinks had been served almost exclusively at soda fountains for immediate consumption. During the late 1800's a growing number of extract or syrup manufacturers entered the business. These persons and companies developed and introduced many new proprietary flavors, including

Hires, Vernor's, Clicquot Club, Dr Pepper, Coca-Cola, and Pepsi-Cola (Stipulation No. 3, CX 1244A, Tr. 470).

28. Around the turn of the twentieth century syrup companies were largely small operations, typically owned by pharmacists or their families (Stipulation No. 3, Tr. 471). In order to provide the necessary inducement for local entrepreneurs to supply the capital required and to make the necessary effort to promote consumer acceptance of new bottled soft drink products, soft drink licensors included exclusive territorial provisions in trademark licenses (Stip. No. 3, CX 1244B-C, Tr. 471-72).

29. Territorial restrictions encouraged greater development of marketing and distribution efforts since exclusive licensees knew that their licensors and other licensees could not obtain a "free ride" on their efforts; they made possible the licensor's maintenance of quality control, thereby insuring uniform application of his common law trademark; they facilitated the licensor's production planning by enabling greater accuracy in calculating the forthcoming demand for syrup in a territory; they reduced the selling cost of the product by avoiding duplication of sales effort in a territory; and they encouraged the bottler to develop the potential of his territory to the fullest, thereby maximizing sales of the trademarked product (Stip. No. 3, CX 1244C, Tr. 471-72). [16]

30. The system of exclusive territorial licenses consistently has been widely employed in the manufacture and distribution of bottled soft drinks. There are over 50 syrup companies who have licensed local bottlers, 36 of them nationwide. These companies market more than 150 different soft drink brands through 7,500 agreements with local bottlers. These agreements for the local production and sale of trademarked products are unique when compared with the traditional organizational structure of American manufacturing and marketing (Stip. No. 3, CX 1244D, Tr. 472-73).

31. One unique feature of the soft drink trademark licensing system is that a nationally advertised product is manufactured locally by independent businessmen who are required to make substantial and continuing investments in plant, equipment, packaging and warehouse space (Clements, Tr. 4029-31). No other industry could be identified where a single national brand owner sells an ingredient to hundreds of independent licensees who manufacture a finished product from that ingredient and others under a trademark license (Clements, Tr. 4032).

32. The soft drink industry is also unique in that it sells a refreshment product which is an "impulse item" (Clement, Tr. 4029), whose most important characteristic is a distinct taste (Clements, Tr. 2989-90, 4032). Constant sampling is necessary to maintain demand for

a brand (Clements, Tr. 4033), and total availability of a brand at a multiplicity of outlets is essential to provide constant sampling necessary to successful marketing of that brand (Clements, Tr. 4029; Reid, Tr. 3554). The soft drink industry is also different from other industries in the broad range of flavors and package sizes and types required to be made available to satisfy consumer demand (Millard, Tr. 2319-20, 2321), in the need for frequent local store-door service (Millard, Tr. 2319, 2324-25), the importance of in-store merchandising (Millard, Tr. 2324-25), and the requirement of a store-door delivery system to sustain the use of a returnable container (Clements, Tr. 4029-30). Soft drinks are the only major product still available in food stores in returnable containers (Ellis, Tr. 944-45, 1022). [17]

33. The syrup company manufactures and sells syrup or flavoring concentrates to the bottlers. Syrup companies also participate in many of the advertising and promotion programs made in connection with their trademarked products, provide advice and technical assistance on production, quality control, management and sales problems, and engage in development and test marketing of new products and containers (Stip. No. 3, CX 1244D, Tr. 473).

34. The bottlers are the manufacturers and distributors of trademarked soft drinks produced from the licensor's syrup or concentrate and manufactured according to his quality standards and specifications. The bottler decides on the plant and equipment to be used, the volume of production by size and type of container and product mix, as well as the price to be charged and the manner in which he can maximize his market penetration and secure the widest possible distribution of trademarked soft drinks throughout his territory (Stip. No. 3, CX 1244E, Tr. 473-74).

35. In most local markets, there are independent producers who manufacture and sell soft drinks under their own labels. Generally, these local and regional brands are not franchised. In recent years, however, several of these companies have expanded from their local bases and have begun to compete in regional and national markets. For example, Shasta, which just over 10 years ago was marketed exclusively on the West Coast, is now available in all states. Frank's is currently marketed in many areas on the East Coast, and Faygo has branched out into almost a dozen eastern and midwestern states. In the process of expansion, these and other local and regional brands have utilized various techniques—distant shipments from existing plants, the establishment of new production facilities in other parts of the country, contract producers and in a few cases, territorial license agreements (Stip. No. 3, CX 144E-F, Tr. 474). [18]

36. Since the early 1960's, private label soft drink brands have

become a substantial competitive force in the soft drink industry. These are sold by a retailer under the retailer's own trade name or under a trade name of a wholesaling or other organization from which the retailer purchases, *e.g.*, 7-Eleven, Yukon Club (A&P), and Gayla (Topco). Private label soft drinks are manufactured either by the retailers or wholesalers themselves or for them by contract bottlers or canners and are generally sold for home consumption in non-returnable bottles and cans. Hundreds of new private labels have entered the market, many in the last five years. In the Washington, D.C., metropolitan area for example, over 15 private label brands are being marketed. Retailers are able to allocate scarce shelf space and prime store locations to their own private label soft drinks and are able to promote them vigorously with both point-of-sale and local media advertising (Stip. No. 3, CX 1244F, Tr. 474-75).

37. Flavored carbonated soft drinks are only one of a number of other commercial beverages available to the American consumer. Coffee is and has been America's most popular commercial beverage. In 1950, soft drinks represented an estimated 10 percent of the total commercial beverage market; by 1970, soft drinks had more than doubled their market share, accounting for an estimated 21 percent. Soft drink consumption has been climbing rapidly, growing at an annual rate of approximately 6 percent for the last 2 decades. This increase enabled flavored carbonated soft drinks to become the nation's second most popular commercial beverage in 1969. Such soft drinks may in the near future overtake coffee as America's number one commercial beverage (Stip. No. 3, CX 1244F-G, Tr. 475-76).

38. Soft drink consumption patterns exhibit both a high degree of regional and seasonal variation. Consumption of soft drinks is higher in summer months and in areas with warm and humid climates, such as the South (Stip. No. 3, CX 1244G, Tr. 476). [19]

39. Consumer taste, flavor preferences, and willingness to try new products also have an impact on soft drink consumption patterns. On a national basis, cola has been the most popular soft drink flavor since 1920 when it surpassed gingerale. Since 1947, various studies have shown that the cola flavor accounts for approximately 60-65 percent of all soft drinks sold. While the share accounted for by cola drinks may have dipped slightly in recent years, according to some surveys, cola is America's most popular flavor, followed by lemon-lime, orange, gingerale, and root beer. As with soft drink consumption, flavor preferences exhibit wide regional variation, with cola more popular in the South than in other areas of the country (Stip. No. 3, CX 1244G-H, Tr. 476).

40. The emergence of low-calorie soft drinks in the last 20 years

also has been responsible for creating a number of new soft drink consumers. Before the introduction of low-calorie soft drinks, consumers voiced two primary reasons for avoiding soft drinks—caloric content and restricted diet. With the advent of the dietetic drinks, these two barriers were overcome. Although “No-Cal” and “Diet-Rite” were originally marketed in 1953, diet-flavored soft drinks did not become a significant market factor until the early 1960’s. Following the cyclamate ban in October 1969, which virtually removed low-calorie soft drinks from the market, soft drink companies marketed saccharin substitutes, which by the end of 1970 had recaptured about 10 percent of total soft drink sales (Stip. No. 3, CX 1244H-I, Tr. 477).

41. The last 10 years have also seen the introduction of a variety of completely new soft drink categories including “isotonic” and “thirst-quenching” soft drinks, such as “Gatorade.” Since 1960, a score of new trade names and flavors also have been introduced. The increase in per capita soft drink consumption has thus in part been brought about by the ability of the soft drink industry to develop new soft drink products, brands and flavors, and the willingness of the consumer to accept them (Stip. No. 3, CX 1244I, Tr. 477-78). [20]

42. Other factors contributing to the growth in per capita consumption of soft drinks are the general increase in disposable personal income and the increasing tendency of Americans to congregate in urban areas. Two other contributions to the growth in per capita soft drink consumption have been the major shift from small size (6-8 oz.) over to medium size containers (10-16 oz.), particularly in the home market, but also in vending machines dispensing packaged products, and the ability of the industry to make readily available at virtually every location soft drinks in a wide variety of brands, flavors, and packages (Stip. No. 3, CX 1244I, Tr. 478).

43. In 1971, soft drinks were available in more than 99 percent of the over 200,000 retail food outlets in the United States. In addition, soft drinks are available in virtually every service station, restaurant, sports stadium, and theater in the country. The total number of retail outlets dispensing or selling soft drinks is well over a million (Stip. No. 3, CX 1244J, Tr. 478-79).

44. In recent years, there has also been a rapid proliferation of vending machines, which has produced an even more intensive coverage of the market. In 1971, there were nearly 1,400,000 vending machines dispensing soft drinks in bottles, cans, and cups (Stip. No. 3, CX 1244J, Tr. 479).

45. Fountain-dispensed soft drinks are available in well over 100,000 retail outlets. The rapid expansion of drive-in eating and

drinking places in recent years has also spurred fountain sales of soft drinks (Stip. No. 3, CX 1244J, Tr. 479).

46. The wide availability of flavored carbonated soft drinks is in part attributable to the high degree of market penetration achieved by bottlers of national brands employing store-door delivery in well-defined areas (Stip. No. 3, CX 1244J, Tr. 479). [21]

47. In addition to increased availability of soft drinks generally, there has been a proliferation of brands, flavors, and containers for the consumer to select from. At a given outlet, it is not uncommon for the consumer to have a choice of 25-30 flavors, both in dietetic and regular form (Stip. No. 3, CX 1244J-K, Tr. 479).

48. Since the turn of the century, soft drink consumption has undergone significant changes. In 1900, 70 percent of soft drinks were consumed on the premises of the vendors, and 30 percent were consumed in homes. Most of the flavored carbonated soft drinks consumed on the premises were dispensed from soda fountains; soft drinks consumed at home were for the most part delivered direct from the bottling plant. With the emergence of supermarkets in the 1930's, the development of the six-bottle carton "Home Package" for Coca-Cola in 1922, the distribution of Coca-Cola in coin-operated vending machines in 1935, the patterns of soft drink distribution and consumption began to change. By the mid-twentieth century, the modern self-service supermarket had become a widespread reality. In the mid-1950's, soft drinks sold for home consumption first surpassed those sold for consumption on the premises. Nationally, food stores account for between 85 percent to 90 percent of the sales for home consumption, or just above 50 percent of total soft drink sales. Soft drinks purchased for home consumption are typically purchased in medium-to-large-size containers (10 oz. and above) and multi-container cartons (Stip. No. 3, CX 1244K-L, Tr. 480).

49. With regard to consumption on the premises, the market is relatively evenly divided between vending machines (which account for approximately 18 percent of total flavored carbonated soft drink sales) and service sales at counters and tables (also approximately 18 percent). Canned and bottled soft drinks compete with bulk soft drinks dispensed at soda fountains and in cup vending machines (Stip. No. 3, CX 1244L, Tr. 480). [22]

50. In the United States, production and consumption of flavored, carbonated soft drinks have increased dramatically over the years, as evidenced by the following table:

Year	Total Value \$ (Wholesale)	Total Cases (192 ounce)	Per Capita (8 oz. containers)
1849	760,000	1,520,000	1.6
1859	1,415,000	2,830,000	2.2

## THE COCA-COLA CO., ET AL.

537

517

## Initial Decision

1869	4,222,000	8,444,000	6.4
1879	4,742,000	9,484,000	4.5
1889	14,354,000	26,098,180	9.9
1899	23,269,000	38,781,660	12.2
1909	43,508,000	62,154,280	16.2
1919	135,341,000	169,176,200	38.4
1929	214,322,238	272,428,486	53.1
1939	361,690,917	482,995,676	88.6
1940	411,699,200	550,400,000	100.1
1941	553,879,040	740,480,000	133.6
1942	526,185,088	703,456,000	126.2
1943	580,351,000	773,801,600	138.6
1944	629,681,100	812,491,700	147.1
1945	584,994,000	731,242,500	132.9
1946	617,168,600	771,460,800	132.3
1947	745,676,000	901,664,000	150.9
1948	835,157,300	1,009,863,700	164.4
1949	860,959,300	1,012,893,300	162.0
1950	876,532,600	1,001,751,474	158.0
1951	939,442,500	1,043,825,000	162.7
1952	1,019,295,000	1,132,550,000	174.0
1953	1,089,513,000	1,177,852,000	177.5
1954	1,166,605,000	1,176,674,000	174.2
1955	1,252,276,000	1,264,925,000	184.2
1956	1,308,000,000	1,321,214,000	188.9

## FEDERAL TRADE COMMISSION DECISIONS

	Initial Decision		91 F.T.C.
1957	1,347,241,500	1,360,850,000	189.2
1958	1,427,463,500	1,359,489,000	186.4
1959	1,633,015,900	1,484,560,000	199.8
1960	1,698,025,600	1,476,544,000	192.0
1961	1,829,083,200	1,524,236,000	198.3
1962	2,001,016,800	1,667,514,000	213.4
1963	2,341,189,000	1,800,915,000	227.4
1964	2,533,167,000	1,948,590,000	242.9
1965	2,735,567,000	2,104,282,000	259.1
1966	3,175,980,000	2,352,587,000	287.0
1967	3,458,632,000	2,470,452,000	298.1
1968	4,165,552,000	2,777,035,000	331.6 [23]
1969	4,369,664,000	2,913,110,000	344.4
1970	4,799,784,000	3,096,635,000	362.8
1971	5,346,960,000	3,353,615,000	388.1
1972	5,683,820,000	3,541,417,000	406.4
1973	6,223,156,500	3,771,610,000	429.6

(CX 1261)

*Bottlers and How They Operate*

51. (Note: Complaint counsel called all of the Coca-Cola bottlers (17) in a "corridor" consisting generally of the area from southern Virginia to upstate New York. In addition, counsel for respondents called bottler witnesses, both for Coca-Cola and other brands whose territories are located in widely separated parts of the United States. These bottler witnesses typify all licensed bottlers in that they cover the spectrum of firms classifiable as urban, suburban, rural, single plant, multi-plant, large, small, first line bottlers, sub-bottler, marketing bottler (*i.e.*, one with no production facilities), multi-territory,

single territory, privately held, publicly held, "Coca-Cola" subsidiary, etc.)

52. Most bottlers of Coca-Cola are small, independent manufacturers. Their size can be measured by (1) the population in a bottler's territory (Wimberly, Tr. 871-72), (2) the bottler's annual case sales of soft drinks (Wimberly, Tr. 872; Susong, Tr. 920; Sales, Tr. 1285), or (3) the number of bottler's employees (RX 36 (p. 2)).

53. Bottlers of Coca-Cola whose territories contain less than 250,000 people include Hartwell, Georgia (35,000 (Rooks, Tr. 1360)); Spirit Lake, Iowa (175,000 (LaDoux, Tr. 1458)); Montross, Virginia (39,000 (Carver, Tr. 1619)); Jamestown, North Dakota (112,000 (Bernabucci, Tr. 1956)); Coatsville, Pennsylvania (240,000 (Filoromo, Tr. 2168)); Dover, Delaware (85,000 (Massey, Tr. 2236)); Westminster, Maryland (128,000 (Roadcap, Tr. 2432-33)); and Ada, Oklahoma (82,000 (Crabtree, Tr. 2662)). Territories between 250,000 and 500,000 people [24] include LaCrosse, Wisconsin (300,000 (Bernabucci, Tr. 1965)); Washington, Pennsylvania (380,000 (Cameron, Tr. 2043-44)); and Stockton, California (290,000 (DeLap, Tr. 2564)). Territories between 500,000 and 1,000,000 people include The Coca-Cola Bottling Company of the Peninsula in Belmont, California (700,000 (Sheldon, Tr. 2607)).

54. In 1974, there were 111 independently owned bottlers of Coca-Cola which had sales below 250,000 equivalent cases of 24 eight ounce bottles; 98 independently owned bottlers of Coca-Cola which had equivalent case sales between 250,000 and 500,000; 87 which had case sales between 500,000 and 1,000,000; and 47 which had between 1,000,000 and 2,000,000 cases (Susong, Tr. 914-15). Of these 343 bottlers with sales below two million cases, there was no common ownership or control (Susong, Tr. 915).

55. The Small Business Administration classifies any manufacturing business with less than 250 employees as a small business (RX 36 (p. 2)). The bottler system for "Coca-Cola" has a large number of small plants, with 85 percent having less than 100 employees (RX 35D). In the census of bottlers of Coca-Cola completed in 1974, of the 567 bottlers who responded, representing about 75 percent of all domestic bottlers of Coca-Cola (RX 35B), 193 had less than 25 employees, 168 had between 25 and 49 employees, 121 had 50-99 employees, 46 had 100-199 employees, and only 39 had more than 200 employees (RX 35P-35Y). Of these plants, 14 were owned by subsidiaries of "Coca-Cola." One of the 14 had less than 50 employees; one had between 50 and 100; five had between 101 and 200; and seven had over 200 (Bernabucci, Tr. 1954).

56. Bottlers are often closely held, family corporations (Brown, Tr. 1653; Burks, Tr. 3000; Ippolito, Tr. 3227). It is not unusual to find all

members of the family, including wives, grandparents, children and other relatives working in some capacity in the business. For example, the president of the Northern Neck Coca-Cola Bottling Company, Montross, Virginia, testified that his son is vice-president of the company and his daughter is secretary (Carver, Tr. 1590). The president of the Coatesville Coca-Cola Bottling Works, Coatesville, Pennsylvania, testified that his three brothers [25] work as sales manager, delivery driver and service manager, respectively, and that one of his sons is planning to go into the business, joining two nephews who are already full-time employees (Filoromo, Tr. 2167). The president of the Dr Pepper bottler in Galveston, Texas, testified that his wife is the company bookkeeper; his son is sales manager and truck checker; and his brother-in-law works in the company's office (Ippolito, Tr. 3229).

57. The bottler of Coca-Cola in Jamestown, North Dakota, testified that his father bought the company in 1933 when it was bankrupt (Bernabucci, Tr. 1955-56). In the Coatesville, Pennsylvania Coca-Cola Bottling Works, the first dividends were not paid until 1935. The founder's salary was so meager that he operated a grocery store with his wife and seven children because, as his son testified, "We had quite a task just keeping bread and butter on the table" (Filoromo, Tr. 2160). Bottlers of Coca-Cola and other national brands initially had to develop the demand for their respective products by sneaking bottles of their products into cases of more accepted "rainbow" flavors (Stokes, Tr. 1072; Cameron, Tr. 2034; Ippolito, Tr. 3228).

58. Bottlers build demand for Coca-Cola and other national brands by generating good will in the community, and have become identified with their products in their communities. For example, the bottler of Coca-Cola in Hartwell, Georgia, has his route salesmen operate a check cashing service for small stores located in rural areas (Rooks, Tr. 1373A).

59. Not all bottlers are small, family-owned corporations. Coca-Cola New York, a publicly held corporation, operates one of the largest independent soft drink businesses in the world with net sales in 1971 of \$160,642,000. Coca-Cola New York operates 900 route delivery trucks, serves 70,000 accounts and almost 25 million people in New York, New Jersey, Pennsylvania, Connecticut, and Massachusetts. In addition to its soft drink operations, Coca-Cola New York has three subsidiary corporations: Mogen David Wine Corporation; Franzia Wine Company; and Igloo Corporation (Millard, Tr. 2248, 2318, 2323; CX 1220). [26]

60. The "Coca-Cola" and Thomas Companies licensing agreements have always and do now grant to the licensee the exclusive right to manufacture, distribute and sell trademarked soft drink products in

517

Initial Decision

bottles and cans in a defined geographical area. The contracts limit the licensee to the sale of his products only for ultimate resale within the licensee's exclusive territory (Susong, Tr. 520; Smith, Tr. 588, 642).

61. License agreements in effect between "Coca-Cola" and its bottlers contain, and have contained the following typical provisions:

. . . company agrees to furnish to bottler, and only to furnish to the territory herein referred to, sufficient syrup for bottling purposes to meet the requirement of the bottler in the territory herein described.

\* \* \* \* \*

. . . company does hereby select bottler as its sole and exclusive customer and licensee for the purpose of bottling the bottler's bottle syrup, Coca-Cola, in the territory described.

\* \* \* \* \*

[Bottler agrees] . . . not to use the trademarks Coca-Cola or Coke, nor bottle nor vend said product except in the territory herein referred to. This limitation, however, is not to prevent bottler from acquiring similar rights for other territory.

\* \* \* \* \*

[Bottler agrees] . . . not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola and not in any territory except as herein referred to.

(Susong, Tr. 506-508; CXs 10, 34, 40, 44-46, 48.) [27]

62. There are other similar agreements in effect between the Thomas Companies and their bottlers. All such Thomas bottler agreements contain, and have contained, the following typical provisions:

[Licensor agrees] . . . to obtain and furnish to party of the second part [bottler] and only to obtain, for the territory herein referred to, sufficient syrup for bottling purposes to meet the requirements of the party of the second part in the territory herein described, provided party of the first part [licensor] can obtain the delivery to it of such syrup from The Coca-Cola Company under the contract existing between party of the first part and The Coca-Cola Company.

\* \* \* \* \*

[Licensor agrees to select bottler] . . . as its sole and exclusive customer and licensee for the purpose of bottling Bottlers' Coca-Cola syrup, and using the name Coca-Cola thereon in the territory herein described.

\* \* \* \* \*

[Bottler agrees] . . . Not to use the name Coca-Cola nor bottle nor vend said product except in the territory herein referred to without the written consent of party of the first part and The Coca-Cola Company. This limitation, however, is not to prevent party

of the second part from obtaining such rights from parties authorized to use the name Coca-Cola and to bottle and vend said product. [28]

\* \* \* \* \*

[Bottler agrees] . . . To order, for the purpose of bottling Coca-Cola, the distinctive bottle, and none other, adopted or that may be adopted by party of the first part; to use said distinctive bottle and none other, in bottling Coca-Cola, and not to use said distinctive bottle for any other purpose than the bottling of Coca-Cola, and not in any territory except as herein referred to without the written consent of party of the first part and The Coca-Cola Company.

(CXs 11-15, 20-23, 26, 29, 31-33.)

63. Bottlers do not ship their products to a food chain if they believe all, or part, of the product is going to be transshipped outside the bottler's territory. If they find that product which has been delivered to a chain or other customer has been transshipped outside the bottler's territory, the bottler undertakes to get the chain to stop such transshipment in the future (Smith, Tr. 595).

64. When bottlers have notified "Coca-Cola" that their exclusive territories have been violated, it has been the policy of "Coca-Cola" to bring the subject to the attention of the bottler from which the product was alleged to have come (Smith, Tr. 664).

65. Usually when the matter is brought to the attention of the trespassing bottler, such bottler does what he can to stop the practice (Smith, Tr. 665).

Bottlers sell only in their own territory for ultimate resale in the territory (Carver, Tr. 1606; Ellis, Tr. 965; Brendle, Tr. 1764; Navarre, Tr. 1522, 1526).

66. Bottlers are free to, and they do, independently of "Coca-Cola" establish their prices for their soft drink products in their defined geographic territories (Smith, Tr. 688-89; Stokes, Tr. 1128). They also are free to purchase "Coca-Cola" approved bottles and crowns, other supplies, vending machines, coolers, vehicles, cases, bottling equipment, etc., from whomsoever they choose and "Coca-Cola" receives no royalty, compensation, or commission (Smith, Tr. 653-54, 690-92). Obtaining approval is not difficult (Smith, Tr. 65). [29]

67. In deciding on their pricing and packaging, bottlers are aware that other Coca-Cola bottlers will not violate their territory or compete in price or in packaging (Stokes, Tr. 1123; Navarre, Tr. 1522-23; Massey, Tr. 2235; Filoromo, Tr. 2153).

68. Bottlers compete within their territories against national brands of soft drinks such as Pepsi-Cola, Seven-Up, Royal Crown, Canada Dry, Dr Pepper, and Shasta, and against regional brands such as Rock Creek, Faygo, and Vernor's private label brands (Stokes, Tr.

1109, 1112-1113; Ellis, Tr. 958-61; Massey, Tr. 2231-32; Filoromo, Tr. 2150-53).

69. Bottlers may and do choose whether they will engage in their own or participate in cooperative promotional efforts with "Coca-Cola" and other bottlers (Smith, Tr. 798-800; Stokes, Tr. 1121; Christian, Tr. 1825; Brown, Tr. 1681-82).

70. Bottlers may, and some do, produce brands other than those of "Coca-Cola." Many of them do not produce all of the "Coca-Cola" brands and do not package in all of the sizes (bottles) authorized by "Coca-Cola" (Sales, Tr. 1202, 1210; Navarre, Tr. 1495; Massey, Tr. 2224; Filoromo, Tr. 2124-25, 2173). If a bottler of Coca-Cola does not carry one or more of its allied products, "Coca-Cola" is free to license another bottler to manufacture, distribute and sell that soft drink brand in the territory of the bottler who declined to handle the brand (Smith, Tr. 675) although to date "Coca-Cola" has chosen not to do so (Smith, Tr. 675).

71. In 1971, 438 of the 726 licensed bottlers of "Coca-Cola" and the Thomas Companies were licensed to sell trademarked soft drink products other than those of "Coca-Cola" (Smith, Tr. 689).

72. Bottlers use a store-door delivery system and do not deliver to chain store warehouses (Brown, Tr. 1673; Navarre, Tr. 1516-17; Massey, Tr. 2228, 2232, 2240; Millard, Tr. 2300). [30]

73. The current average cost in the United States to deliver Coca-Cola and allied products in cans directly to individual supermarkets and to merchandise the product under the prevailing store-door delivery system used by bottlers is approximately the same (\$.06 more per case) as the average cost of delivery and merchandising Coca-Cola through the food store warehouse delivery system (Cowart, Tr. 3361-62; RX 123). Cans are the easiest package to deliver through the warehouse system because cans are a compact, low cubage container (Cowart, Tr. 3362). This is indicated by the fact that cans are the predominant container delivered through the warehouse delivery system. Eighty percent of Shasta soft drinks (Meyers, Tr. 1737) and most private labels (Smith, Tr. 735) are sold in cans.

74. The difference between costs of the store-door delivery system and the warehouse delivery system in different parts of the country for delivering a case of cans would vary from three to five cents (Cowart, Tr. 3438). This difference is about 1 percent to 1 1/2 percent of the current wholesale price of a case of cans which, for example, is \$4.77 in San Francisco (Cowart, Tr. 3425, 3438). The average cost in the United States to deliver Coca-Cola in 32-oz. non-returnable bottles through warehouses would be 9.6 cents more per case than the cost under the current store-door delivery system (Cowart, Tr. 3438-39).

The reason the costs of the store-door delivery system and the warehouse delivery system are approximately the same for non-returnable containers is that the same functions are performed under each system (Cowart, Tr. 3326-29, 3332-34; RX 121; RX 122).

75. The bottlers obtain canned trademarked soft drink products in the following ways. (1) Some bottlers have their own canning facilities. (2) Some bottlers have canned products produced for them by other bottlers under an agency canning agreement. (3) Some bottlers have formed canning cooperatives to produce canned products for their members. (4) Some bottlers obtain canned product from Cannery for Coca-Cola Bottlers, Inc., a subsidiary of "Coca-Cola." Others obtain canned products from independent contract canners approved by "Coca-Cola" (Ogden, Tr. 834, 836, 837). [31]

76. A typical bottling line includes: (1) a system for cleansing the container, (2) a water purification system, (3) a carbonation system, (4) a system which mixes syrup in the correct ratio with water and carbonation supplied by supporting systems, (5) a filling system whereby the mixture is transferred to bottles in the correct amount, (6) a closure system for final capping of the finished product, and (7) ancillary systems which case and transfer finished products in accordance with the requirements of the particular operation (Smith, Tr. 586-87).

77. Bottlers' facilities are inspected by "Coca-Cola" on the average of three to four times a year (Sales, Tr. 1239-40; Alford, Tr. 2491; Hornsby, Tr. 3153-54). These inspections are generally unscheduled and unannounced (Susong, Tr. 921; Rooks, Tr. 1379; Bernabucci, Tr. 1980; Millard, Tr. 2326). They have included water analysis, bacteriological checks on water and processing equipment, measure of syrup content and degree of carbonation, bottle washing solution checks, and sanitation monitoring (Ellis, Tr. 973; RX 33A-J). Quality control inspectors also visit retail outlets and purchase products for analysis (Susong, Tr. 921; Ellis, Tr. 974-75). In addition, each production facility is required to submit monthly samples of every product to a quality control laboratory of "Coca-Cola" (Rooks, Tr. 1379-80; Alford, Tr. 2491-92; Hornsby, Tr. 3153). Many production facilities have their own laboratories, chemists, and quality control personnel (Ellis, Tr. 975-76; Millard, Tr. 2325-26; Alford, Tr. 2480-81; Crabtree, Tr. 2669). Inspections conducted by "Coca-Cola" were characterized as "more stringent" than governmental inspection by state authorities and the Food and Drug Administration (LaDoux, Tr. 1468). On occasion "Coca-Cola" has notified bottlers of Coca-Cola that it would cancel their contracts if substandard quality conditions were not corrected (Susong, Tr. 911-12).

78. Bottlers of Coca-Cola rotate the stock on retail shelves to insure that the product does not get old and that the consumer purchases a fresh-tasting drink (Smith, Tr. 698; Ellis, Tr. 979; Sales, Tr. 1241, 1310-11; Rooks, Tr. 1373; LaDoux, Tr. 1465; Carver, Tr. 1632; Christian, Tr. 1857; Millard, Tr. 2324; Roadcap, Tr. 2454; Burks, Tr. 3008). Route salesmen check the date code marked on the product (Ellis, Tr. 979; Sales, Tr. 1241; Rooks, Tr. 1373; Carver, Tr. 1632). Flavored [32] carbonated soft drinks do not contain preservatives (Smith, Tr. 698; Ellis, Tr. 978). Most people familiar with the soft drink industry agree that soft drink products have a definite shelf life, a span of time beyond which the taste begins to noticeably deteriorate (Smith, Tr. 698). This deterioration affects taste but does not present a danger to health (Smith, Tr. 698; Ellis, Tr. 978). Deterioration results from the process of oxidation, which varies depending on exposure to heat and light (Ellis, Tr. 978-79). Estimates of this span are variously given for bottled products as two to four weeks (Stokes, Tr. 1111-17), three to eight weeks (Sales, Tr. 1240-41), sixty days (Carver, Tr. 1632), a few weeks (Ellis, Tr. 979), a month or so (Cameron, Tr. 2087), and four to eight weeks for bottles and 25 days for cans if stored in a cool, dark place (Rooks, Tr. 1381). The shelf life of cans depends on whether the cans are made of steel or aluminum. Aluminum cans retain taste quality a little longer than steel cans and do not transmit a metallic flavor to the drink (Stokes, Tr. 1116-17; Sales, Tr. 1240-41, 1343-44; Millard, Tr. 2300). The taste of flavored carbonated soft drinks becomes "unbearable" in eight to ten weeks in steel cans (Sales, Tr. 1343-44).

79. If despite stock rotation old product is discovered at a retail outlet, route salesmen are instructed to replace the product and bring the old product back to the plant for disposal (Ellis, Tr. 979; Sales, Tr. 1311; Rooks, Tr. 1381; Carver, Tr. 1632; Roadcap, Tr. 2454).

80. The plant inspection and the submission of product samples (Cobetto, Tr. 2833-34; Strachan, Tr. 2878-79; Ippolito, Tr. 3245; Hurst, Tr. 3453; Clements, Tr. 3989) and stock rotation by bottlers' route salesmen (Cobetto, Tr. 2834; Strachan, Tr. 2893; Ippolito, Tr. 3248) are employed by other national brand soft drink licensors and their bottlers.

81. The distributional system of every licensed bottler of Coca-Cola is predicated upon store-door delivery and the direct servicing of all accounts (Smith, Tr. 655-56). [33]

82. Coca-Cola is distributed widely by bottlers and is available for purchase by consumers, often through vending machines owned by bottlers or others, through such outlets as:

Supermarkets	Train Stations/Depots
Convenience Stores	Bus Stations/Depots
Small Grocers	Bars and Taverns
Other Food Stores	Restaurants
Drug Stores	Luncheonettes
Service Stations	Drive-Ins
Department Stores	Cafeterias
Discount Stores	Snack or Specialty Shops
Variety Stores	Offices
Sports Arenas	Industrial Plants
Civic Centers and Auditoriums	Schools
Golf Courses	Hospitals and Nursing Care Homes
Amusement Parks	Prisons, and Retail Establish- ments
Bowling Alleys	not listed above ( <i>e.g.</i> , beauty salons, barber shops, liquor stores, home delivery vendors and movie theaters).
Ice and Roller Rinks	
Hotels & Motels	
Airports	

(Stipulation No. 5, RX 2-Z41-Z42.)

83. While chain store accounts usually represent from 20 to 30 percent of a bottler's business, they constitute only a minute fraction of the bottler's delivery stops (Smith, Tr. 660).

84. Licensed bottlers of "Coca-Cola" service many unprofitable accounts in order to have the product available in as many outlets as possible (Smith, Tr. 700). (See Findings 137-148, 174-178 below.) [34]

85. The bottler of Coca-Cola in Annapolis, Maryland, obtained a 3.7 percent return on investment after taxes in 1974 (Brendle, Tr. 1789), which return was greater than that obtained in 1973 (Brendle, Tr. 1786). The Coatesville Coca-Cola Bottling Works, Inc. has been profitable since its inception in 1917 (Filoromo, Tr. 2196), but did not pay a dividend until 1935 (Filoromo, Tr. 2160), and still pays "meager" dividends today (Filoromo, Tr. 2199). The Filoromo family, which owns Coatesville Bottling Works, works on small salaries and makes a return on invested capital of 2 1/2 - 3 percent after taxes (Filoromo, Tr. 2197). The James E. Crass Coca-Cola Bottling Plants, Inc., with plants in Washington, D.C., Richmond, Virginia, Frederick, Maryland, and elsewhere, pays dividends of 2 - 3 percent on book value, which percentage would be much lower if based on market value of the investments (Stokes, Tr. 1076). The bottler of Coca-Cola in Hartwell, Georgia, made an after-tax profit of \$46,000 (Rooks, Tr. 1406) and its

two owners receive monthly salaries of \$1,000 and \$1,250, respectively (Rooks, 1407). The bottler of Coca-Cola in Spirit Lake, Iowa, made a profit during 14 of the last 17 years, which profit level has never been in excess of four percent of sales (LaDoux, Tr. 1478-79). The Spirit Lake bottler was profitable last year, obtaining a two percent return on sales (LaDoux, Tr. 1478-79), barely profitable the year before, and unprofitable two years ago (LaDoux, Tr. 1475). The bottler of Coca-Cola in Newport News has been profitable since 1914 and obtains a return on investment below five percent (Brown, Tr. 1701). The Coca-Cola Bottling Company of New York, Inc., a publicly held bottler, has a current return on equity of 6.4 percent (Millard, Tr. 2357-58). The bottler of Coca-Cola in Ada, Oklahoma has obtained a 3 - 4 percent return on book value for the last few years (Crabtree, Tr. 2684) and achieves a 10 cent per case profit before taxes (Crabtree, Tr. 2684). The bottler of Coca-Cola in Jamestown, North Dakota, receives a 7 - 8 percent return after taxes on the replacement value of his investments (Bernabucci, Tr. 1973-74). The salaries taken by bottlers and their rates of return on invested capital and sales are reasonable. [35]

86. Effective interbrand competition has also kept the profits of bottlers of other national brands at a reasonable level. The Pepsi-Cola bottler in Albany, New York, obtains a 4 1/2 percent return on the market value of his investments (Strachan, Tr. 2873). The Dr Pepper-Pepsi-Cola bottler in Dyersburg, Tennessee obtains a five percent before tax return on the replacement value of the company's assets (Burks, Tr. 3047), takes less than \$20,000 in salary (Burks, Tr. 3047), has paid only \$16,000 in dividends since 1965 (Burks, Tr. 3046-47), and makes a per case profit of only 13 to 14 cents before taxes (Burks, Tr. 3048). The Dr Pepper bottler in Galveston, Texas, makes a profit of \$40,000 on sales of \$1,600,000 (Ippolito, Tr. 3271-72), obtains a five percent return on the market value of his investments (Ippolito, Tr. 3268), makes a profit of 15 to 20 cents per case before taxes (Ippolito, Tr. 3267), and has not paid any dividends in the last decade (Ippolito, Tr. 3267).

87. When family-owned bottlers of Coca-Cola have decided that they no longer wish to remain in the bottling business, they have been and are free to sell their exclusive trademark license to bottle and sell Coca-Cola in a given territory. "Under the existing system, if it becomes inefficient or unprofitable for a bottler to continue to serve his area, or when the members of a family decide that they no longer wish to remain in the bottling business, they can sell their franchise, as well as their plant and equipment" (Smith, Tr. 614). "Usually a bottler can afford to pay his neighboring bottler a generous price for his territory" and "the bottler who sells his plant is usually assured that he

will receive a fair and equitable compensation for the investment he has made in developing his territory" (Smith, Tr. 616). Bottlers can acquire another bottler without the approval of "Coca-Cola" through a stock acquisition (Smith, Tr. 628). "Coca-Cola," if asked, has recommended that bottlers merge or consolidate where appropriate (Smith, Tr. 615-16). However, bottlers are independent businessmen who make their own independent decisions and who frequently act contrary to the advice of "Coca-Cola" (Smith, Tr. 615-16). [36]

*Competition in the Soft Drink Industry*

Generally

88. There is intense competition in the sale of flavored carbonated soft drinks which stems from the fact that there is a large number of brands available to the consumer in local markets. In 1971, a Nielsen Survey showed that there were 135 different brands of cola flavored soft drinks marketed in food stores (Smith, Tr. 705). In the Washington, D.C., metropolitan area alone, there are over 30 brands of colas being marketed (Sales, Tr. 1243-1251). In addition to the cola brands, more than 20 other brands of flavors such as root beer, orange, gingerale, and lemon-lime were being sold in the Washington, D.C., market (Sales, Tr. 1243, 1255; CX 372; CX 373). In the territory of the Newport News, Virginia bottler of Coca-Cola, between 30 and 40 different brands of orange and grape soft drinks were being marketed (Brown, Tr. 1666). Over 176 different brands of flavored carbonated soft drinks were sold in the territory of The Coca-Cola Bottling Company of New York, Inc. (Millard, Tr. 2347).

89. The consumer has a substantial number of brands available from which to choose in large urban areas, small towns, and rural communities alike. For example, over 40 different brands in the areas around Elmira (RX 78A-E), and Syracuse, New York (RX 83A-G); over 35 different brands in the areas around Richmond, Virginia (CX 364A-C; CX 367A-B), Utica (RX 84A-D), Watertown (RX 85A-D), and Binghamton, New York (RX 76A-C); over 30 different brands in the areas around Philadelphia (RX 73A-D), Fredericksburg, Virginia (CX 365; CX 368A-B), Petersburg, Virginia (CX 366; CX 369A-B), Frederick, Maryland (CX 362A-B), Westminster, Maryland (RX 53A-C), Cortland (RX 77A-C), Finger Lakes (RX 79A-D), Gloversville (RX 80A-C), and Oneonta, New York (RX 82A-D); and over 20 different brands in Camden, New Jersey (RX 73E-F), Albany (RX 74A-C), Glens Falls (RX 75A-C) and Hudson, New York (RX 81A-B). Many brands are marketed in a number of different flavors. At a given retail outlet, it is not uncommon for the consumer to also have a choice of 25-30

flavors, both in dietetic and regular form (Stip. No. 3, CX 1244K, Tr. 479). [37]

90. The degree of competition in the industry both nationally and in over two dozen local markets was described by various witnesses in the business as follows: "very active" (Smith, Tr. 707); "highly competitive" (Ellis, Tr. 986); "fierce," "intense," and "tremendous" (Sales, Tr. 1242, 1332); "very aggressive" (LaDoux, Tr. 1458); "bloody, fierce" (Navarre, Tr. 1536); "extensive" (Brown, Tr. 1697); "strenuous" (Brendle, Tr. 1781); "quite intense" (Levin, Tr. 1912); "severe competitive situation" (Filoromo, Tr. 2179); "vicious, intense, heated," "most competitive business I have ever seen" (Millard, Tr. 2351-53); "high[ly] competitive" (DeLap, Tr. 2576); "very, very competitive" and "very, very intense" (Crabtree, Tr. 2673, 2679); "very intense" (Cobetto, Tr. 2827); "fierce" (Strachan, Tr. 2885-86); "brutal" (Connellee, Tr. 2965); "terrific," "aggressive" (Ippolito, Tr. 3233-34, 3264-65); "more competitors . . . than anywhere in the supermarket" (Reid, Tr. 3560); "the most competitive industry," "very intensive, very fierce and very vigorous" (Clements, Tr. 4024).

91. The testimony of witnesses familiar with the soft drink industry was that such competition was increasing. (Smith, Tr. 707-08; Ellis, Tr. 986; Sales, Tr. 1243; Navarre, Tr. 1536; Brendle, Tr. 1781; Levin, Tr. 1912-13; Cameron, Tr. 2057; Filoromo, Tr. 2180; Alford, Tr. 2508; Delap, Tr. 2576; Sheldon, Tr. 2615; Strachan, Tr. 2886; Reid, Tr. 3560.)

#### Brand Competition

92. "Coca-Cola" and allied products sold by bottlers of Coca-Cola compete against a wide variety of national brand flavored carbonated soft drinks. Among the national brand products with which bottlers of Coca-Cola and allied products testified they compete in various local markets are Pepsi-Cola (Ogden, Tr. 839; Stokes, Tr. 1170; LaDoux, Tr. 1456; Carver, Tr. 1610; Levin, Tr. 1899) and other products of the Pepsi-Cola Company such as Diet Pepsi (Brown, Tr. 1684; Alford, Tr. 2501), Patio flavors (Millard, Tr. 2344) and Mountain Dew (Rooks, Tr. 1388; Brendle, Tr. 1774); Seven-Up (Smith, Tr. 705; Stokes, Tr. 1170; Rooks, Tr. 1388; Brown, Tr. 1684; [38] Brendle, Tr. 1774; Christian, Tr. 1834) and other products of the Seven-Up Company such as Howdy Cola (RX 73B) and Diet Seven-Up (Millard, Tr. 2344; Alford, Tr. 2501); Dr Pepper (Rooks, Tr. 1388; LaDoux, Tr. 1456; Carver, 1610) and Sugar Free Dr Pepper (Millard, Tr. 2344); Canada Dry (Rooks, Tr. 1388; Brendle, Tr. 1774; Christian, Tr. 1834; Cameron, Tr. 2057; Filoromo, Tr. 2151; Massey, Tr. 2231) and other products of the Canada Dry Corporation such as Jamaica Cola (Sales, Tr. 1251) and Wink (Carver,

Tr. 1611); Royal Crown (Ogden, Tr. 839; Stokes, Tr. 1170; Navarre, Tr. 1514-15; Christian, Tr. 1834; Levin, Tr. 1899) and other products of the Royal Crown Cola Co. such as Par-T-Pak (Carver, Tr. 1611), Diet Rite (Stokes, Tr. 1146; Rooks, Tr. 1388; Alford, Tr. 2501) and Nehi flavors (Stokes, Tr. 1146; Alford, Tr. 2501-02); Schweppes (Ellis, Tr. 985; Brown, Tr. 1684); Squirt (Ellis, Tr. 985); NuGrape (Wimberly, Tr. 875); London Dry (Rooks, Tr. 1388); YooHoo (Rooks, Tr. 1388; Levin, Tr. 1899) and Brownie (Brown, Tr. 1684) chocolate sodas; Dixi Cola (Sales, Tr. 1250); Climax gingerale (Carver, Tr. 1610; Brown, Tr. 1684); Lipton (Sales, Tr. 1252) and Nestea (Crabtree, Tr. 2676) canned iced teas; Frostie (Stokes, Tr. 1146; Alford, Tr. 2502), Dad's (Stokes, Tr. 1146), Hires (Levin, Tr. 1899), Ma's Old Fashioned (Filoromo, Tr. 2152) and A&W (Levin, Tr. 1899) root beers; Orange Crush (Levin, Tr. 1899; Bernabucci, Tr. 1983; Massey, Tr. 2230); No Cal (Stokes, Tr. 1146; Filoromo, Tr. 2151; Millard, Tr. 2344); Weight Watchers (Levin, Tr. 1899); Tru-Ade (Stokes, Tr. 1146; Carver, Tr. 1610); Double Cola (Sales, Tr. 1248; DeLap, Tr. 2576; Crabtree, Tr. 2676); Triple Cola (Stokes, Tr. 1147); Cliquot Club (Sales, Tr. 1250); White Rock (Stokes, Tr. 1147; Millard, Tr. 2344); Snow Peak (Stokes, Tr. 1147); C&C Cola (Stokes, Tr. 1147; Millard, Tr. 2344); Wild West Sasparilla (Brown, Tr. 1684); and Shasta (Wimberly, Tr. 875; LaDoux, Tr. 1456; Carver, Tr. 1611). Bottlers of Pepsi-Cola (Strachan, Tr. 2883-84), Dr Pepper (Burks, Tr. 3035-36; Ippolito, Tr. 3243, 3256, 3265), and Seven-Up and Royal Crown (Cobetto, Tr. 2825) as well as witnesses selling Dr Pepper (Clements, Tr. 3987, 4015); Shasta (Meyers, Tr. 1724, 1727, 1733); and Lipton (Reid, Tr. 3562-63) and Nestea (Hurst, Tr. 3455-56) canned iced teas testified that their respective products compete with Coca-Cola and allied products as well as other national brand flavored carbonated soft drinks. [39]

93. In most local markets, bottlers of Coca-Cola and other national brands compete with local and regional brands of flavored carbonated soft drinks manufactured and sold by independent producers under their own labels (Stip. No. 3, CX 1244E, Tr. 474). The brands of these local and regional manufacturers, such as Blair House and Rock Creek in Washington, D.C., Suburban Club in Baltimore, Frank's in Philadelphia, Graf's in Milwaukee, and Faygo and Vernor's in Detroit, have been strong competitors in specific markets for decades (Stip. No. 3, CX 1244E, Tr. 474).

94. Other local and regional brands of flavored carbonated soft drinks with which Coca-Cola and allied products compete include Canfield's in Chicago (Ogden, Tr. 839; Meyers, Tr. 1732); Frank's in Pennsylvania, Maryland, Delaware, Virginia, and the District of Columbia (Ellis, Tr. 984; Stokes, Tr. 1146; Sales, Tr. 1249; Carver, Tr.

1611; Levin, Tr. 1899; Massey, Tr. 2231; Roadcap, Tr. 2423); Hoffman's in Maryland, Virginia, Pennsylvania, and New York (Ellis, Tr. 985; Stokes, Tr. 1146; Meyers, Tr. 1733; Christian, Tr. 1899; Millard, Tr. 2344); Suburban Club in Maryland and Virginia (Ellis, Tr. 985; Stokes, Tr. 1146; Carver, Tr. 1610); Rock Creek (Sales, Tr. 1249; Brendle, Tr. 1780) and Blair House (Sales, Tr. 1249; Brendle, Tr. 1780) in the greater Washington, D.C., area; Green Spot, A-Treat, Reading Beverages, and Crystal Beverages in the Reading, Pennsylvania, area (Levin, Tr. 1899); Ritz in Florida (Meyers, Tr. 1732); Mission in San Antonio and the Southwest (Meyers, Tr. 1733; Alford, Tr. 2505); Checkers in Louisville (Meyers, Tr. 1733); Texas Beverages in San Antonio (Roadcap, Tr. 2482); Belfast in the San Francisco area (Sheldon, Tr. 2614); White Rock in New York and New Jersey (Millard, Tr. 2344); Regent in Pittsburgh (RX 2Z34); and Variety Club in Toledo (RX 2Z10). Various regional brands were described as a "very strong competitor" (Suburban Club) (Ellis, Tr. 985), "tough competitors" (regional brands collectively) (Meyers, Tr. 1732), and "tremendous competitors" (Faygo and Shasta) (Cameron, Tr. 2058). In fact, the bottler of Coca-Cola in San Antonio had The Coca-Cola Company develop a red cream soda, "Fanta Red," in order to compete with the strong market performance in the area of "Big Red," a local red cream soda brand (Alford, Tr. 2482, 2502-04). Big Red retails at the same price as Coca-Cola and has 10 percent of the home market (Alford, Tr. 2502-03). [40]

95. Shasta, which is produced by Consolidated Foods Corp. and which 10 years ago was confined to the West Coast, has now become a national brand marketed in all 50 states (Smith, Tr. 707; Meyers, Tr. 1710-14; Stip. No. 3, CX 1244E, Tr. 474). Shasta, in 1971, on the basis of estimates by Nielsen, was the fourth ranked brand in food stores in San Francisco, San Jose, Fresno, Seattle, Spokane, Tacoma, Portland, Baton Rouge, Las Vegas, Denver, Reno, Phoenix, Kansas City, and St. Louis (RX 2Z-2Z1).

96. Physical case sales of Shasta brand flavored carbonated soft drinks nationally and in the New York-Virginia corridor area in the years indicated were as follows:

<i>Year</i>	<i>N.Y.-Va. Corridor</i>	<i>United States</i>
1967	493,000	17,645,000
1970	1,008,000	35,676,000
1972	4,629,000	56,992,000

(Stip. No. 7, RX 102Z16).

97. Shasta soft drink products are priced below the prices of

national soft drink brands and above the prices of private label soft drink products (Meyers, Tr. 1751).

98. Bottlers of Coca-Cola and other national brands also compete with private label soft drinks which, since the early 1960's, have become a substantial competitive force in the soft drink industry. Private label soft drinks are sold by a retailer under the retailer's own trade name or under a trade name of a wholesaling or other organization from which the retailer purchases, *e.g.*, 7-Eleven, Yukon Club (A&P), and Gayla (Topco) soft drinks. Private labels are manufactured either by the retailer or wholesalers themselves or for such firms by contract bottlers or canners. Private labels are generally sold for home consumption in non-returnable bottles and cans (Stip. No. 3, CX 1244F, Tr. 474-75). Private label soft drinks are sold by food chains, independent grocers, drug stores (Sales, Tr. 1247-48; Brown, Tr. 1683; Connellee, Tr. 2965), convenience stores (Sales, Tr. 1247; Navarre, Tr. 1520; Connellee, Tr. 2965), dairy stores (Sales, Tr. 1247), [41] restaurant chains (Sales, Tr. 1246-47), and others. In fact, many food chains now sell more than one private label (Ellis, Tr. 983; Sales, Tr. 1243-45; Navarre, Tr. 1518-19; Brendle, Tr. 1775; Filoromo, Tr. 2151-52; Hornsby, Tr. 3176). Nationally, literally hundreds of new private label soft drinks have entered the market, many in the last five years (Stip. No. 3, CX 1244F, Tr. 475). In the East, sales of private label flavored carbonated soft drinks by contract canners grew "dramatically" between 1964 and 1971 in part because more food chains went into the sale of private labels (Hornsby, Tr. 3173).

99. Coca-Cola and allied products and other national brand flavored carbonated soft drinks compete with a wide variety of private labels in virtually every market (Smith, Tr. 705; Sales, Tr. 1244-48; LaDoux, Tr. 1456; Navarre, Tr. 1518-20; Millard, Tr. 2346-48; Roadcap, Tr. 2424-25; Alford, Tr. 2504-05; DeLap, Tr. 2576; Strachan, Tr. 2885; Clements, Tr. 4015).

100. In smaller communities there are typically between four and ten private label soft drinks being marketed which compete with Coca-Cola and allied products. For example, in Richmond, Virginia, Coca-Cola and allied products compete with A&P's "Yukon Club," Giant Foods' "Glee," Safeway's "Cragmont," Grand Union's "Penguin," Colonial Stores' "Zesty," Food Fair's "Pantry Pride" and "Hy Tyme," and 7-11 convenience store's "7-11" brand (Stokes, Tr. 1114; CX 364A; CX 366). In Annapolis, Maryland, the bottler of Coca-Cola competes with Giant Foods' "Giant" and "Glee" brand private labels, Safeway's "Cragmont," A&P's "Yukon Club," Pantry Pride's "Pantry Pride" and "Fyne Taste," and Acme's "Bala Club" and "Ideal" brands (Brendle, Tr. 1775). In Wilmington, Delaware, Coca-Cola and allied products

compete with Acme's "Ideal," "Super Saver," and "Bala Club," Penn Fruit's "Gayla," Pantry Pride's "Pantry Pride" and "Hy Tyme," A&P's "A-brand," "Bond Street," and "Yukon Club," Shop Rite's "Shop Rite" brand, Pathmark's "Pathmark" private label, and "7-11" (Navarre, Tr. 1518-19; RX 32). [42]

101. Bottlers of Coca-Cola in Charlottesville, Virginia (Christian, Tr. 1839-41); Jamestown, North Dakota (Bernabucci, Tr. 1983-84); Westminster, Maryland (Roadcap, Tr. 2424-25); Coatesville, Pennsylvania (Filoromo, Tr. 2151-52); Montross, Virginia (Carver, Tr. 1611, 1614-16); and Dover, Delaware (Massey, Tr. 2234), testified that they compete with a number of private label brands.

102. Private label brands are a substantial competitive force. Nationally, Neilsen estimates that 20 percent of flavored carbonated soft drink sales in food chains are private label brands and that 40 percent of the sales of canned soft drinks are private labels (Smith, Tr. 705-06). The same source also estimates that private labels account for approximately 40 percent of all flavored carbonated soft drinks sold in food stores in the Washington, D.C., area (Sales, Tr. 1275) and approximately 30 percent in the New York metropolitan area (Millard, Tr. 2348).

#### Competition in Prices

103. There is price competition between Coca-Cola and allied products and other brands of flavored carbonated soft drinks (Smith, Tr. 742, 744; Sales, Tr. 1238, 1258-59; Rooks, Tr. 1362; Navarre, Tr. 1537-38). This pricing competition was described as "intense" (Levin, Tr. 1912; Reid, Tr. 3562) and "very tough" (Smith, Tr. 742). There is also very intense price competition from regional brands. For example, C&C Cola increased its market share in food stores in metropolitan New York from not being traceable in 1970 and 1972 to 3.6 percent of the market in 1975 (Millard, Tr. 2358). However, as a result of the exclusive territory provisions, competition *between licensed Coca-Cola bottlers* has been eliminated in their pricing of soft drinks, in the packaging of products, the sizes of containers and in the services they provide, such as warehouse delivery and pick-up at the bottling plant (Smith, Tr. 672-77). [43]

104. Because of keen interbrand price competition, bottlers of Coca-Cola attempt to price Coca-Cola and allied products at a level equal to or below major national brand competitors (Alford, Tr. 2483). In May 1975, Coca-Cola was priced below Pepsi-Cola in such markets as Washington, D.C. (Sales, Tr. 1238), Humbolt, Iowa (LaDoux, Tr. 1459), Westminster, Maryland (Roadcap, Tr. 2443), Montross, Virginia (Carver, Tr. 1630), Charlottesville, Virginia, (Christian, Tr. 1854-56),

Newport News, Virginia (Brown, Tr. 1671-A), and Coatesville, Pennsylvania (Filoromo, Tr. 2180). When Coca-Cola is priced below Pepsi-Cola and other competing brands, as happened in Charlottesville between November 1974 and May 1975, sales of Coca-Cola improve substantially at the expense of the other brands (Christian, Tr. 1854-56). These other national brands view competitive pricing as important (Burks, Tr. 3046; Clements, Tr. 4024), and the Dr Pepper bottler in Dyersburg, Tennessee, indicated that he could not afford to sell at a retail price of even one, two or three cents higher on a six pack than Coca-Cola and other national brands for an extended period of time (Burks, Tr. 3046). The bottler of Coca-Cola in San Antonio testified that his sales will be adversely affected if his prices are two or three cents higher on a six pack (Alford, Tr. 2483), and the licensor of Nestea canned iced tea testified that even a one cent difference on a six pack may affect consumer choice (Hurst, Tr. 3457).

105. During late 1973 and 1974, there was a substantial increase in the price of sugar (Brown, Tr. 1694; Cameron, Tr. 2056; Sheldon, Tr. 2616; Clements, Tr. 4017), which is one of the principal ingredients in flavored carbonated soft drinks, and there also were increases in container and other costs (Brown, Tr. 1694). These increases in the cost of ingredients and containers brought about a substantial increase in the prices of flavored carbonated soft drinks (Brown, Tr. 1693-94; Sheldon, Tr. 2616; Clements, Tr. 4017). In 1974, home market sales of flavored carbonated soft drinks declined for the first time (Clements, Tr. 4016) as the substantial increase in the price of flavored carbonated soft drinks resulted in consumers purchasing powdered mixes and other types of beverages (Clements, Tr. 4016-17). [44]

106. The prices charged by bottlers of Coca-Cola and allied products are determined by the prices of competing brands, costs of ingredients, and containers (Ellis, Tr. 965; Sales, Tr. 1259-60, 1324; Carver, Tr. 1617, 1640; Millard, Tr. 2310). Such competition also controls the prices charged by bottlers of Dr Pepper (Clements, Tr. 4024) and other national brand soft drinks (Cobetto, Tr. 2836). When costs of ingredients and containers are relatively stable, bottlers of Coca-Cola have been able to maintain their price levels. For example, the wholesale prices charged by Washington Coca-Cola Bottling Company did not rise from April 1, 1971, until April 1, 1974 (Sales, Tr. 1260).

107. Because of competition from other brands when the cost of sugar forced the price of sweetened flavored carbonated soft drinks to increase, many bottlers of Coca-Cola did not correspondingly increase the price for diet flavored carbonated soft drinks which do not contain sugar (Carver, Tr. 1625; Cameron, Tr. 2091-92; Roadcap, Tr. 2448-49).

The result was a 30 to 50 cent per case differential between diet and sugar sweetened flavored carbonated soft drinks (Carver, Tr. 1625; Roadcap, Tr. 2448-49). Because of a reduction in the price of sugar in 1975, bottlers of Coca-Cola began to reduce their wholesale soft drink prices (Rooks, Tr. 1385; Cameron, Tr. 2056; Sheldon, Tr. 2617; RX 68).

108. When prices charged by bottlers of Coca-Cola are above those charged by major competitors such as Pepsi-Cola, sales of Coca-Cola decline. In early 1973, the effective price of Pepsi-Cola fell below Coca-Cola in New York City. The result was that the home market share average of Coca-Cola over Pepsi-Cola declined from 18 versus 11 percent to 14 versus 12 percent. This forced The Coca-Cola Bottling Company of New York to increase pricing and promotion expenditures from \$7-8 million to \$17 million to recapture its position (Millard, Tr. 2355-57). In Hartwell, Georgia, loss of market share forced the bottler of Coca-Cola to meet the quantity discounts offered by his Pepsi-Cola competitor (Rooks, Tr. 1391-92). Similarly, when as a result of increased sugar prices Coca-Cola Bottling Company of the Peninsula in California found itself to be premium priced over Pepsi-Cola [45] and other national brands for the first quarter of 1975, the price differential led to a considerable slowdown in sales of Coca-Cola. The result was that Coca-Cola "priced [itself] out of the market place" (Sheldon, Tr. 2616-17). When Coca-Cola Bottling Company of the Peninsula reduced its price in March 1975 (Sheldon, Tr. 2617; RX 68), sales of Coca-Cola significantly increased (Sheldon, Tr. 2620).

109. The wholesale prices charged by bottlers of Coca-Cola are competitive with the wholesale prices charged by their national brand competitors in the same local markets. On July 15, 1971, for example, the regular wholesale prices for a case of 24 12-ounce cans of Coca-Cola and Pepsi-Cola were \$3.00 each in Annapolis (CX 453A; RX 103I); \$3.00 each in Charlottesville (CX 431; RX 103X); \$3.00 each in Montross, Virginia (CX 387B; RX 103Z1); \$3.00 each in Westminster, Maryland (CX 991; RX 103Z1); \$3.25 each in Albany, New York (CX 929; RX 103T); \$3.10 each in Elmira, New York (CX 929; RX 103S); \$3.25 each in Glens Falls, New York (CX 929; RX 103R); \$3.25 each in Syracuse, New York (CX 929; RX 103Z2); \$3.10 each in Binghamton, New York (CX 929; RX 1030); \$3.00 each in Philadelphia (CX 694; RX 103V); and \$3.10 each in Watertown, New York (CX 929; RX 103N).

110. The most economical packages sold by bottlers of Coca-Cola and other national brands in almost every market are the larger size returnable bottles, namely the 16-ounce returnable (Smith, Tr. 770; Stokes, Tr. 1140-41; Sales, Tr. 1261, 1338-39; LaDoux, Tr. 1459, 1461; Brendle, Tr. 1773; Christian, Tr. 1822-23, 1863; Levin, Tr. 1925, 1940; Filoromo, Tr. 2148; DeLap, Tr. 2579; Connellee, Tr. 2971) and the 32-

ounce returnable/resealable (Stokes, Tr. 1141; LaDoux, Tr. 1459; Navarre, Tr. 1540; Carver, Tr. 1631; Christian, Tr. 1861; Ippolito, Tr. 3249-50). Even bottlers who do not distribute returnables (Strachan, Tr. 2870-72) or who sell only a small percentage of returnables (Millard, Tr. 2305) testified that the returnable bottle with a reasonable trippage was the "most economical" package for the consumer. [46]

111. The returnable bottle is the most economical package to the consumer because the higher cost of the returnable container itself is spread over a large number of trips which the bottle makes before it is lost, destroyed or is no longer usable (Ellis, Tr. 997). For example, a 16-ounce returnable bottle which costs 12 cents, and which makes 18-20 trips before it is lost or destroyed, averages out to a container cost of only a fraction of a cent per trip (LaDoux, Tr. 1461-62; Alford, Tr. 2488; Clements, Tr. 3996). On the other hand, when a consumer buys a non-returnable bottle, the full cost of the container must be recovered in the purchase price of the beverage (Clements, Tr. 3996, 4042; RX 16).

112. Container costs are a substantial part (often over 50 percent) of the total cost of flavored carbonated soft drinks sold in non-returnable containers (Hornsby, Tr. 3177). In May 1975, a case of 24 empty 12-ounce conventional steel cans cost \$1.44 or 6 cents per can (LaDoux, Tr. 1461-62). The cost of aluminum cans is almost identical to conventional steel cans (Sales, Tr. 1342-43).

113. Nationwide, approximately 55 percent of the sales of Coca-Cola in bottles and cans on a volume basis is sold in returnable bottles (Smith, Tr. 661, 777-78; Teasley, Tr. 3633, 3653, 3755). The percentage of soft drinks sold in returnable bottles varies in different areas of the country (Teasley, Tr. 3758-59, 3777-78; RX 7). Fifty percent of the sales of Coca-Cola in bottles and cans in Richmond are packaged in returnable bottles (Stokes, Tr. 1115, 1167); 30 percent in Washington, D.C. (Stokes, Tr. 1167); 65 percent in Hartwell, Georgia (Rooks, Tr. 1384); 70 percent in Spirit Lake, Iowa (LaDoux, Tr. 1462) and the State of Iowa generally (LaDoux, Tr. 1463); 30 percent in Wilmington, Delaware (Navarre, Tr. 1541-42); 25 percent in Havre de Grace, Maryland (Navarre, Tr. 1542); 75 percent in Charleston, West Virginia (Navarre, Tr. 1542); 54 percent in Miami (Navarre, Tr. 1542); 74 percent in Montross, Virginia (Carver, Tr. 1633); 60 percent in Charlottesville, Virginia (Christian, Tr. 1859); 40 percent in Reading, Pennsylvania (Levin, Tr. 1916); 65 percent in Washington, Pennsylvania (Cameron, Tr. 2042); 20 percent in Coatesville, Pennsylvania (Filoromo, Tr. 2172); 47.9 percent in Westminster, Maryland (Roadcap, Tr. 2448); 41 percent in Dover, Delaware (Massey, Tr. 2226); 51 percent in San Antonio, Texas (Alford, Tr. 2487); 45 percent in Stockton,

California (DeLap, Tr. 2567); 55-57 percent in Palo Alto, Burlingame and San Mateo, California (Sheldon, Tr. 2610); 60 percent in Jamestown, North Dakota (Bernabucci, Tr. 1982) and 70 percent in Ada, Oklahoma (Crabtree, Tr. 2670). [47]

114. There has recently been a resurgence of the use of returnable bottles and it appears that the share of the total soft drink market accounted for by returnable bottle sales has stabilized (Smith, Tr. 604, 609, 661-62; Strachan, Tr. 2872; Teasley, Tr. 3640, 3645-46). The percentage of Coca-Cola sold in returnable bottles has risen in Richmond, Virginia (Stokes, Tr. 1179-80), is increasing in Miami, Florida, and Wilmington, Delaware (Navarre, Tr. 1542), and reverted from 45 percent returnable/55 percent non-returnable to 55 percent returnable/45 percent non-returnable in the territory of The Coca-Cola Bottling Company of the Peninsula in California (Sheldon, Tr. 2610). The principal reasons that the share of the market may have stabilized are adjustments in the deposit structure and the increasing segmentation of the market to the point where economy oriented purchasers are buying returnable bottles and convenience buyers are purchasing convenience packages rather than buying returnables and discarding them (Teasley, Tr. 3640). The introduction of the 32-ounce returnable also helped arrest the decline in returnable bottle sales (Smith, Tr. 662). In the immediate future, there are no market forces or trends in consumer preferences which are likely to bring about a substantial change in the share of soft drink volume accounted for by sales of returnable bottles (Teasley, Tr. 3650-51).

115. Other national brands have also emphasized the low price per ounce returnable bottle (Strachan, Tr. 2871, 2915-16). Nationally, 65 percent of Dr Pepper's volume is sold in returnable bottles (Clements, Tr. 3994). Eighty-five (85) percent of the volume of the Dr Pepper-Pepsi-Cola Bottling Company in Dyersburg, Tennessee is sold in returnable bottles (Burks, Tr. 3030, 3096). Sixty (60) percent of the volume of Dr Pepper in the State of Texas is sold in returnables (Ippolito, Tr. 3252-53, 3287). In Herminie, Pennsylvania, and Wheeling, West Virginia, the Seven-Up/Royal Crown bottler has approximately 80 percent and 50 percent, respectively, of his sales volume in returnables (Cobetto, Tr. 2818-19, 2837).

116. In July 1971, the average retail price of Coca-Cola in the United States in 16-ounce returnable bottles, according to Nielsen sources, was lower than the average price per ounce at which Coca-Cola in the 6 1/2-ounce returnable bottle was sold at retail in 1900 (Smith, Tr. 716). [48]

117. Nielsen reported that in the period December 1970-January 1971 the retail price per ounce of Coca-Cola in 16-ounce returnable

bottles nationwide was on the average of one percent less than the price per ounce on private label cans sold in chains and large independent food stores (RX 8). In June-July 1971, the nationwide average retail price per ounce for Coca-Cola in 16-ounce returnable bottles was the same as the average price per ounce for private label soft drinks in all containers combined (RX 9).

118. In many local markets, Coca-Cola in 16 and 32-ounce returnable bottles is cheaper than private labels. In Montross, Virginia, a 32-ounce returnable bottle of Coca-Cola in May 1975 retailed for 33 cents; 32 ounces of Rich Food's private label in 28-ounce non-returnable bottles retailed for 38 cents; 32 ounces of Safeway's Cragmont retailed for 48 cents; 32 ounces of A&P's Yukon Club retailed for 53 cents; and 32 ounces of Shasta retailed for 59 cents (Carver, Tr. 1634-35). In Newport News, Virginia, in May 1975, the 16-ounce returnable bottle of Coca-Cola sold at retail for a little over a penny an ounce (six 16-ounce bottles for \$1.08 or 96 ounces for \$1.08) (Brown, Tr. 1680), while a six-pack of private label soft drinks in cans (72 ounces) retailed for between 99 cents and \$1.05, or over 1.33 cents per ounce (Brown, Tr. 1693). In Jamestown, North Dakota, 32-ounce returnable bottles of Coca-Cola retailed at 1.2 cents per ounce and private label cans retailed at 1.4 cents per ounce (Bernabucci, Tr. 1981-82). In San Antonio, Coca-Cola in 16 and 32-ounce returnable bottles retailed at regular everyday prices at about one cent per ounce, whereas private label soft drinks in cans retailed at approximately 18-20 cents each or 1.5 to 1.7 cents per ounce (Alford, Tr. 2492). And in Ada, Oklahoma, 32-ounce returnable bottles of Coca-Cola retailed at 33 cents each or three for a dollar, which is about a penny an ounce (Crabtree, Tr. 2671); 12-ounce cans of private label soft drinks retailed at 18-19 cents each at 1.5 cents per ounce (Crabtree, Tr. 2674); and 64-ounce non-returnable bottles of the private labels retailed at 69 cents or just over one cent per ounce (Crabtree, Tr. 2690). [49]

119. The 16 and 32-ounce returnable bottles provide direct price per ounce competition to private labels (Ellis, Tr. 995, 1021-22; Brown, Tr. 1661; Strachan, Tr. 2870). Because national brands sold in returnables provide the strongest price competition for private labels, food chains dislike handling national brands in economical returnable bottles (Ellis, Tr. 1021-22; Strachan, Tr. 2867A, 2870). In areas where national brands are predominantly in returnable bottles, private label market penetration is weak; in areas where national brands have been forced into non-returnable containers, private labels are strong (Strachan, Tr. 2883-85). In markets where 32-ounce returnables are sold, chains often keep them at locations in the beverage section which are physically distant from their private labels (Burks, Tr. 3032-33).

120. Without exclusive territories the use of the returnable bottle by bottlers of Coca-Cola and other national brands would be substantially reduced, if not eliminated (Smith, Tr. 734-736; Ellis, Tr. 995; Rooks, Tr. 1400, 1431; Bernabucci, Tr. 1994; Roadcap, Tr. 2466; Crabtree, Tr. 2689; Strachan, Tr. 2903; Clements, Tr. 4038-39). If the chain stores converted to a system of warehouse delivery, the chain stores would eliminate returnable bottles entirely because the returnable bottle is incompatible with warehouse delivery (Smith, Tr. 735-36; Ellis, Tr. 995; Rooks, Tr. 1401; Cobetto, Tr. 2838-39; Strachan, Tr. 2870, 2903). In Los Angeles, where national brand soft drinks are delivered to warehouses, no returnable bottles are handled through the warehouse system (Hurst, Tr. 3496).

121. Returnable bottle usage would also decline because bottlers would be reluctant to invest in returnable bottles when they had no assurance that they would be able to recapture their large investment in returnable bottles for reuse (Smith, Tr. 700; Rooks, Tr. 1404; Cobetto, Tr. 2813; Clements, Tr. 4046).

122. If bottlers lose their high volume accounts or such accounts shifted to predominantly nonreturnable containers, the cost of providing returnable bottles to the remaining low-volume accounts will necessarily increase to cover fixed costs (Alford, Tr. 2540; DeLap, Tr. 2590), thereby reducing the price per ounce advantage and economical appeal of returnable bottles to consumers, and consequently reducing demand for returnable packages (Smith, [50] Tr. 735-36; Ellis, Tr. 1020; Roadcap, Tr. 2466; Connellee, Tr. 2989, 2994). Once returnable bottles lose their economy image, and the price per ounce differential with non-returnables narrows, consumers will stop purchasing returnables (Cameron, Tr. 2066-68). Without the economy appeal of the returnable, trippage (*i.e.*, the number of fillings of a returnable bottle) will decline and the returnable bottle will die (Smith, Tr. 734-36).

123. The retail price per ounce differential between Coca-Cola in returnable bottles and non-returnable containers varies in specific markets. For example, in July 1971, in Baltimore it cost the consumer approximately 30 percent more per ounce to buy Coca-Cola in 16-ounce non-returnable bottles than in 16-ounce returnable bottles and 66 percent more per ounce in 12-ounce cans than in 16-ounce returnable bottles (Ellis, Tr. 982). In Wilmington, Delaware, the retail price of 32-ounce returnable bottles of Coca-Cola is four for \$1.69 or 1.32 cents per ounce; the prevailing retail price for cans is six for \$1.49 or 2.06 cents per ounce, 36 percent more expensive to the consumer on a per ounce basis (Navarre, Tr. 1541). In May 1975, in Montross, Virginia, the 16-ounce returnable bottle retailed in supermarkets at 1.08 cents per ounce (Brown, Tr. 1680); cans retail at 2 cents per ounce or

approximately twice as much (Brown, Tr. 1680, 1692). In Jamestown, North Dakota, the May 1975 retail price per ounce of Coca-Cola in 32-ounce returnable bottles was 1.2 cents; the price per ounce in 32-ounce non-returnables was 1.5 cents, and in cans, 2.2 cents (Bernabucci, Tr. 1981). In May 1975, Coca-Cola in 16-ounce returnable bottles was on a per ounce basis, 29 percent cheaper than Coca-Cola in 16-ounce non-returnables, 27 percent cheaper than Coca-Cola in 32-ounce non-returnables, 16 percent cheaper than Coca-Cola in 64-ounce non-returnables; and 61 percent cheaper than Coca-Cola in 12-ounce cans in Reading, Pennsylvania (Levin, Tr. 1925). In San Antonio, Texas, the May 1975 retail price per ounce for Coca-Cola in 16 and 32-ounce returnable bottles was about a penny. Coca-Cola in 48 and 64-ounce non-returnable bottles retailed at about 1.5 cents per ounce, or 50 percent more expensive than it is in a 16-ounce returnable bottle, and Coca-Cola in cans retailed at 1.9 cents per ounce, or 90 percent more expensive (Alford, Tr. 2488, 2551).

124. Large size returnable bottles provide the same price per ounce advantages to other national brands as they do to Coca-Cola. Dr Pepper in Dallas sells 16 and 32-ounce returnables at the same price per ounce that prevailed 70 years ago (Clements, Tr. 3994-95). From 1971 until 1974, the Dr Pepper bottler in Dyersburg, Tennessee, was selling Dr Pepper in 16-ounce, and later in 32-ounce, returnable bottles on a per ounce basis at approximately the same price that soft drinks were being sold for in the 1930's (Burks, Tr. 3030). [51]

125. Other brands in large size returnables also sell at a retail price per ounce comparable to private labels. For example, Dr Pepper in 32-ounce returnable/resealable bottles in Dyersburg, Tennessee, in June 1975 retailed for between 41 and 43 cents per bottle (Burks, Tr. 3031). The private label of the largest chain in Dyersburg, Kroger's "Big K," in 28-ounce non-returnable bottles sold for 43 cents in June 1975, or for more than Dr Pepper on a per ounce basis (Burks, Tr. 3032). And in Galveston, Texas, in June 1975, Dr Pepper in 32-ounce returnables was cheaper on a price per ounce basis than private label cans (Ippolito, Tr. 3255-56).

126. Other brands of soft drinks sold in returnable bottles are less expensive on a per ounce basis than the same brands sold in non-returnable bottles and cans. In June 1975, in Galveston, Dr Pepper in 32-ounce returnable/resealable bottles retailed for 33 cents or about one cent per ounce; in 32-ounce non-returnables the price was 49 cents of 1 1/2 cents per ounce; in cans the price was six for \$1.40 or almost 2 cents per ounce (Ippolito, Tr. 3255-56). In Dallas, the retail per ounce price of Dr Pepper in cans was 1.75 cents versus less than 1 cent in returnable bottles (Clements, Tr. 3994-96). In Dyersburg, Tennessee, a

32-ounce returnable/resealable bottle of Dr Pepper retailed for between 41 and 43 cents; a 28-ounce non-returnable bottle of Dr Pepper retailed for 49 cents and a six-pack of 12-ounce cans of Dr Pepper retailed for between \$1.37 and \$1.39. The retail price per ounce of Dr Pepper in 32-ounce returnable bottles was 1.3 cents, and for cans the per-ounce price was nearly 2 cents (Burks, Tr. 3031-34).

127. Bottlers of Coca-Cola and other brands compete by offering price promotions. Promotions are normally offered in the form of allowances or cents-off the wholesale price per case (Sales, Tr. 1333) or by providing one case free with a given number of cases purchased (Stokes, Tr. 1181-82; Millard, Tr. 2389). Many industry witnesses indicated they [52] compete through price promotions in their respective markets (Ogden, Tr. 840; Sales, Tr. 1237; Navarre, Tr. 1503-05; Carver, Tr. 1604; Christian, Tr. 1854; Filoromo, Tr. 2192-93; Millard, Tr. 2357-58; Alford, Tr. 2510-11; DeLap, Tr. 2576-77; Strachan, Tr. 2886; Burks, Tr. 3043, 3088; Hurst, Tr. 3456; Reid, Tr. 3562-63; Clements, Tr. 3995, 4025).

128. Price promotions are increasing substantially year after year (Navarre, Tr. 1503; Bernabucci, Tr. 1986; Millard, Tr. 2357; Strachan, Tr. 2886). For example, the Delaware Coca-Cola Bottling Company in Wilmington, Delaware, has increased its discount or promotional budget, that is the amount of the reduction of normal wholesale prices which it allocates for cents-off promotions, from \$70,000 two years ago to \$550,000 today (Navarre, Tr. 1503). The Coca-Cola bottler in Jamestown, North Dakota and in LaCrosse, Wisconsin indicated that 10 years ago price promotions were "rarely offered" but that currently his expenditures for promotional allowances ran \$50,000 a year in Jamestown and \$60,000 in LaCrosse (Bernabucci, Tr. 1986). The bottler of Coca-Cola in Stockton, California, testified that to keep up with competition "we are running into more and more promotions and promotional discounts" (DeLap, Tr. 2576). The amount of money the bottler of Coca-Cola in Stockton spent on cents-off discounts increased from \$12,734.42 in 1967 to \$104,505.85 in 1974 (DeLap, Tr. 2577). The bottler of Coca-Cola in San Antonio testified that "10 years ago we never did any price promotions" and "now it is a fact of life" and that "if we don't price promote \* \* \* then we are dead" (Alford, Tr. 2508). The Seven-Up bottler in Herminie, Pennsylvania, indicated that he has been "promoting heavily" with cents-off promotions the last four or five years, and that this type of "competition is very keen" (Cobetto, Tr. 2829). [53]

129. Food chains do not always pass on promotions in the form of lower retail prices to the consumer. The bottler of Coca-Cola in Wilmington, Delaware, indicated that the chains pass on the promo-

tions 80-90 percent of the time (Navarre, Tr. 1504). Safeway in Washington, D.C., refused to pass on a 52 cents per case promotion for Coca-Cola during November 1971 and instead increased its margin to 37 percent (Sales, Tr. 1286-87, 1290; RX 23). In November 1974, Dart Drug received a 60 cents per case wholesale price reduction from the Washington, D.C. bottler of Coca-Cola for a two-week period but reduced its retail price to the consumer only during one of the two weeks (Sales, Tr. 1288; RX 24). In Dyersburg, Tennessee, Kroger, the largest food chain in the area, received one case free with the purchase of a case of 32-ounce returnable bottles of Bubble-Up, effectively reducing the wholesale price 50 percent, but did not reduce the price to the consumer below its normal retail price for a carton of 32-ounce returnable resealable bottles (Burks, Tr. 3041-42). In other markets, food chains have refused to pass on promotions to the consumer (Stokes, Tr. 1181-82; Millard, Tr. 2380; Strachan, Tr. 2890; RX 18). During promotions, food chains try to purchase extra stock which they store in their backrooms and then sell at the normal retail price after the promotions (Massey, Tr. 2194; Millard, Tr. 2376). And, in New York City, food chains will not pass on promotions of one case free with ten cases; the bottler of Coca-Cola has to give one case free with five in order to have the wholesale savings passed on (Millard, Tr. 2376-77). The fact that outlets other than food chains receive and pass on promotions influences the food chains' willingness to pass on soft drink promotions (Ellis, Tr. 994, 1021; Sales, Tr. 1319).

130. Promotions for Coca-Cola, Pepsi-Cola, Royal Crown, Seven-Up, Dr Pepper, canned iced teas, and private label flavored carbonated soft drinks affect sales. When bottlers of Coca-Cola are running promotions on Coca-Cola, sales volume increases noticeably (Carver, Tr. 1630-31; Levin, Tr. 1914; Alford, Tr. 2510, 2578). According to bottlers of other brands, promotions of Coca-Cola take sales away from Pepsi-Cola (Strachan, Tr. 2886-87, 2889-90), Seven-Up (Crabtree, Tr. 2682), and Nestea (Hurst, Tr. 3456) and Lipton (Reid, Tr. 3562-63) canned iced teas. When Pepsi-Cola (Stokes, Tr. 1123; Carver, Tr. 1631; Levin, Tr. 1914; Crabtree, Tr. 2682), Royal Crown (Carver, Tr. 1631), Seven-Up (Bernabucci, Tr. 1972; Crabtree, Tr. 2682), [54] Dr Pepper (Alford, Tr. 2510), private labels (Brown, Tr. 1697), Nestea canned iced tea (Hurst, Tr. 3456), and other national brand competitors (Brown, Tr. 1697; Alford, Tr. 2578) run promotions of their own, sales of Coca-Cola are adversely affected: Correspondingly, when Seven-Up (Cobetto, Tr. 2832), Pepsi-Cola (Strachan, Tr. 2886), Nestea (Hurst, Tr. 3456) and other brands run promotions, their sales volume increases.

131. Bottlers of Coca-Cola and other national brands charge a uniform price to both large and small accounts (Smith, Tr. 659;

Navarre, Tr. 1577; Brown, Tr. 1673; Brendle, Tr. 1784; Alford, Tr. 2520; Clements, Tr. 4040, 4060-61). Uniform pricing allows the smaller accounts to be serviced (Smith, Tr. 659; Navarre, Tr. 1577; Alford, Tr. 2520; Clements, Tr. 4042-44).

#### Competition in Fountain Drinks

132. Coca-Cola and other flavored carbonated soft drinks sold in bottles and cans compete with post-mix soft drink products dispensed at soda fountains and in cup vending machines (Stip. No. 3, CX 1244L, Tr. 481). Bottlers of other national brands face interbrand competition from post-mix Coca-Cola. The interbrand competition among Coca-Cola, Dr Pepper and other post-mix soft drinks has been characterized as "very tough" (Smith, Tr. 672; Clements, Tr. 4017, 4022). Bottlers of Seven-Up and Royal Crown (Cobetto, Tr. 2827-28) and Dr Pepper (Ippolito, Tr. 3262-64) have lost bottle and can accounts to interbrand post-mix competition from "Coca-Cola." Post-mix Dr Pepper has taken bottle and can accounts from "Coca-Cola" (Burks, Tr. 3042-43).

133. Coca-Cola sold by licensed bottlers in bottles, cans and pre-mix containers is subject to vigorous intrabrand competition from post-mix Coca-Cola sold by independent wholesalers. The president of "Coca-Cola" (Smith, Tr. 672, 687, 706-07, 744) and bottlers testified that Coca-Cola sold in bottles, cans and pre-mix containers competes against post-mix Coca-Cola sold by independent wholesalers or jobbers (Ellis, Tr. 990-91; LaDoux, Tr. 1457; Carver, Tr. 1627, 1640; [55] Millard, Tr. 2348-50; Crabtree, Tr. 2677-78). There usually are a number of post-mix wholesalers selling in a given area, including some bottlers of Coca-Cola who also serve as post-mix wholesalers (Sales, Tr. 1257; LaDoux, Tr. 1457).

#### Competition in Powdered and Noncarbonated Drinks

134. Flavored carbonated soft drinks also face competition from powdered soft drink mixes in pricing, advertising, and shelf space. Price competition from powdered soft drink mixes is evidenced by the low per-ounce price of powdered mix brands (Sales, Tr. 1253). The Coca-Cola Bottling Company of New York analyzed monthly the prices of powdered soft drink mixes in making decisions on the pricing of Coca-Cola and allied products (Millard, Tr. 2322). The surge in sugar costs heightened price competition by increasing the per-ounce price differential between powdered soft drink mixes and sweetened flavored carbonated soft drinks (LaDoux, Tr. 1457). During the summer months media advertising of powdered soft drink mixes intensifies (Carver, Tr. 1639-40). Advertisements stress the lower per-

ounce price of powdered mixes vis-a-vis flavored carbonated soft drinks (Levin, Tr. 1939; Alford, Tr. 2505-06). In 1974, home market sales of powdered soft drink mixes increased substantially while sales of flavored carbonated soft drinks declined (Clements, Tr. 4016-17, 4059-60).

135. Coca-Cola and other national brand flavored carbonated soft drink products also compete to some degree with noncarbonated drinks, such as Hi-C (Sales, Tr. 1257; Strachan, Tr. 2885; Hurst, Tr. 3455), Hawaiian Punch (Rooks, Tr. 1388; Strachan, Tr. 2885; Burks, Tr. 3037), Gatorade (Millard, Tr. 2282), Tru-Ade (Burks, Tr. 2965), fruit juices (Rooks, Tr. 1388; Cobetto, Tr. 2827), and other beverages which satisfy the consumer's desire for liquid refreshment (Smith, Tr. 705; Rooks, Tr. 1389; Alford, Tr. 2483). [56]

136. Flavored carbonated soft drinks "compete with every other liquid a person consumes" (Smith, Tr. 705). There is data which indicates that a human being will consume a finite quantity of liquid over a given period of time (Smith, Tr. 705). Annually, per capita consumption of liquids has remained at about 120 gallons over the last two decades (Hurst, Tr. 3453-54). Within the 120 gallons, there have been fluctuations as consumption of different types of beverages increases and decreases (Hurst, Tr. 3454-55). In this broad sense, Coca-Cola and other flavored carbonated soft drinks compete with every other beverage (Smith, Tr. 705; Navarre, Tr. 1533; Meyers, Tr. 1732; Strachan, Tr. 2861).

#### Competition in Product Availability

137. Bottlers of Coca-Cola and other national brand flavored carbonated soft drinks compete to have their brands available in a large number of outlets (Sales, Tr. 1344; Navarre, Tr. 1538; Burks, Tr. 3044). This competition was described as "quite vigorous" (Reid, Tr. 3563) and as "constant fighting in the marketplace to make ourselves available" (Ippolito, Tr. 3267). In the soft drink industry, "[i]t seems like everyone would like to be everywhere, on every street corner \* \* \*." (Reid, Tr. 3563.)

138. To provide availability, bottlers of Coca-Cola and other national brands have not imposed minimum delivery requirements. Some deliver one case of product on a weekly basis (Sales, Tr. 1232; Christian, Tr. 1869; Filoromo, Tr. 2191-92; Millard, Tr. 2374; Burks, Tr. 3013). This contrasts with warehouse delivered soft drink products, such as Shasta, which has minimum delivery requirements at its Baltimore, Maryland, and Union, New Jersey, plants of 500 cases of 12-ounce cans and 660 and 550 cases, respectively, of 28-ounce non-returnable bottles (CX 1262). [57]

139. Bottlers of different brands compete to place vending machines (Sales, Tr. 1333; Brendle, Tr. 1781-82; Christian, Tr. 1852-53; Ippolito, Tr. 3267; Clements, Tr. 4026). The president of the Dr Pepper Company testified that competition for vending machine locations is a "very, very intensive battle all the time" because the bottler makes an extreme effort to obtain a prime location but has no assurance that he is going to be able to hold that location from some competitor (Clements, Tr. 4026). In Washington, D.C., the bottler of Coca-Cola competes with Pepsi-Cola by placing vending machines in unproductive outlets as part of its image building process (Sales, Tr. 1333).

140. Bottlers also compete to supply soft drinks and services at special events (*e.g.*, school picnics, football games, etc.) in order to create consumer demand through sampling of the soft drink product, as well as to build goodwill (Stokes, Tr. 1078; LaDoux, Tr. 1460; Levin, Tr. 1916; DeLap, Tr. 2583; Strachan, Tr. 2895; Burks, Tr. 3018-19; Clements, Tr. 3992-93).

#### Competition in Merchandising

141. Effective merchandising of soft drinks requires adequate shelf space in food stores. The president of the Dr Pepper Company testified that shelf space determines "whether you live or die" in a retail account (Clements, Tr. 4000). Bottlers testified that adequate shelf space is "a means of survival" (Sheldon, Tr. 2620); "probably one of the biggest keys to sales success in a supermarket" (Burks, Tr. 3019-20); "critical" (LaDoux, Tr. 1465); and a "constant problem" (Alford, Tr. 2513). L. T. Christian summarized the relationship between shelf space and sales when he testified that "[t]he larger the shelf space, the more sales I will make" (Tr. 1858).

142. Bottlers compete in home market accounts, *e.g.*, food stores, to obtain shelf and display space. They also compete in the placement of point-of-sale advertising, stock rotation, and in providing frequent service (Millard, Tr. 2324-25). [58]

143. Competition for shelf space in food stores was described as follows: "[b]loody, fierce, makes the Battle of the Bulge look like a Sunday school picnic" (Navarre, Tr. 1536); "every day battle," (LaDoux, Tr. 1459); "ferocious" (Ippolito, Tr. 3266); "intensive" (Ogden, Tr. 840); "constant day in and day out battle" (Millard, Tr. 2325). In discussing all forms of competition among soft drink products, the president of the Dr Pepper Company described shelf space competition as "probably one of the toughest ones" (Clements, Tr. 4025). To obtain more and better shelf space, bottlers of Coca-Cola conduct "space to sales" studies for food stores to persuade food store management to allocate more space to their respective products

(Navarre, Tr. 1540). Point-of-sale material is provided to customers free of charge (Levin, Tr. 1915), and is placed by route salesmen who periodically check the material (Rooks, Tr. 1372).

144. Bottlers also compete to place carton coolers in food stores, and to set up special racks or gondolas which help sales of their respective products (Ogden, Tr. 840; Rooks, Tr. 1363; Millard, Tr. 2325; Strachan, Tr. 2892). Displays increase sales substantially (Sales, Tr. 1221; Reid, Tr. 3556-57; Clements, Tr. 4001). Bottlers also compete by providing refrigeration units free or at a nominal charge in which to store soft drinks in cartons. They are called visi-coolers or carton coolers and cost \$600 to \$1100 each (DeLap, Tr. 2574-75; Strachan, Tr. 2868; Connellee, Tr. 2968-69).

#### Competition in Providing Service

145. Another important aspect of merchandising competition among soft drink bottlers is in service they provide resellers (Sales, Tr. 1267; Brown, Tr. 1682-83; Levin, Tr. 1915; Ippolito, Tr. 3244). Competition in the area of service was described as "the name of the game" (LaDoux, Tr. 1464), and "a key to success" (Burks, Tr. 3008). The president of The Coca-Cola Bottling Company [59] of New York, Inc., indicated the soft drink industry "was enormously dependent" on frequency of service (Millard, Tr. 2319). As one bottler of Coca-Cola stated, "[i]f we fall down on service in supermarkets, Pepsi starts getting the business from us and vice versa. It is a very competitive business" (Brown, Tr. 1682-83).

146. Service competition embraces a number of separate competitive elements. First, service competition involves frequency of service in delivery of product by a route salesman. Frequency of service is necessary because, on a container basis, soft drinks are the fastest moving item in a food store (Hurst, Tr. 3511). Supermarkets and other accounts are frequently served more than one time per week (Crabtree, Tr. 2664; Ippolito, Tr. 3242-43; Hurst, 3465-66; Reid, Tr. 3567). Bottlers frequently provide service to food chains on weekends, including Sundays (Crabtree, Tr. 2664; Strachan, Tr. 2892).

147. Service competition also emphasizes such tasks as cleaning and filling beverage coolers and sorting empty bottles (Christian, Tr. 1856; Levin, Tr. 1915; DeLap, Tr. 2581; Burks, Tr. 3008-09).

148. Bottlers also engage in service competition with respect to keeping vending machines supplied with soft drinks and in providing prompt, usually free, repairs for vending machines which become inoperative (Smith, Tr. 697; Carver, Tr. 1633; Levin, Tr. 1915; Connellee, Tr. 2968). Some bottlers, such as the bottler of Coca-Cola in

