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H.R. 3641: Mitigating Antitrust Sanctions for Research and Development Joint Ventures

I. Introduction

Although the joint venture¹ has existed for centuries,² in the two decades following the Supreme Court's decision in *United States v. Penn-Olin Chemical Co.*³ finding the Clayton Act⁴ ap-

1. There is no generally accepted definition of the term "joint venture." This Comment will confine the discussion to the joint venture described by Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007, 1016-17 (1969) (creation of an entity of new or different capacity where ownership of the capital stock is split among independent entities), and the research and development program as described in H.R. 3641, 98th Cong., 1st Sess., 129 CONG. REC. 5548 (1983). See Appendix for the complete text of the proposed Bill.

2. See J. TAUBMAN, *THE JOINT VENTURE AND TAX CLASSIFICATION* 27-81 (1957) (tracing the joint venture to Babylonian "commenda" and Roman "societas").

3. 378 U.S. 158 (1964), *on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd*, 389 U.S. 308 (1967).

Pennsalt Chemical Corporation and Olin Mathieson Chemical Corporation formed the jointly owned Penni-Olin Chemical Corporation to produce and sell sodium chlorate in the southeastern part of the United States. Pennsalt was the third largest producer of sodium chlorate in the country but its plant was located in Oregon, far from the southeastern market. Prior to the joint venture, Olin purchased a large amount of sodium chlorate for resale and had a dominant hold of the sodium chlorate sales in the southeast. The joint venture enabled Pennsalt to enter a new market with a new plant and an established sales force. It also allowed Olin to produce a chemical which it had formerly only bought for resale. *Id.* at 163-65.

The Supreme Court rejected the district court's reasoning that in order for the joint venture to have "restrained competition," both parent corporations would have had to have been probable market entrants. For the Supreme Court it was enough if the joint venture foreclosed the entry of even one parent who would have probably entered the market independently in the absence of the joint venture. *Id.* at 173-74.

4. Clayton Act § 7, 15 U.S.C. § 18 (1976 & Supp. V 1981) (original version at ch. 323, § 7, 38 Stat. 730, 731-32 (1914)). Section 7 provides, in relevant part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another person engaged also in commerce or in any activity affecting commerce, where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.

plicable to the creation⁵ of a joint venture, American business has become increasingly wary of the potential antitrust complications the joint venture poses.⁶ The joint venture framework offers several economic advantages to its participants;⁷ at the same time it creates concern over possible impediments to free competition in violation of the antitrust laws.⁸ These competing economic tensions produce an atmosphere for heated debate on the need for innovation and technological advancement free from government regulation in American industry⁹ and the need for increased protection of the public through the antitrust laws.¹⁰

H.R. 3641¹¹ was recently introduced¹² in the House of Representatives. The Bill attempts to give industry the impetus to innovate by conducting research and development through joint ventures. It would limit some of the sanctions normally available for violations of the antitrust laws, if those violations arise from the operations of the joint venture.¹³

5. The Supreme Court held that the acquisition of stock prohibition of § 7 of the Clayton Act, *see id.*, applied with equal force to the "joint participation of two corporations in the creation of a third as a new domestic producing organization." *Penn-Olin*, 378 U.S. at 168-69 (footnote omitted). *See infra* notes 32-37 and accompanying text.

6. Indicative of this increased attention is the flood of literature on the joint venture. For the most helpful of the secondary sources documenting this increased attention, see M. HOWARD, *ANTITRUST AND TRADE REGULATION* (1983); Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521 (1982); Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453 (1976); Favretto, *Application of the Sherman Act to Joint Ventures and Operations of Multinational Corporations*, 50 ANTITRUST L.J. 465 (1982); Fox, *Application of the Clayton Act to International Mergers, Acquisitions and Joint Ventures*, 50 ANTITRUST L.J. 477 (1982); Fox, *Joint Research and Patent Pools*, in TWENTIETH ANNUAL ADVANCED ANTITRUST SEMINAR 353 (1980); Pitofsky, *supra* note 1.

7. *See infra* notes 23-40 and accompanying text.

8. *See infra* notes 38-65 and accompanying text.

9. For a particularly adamant view, see D. ARMENTANO, *ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE* 271-78 (1982); *cf.* Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1571 (permissive antitrust policy is justified for research joint ventures).

10. *See, e.g.*, M. GREEN, B. MOORE & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM passim* (1972).

11. *See* H.R. 3641, *supra* note 1 and Appendix.

12. Rep. Fish (R. - N.Y.) introduced the Bill on July 25, 1983. It was co-sponsored by Rep. Crockett (D. - Mich.), Rep. Edwards (D. - Cal.), Rep. Frank (D. - Mass.), Rep. Hyde (R. - Ill.), Rep. Lundgren (R. - Cal.), Rep. Mazzoli (D. - Ky.), Rep. Moorhead (R. - Cal.), and Rep. Sawyer (R. - Mich.), and was referred to the Committee on the Judiciary.

13. H.R. 3641, *supra* note 1 and Appendix; *see infra* notes 96-126 and accompanying

This Comment examines the provisions of the proposed Bill and their probable effect, if enacted, on antitrust policy and enforcement. Part II puts the Bill in historical perspective and will briefly trace the interaction of the joint venture and the antitrust laws. Part III discusses the provisions of H.R. 3641 in the context of existing statutory law. Part IV examines the intended effect of the Bill on antitrust sanctions and the structuring of corporate entities. Part V concludes that H.R. 3641 would encourage research and development joint ventures by eliminating the threat of treble damage actions, but that the Bill, as it stands, unnecessarily protects joint ventures engaging in *applied* research.

II. Background

It is difficult, if not impossible, to arrive at a definition of the term "joint venture" on which all would agree. It has been described as "[m]ore than a simple contract yet less than a merger,"¹⁴ and as a form of "quasi-merger."¹⁵ A leading commentator came closest to a comprehensive definition when he described the joint venture as a "joint creation of new servicing or productive capacity, or the reorganization of existing capacity so as to create substantially new or different services or products, where the majority of capital stock is held by two corporate parents."¹⁶

Creating an independent entity distinct from the parent corporations for the limited purposes of a joint venture may be preferable to a merger of the parent corporations.¹⁷ With in-

text.

14. Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, *supra* note 6, at 454.

15. C. KAYSEN & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 136 (1959); Pitofsky, *supra* note 1, at 1007.

16. Pitofsky, *supra* note 1, at 1016. Pitofsky elaborates that the concept of joint venture should be limited by the degree of integration of production, management, distribution and financial functions of the entity. If there is no substantial integration of these functions then the joint venture simply masks a consensual cartel. If the integration is complete, or substantially so, between the parent entities, then merger rules would apply. *Id.* Pitofsky speaks of the prototypical joint venture. *Id.* at 1017. A venture may, of course, include more than two corporate parents.

17. M. HOWARD, *supra* note 6, at 243. A merger may not be a legal choice. Many foreign governments require that a foreign company doing business within their borders

creasing frequency companies have resorted to the joint venture as a means of avoiding the strict limitations on expansion through horizontal¹⁸ and vertical¹⁹ merger.²⁰ Thus, joint ventures have recently attracted considerable attention. Of the two principal types of joint ventures,²¹ the more important for the purposes of this Comment is that which is formed to enable the participants to pool their resources to engage in extraordinarily costly activities (e.g., research and development) using the economies of scale made possible by the pooling of assets.²²

There are several plain advantages to creating a joint venture to carry out research and development. The joint venture permits research on a product, process, or technique which the concerns, acting alone, would be unable to undertake without these economies of scale.²³ It also enables the research to be conducted more efficiently. For instance, a group of small companies conducting joint research may be better able to compete

be co-owned by their own national companies. The enterprise inspiring the joint venture may be a short-lived, one-time effort, making merger inappropriate (e.g., cooperation on the building of a hydroelectric project). The project contemplated might also be too immense or too costly for one entity to tackle alone, yet the firm involved may want to retain their independence upon completion of the project. *Id.*

18. A "horizontal merger involves firms directly competing in the sale of similar goods or services." *Id.* at 106. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 334-35 (1962).

19. A "vertical merger represent[s] the combining together of firms operating in different stages of the same industry that have been in an actual or potential buyer-seller relationship." M. HOWARD, *supra* note 6, at 106. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. at 323-24; *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

20. Pitofsky, *supra* note 1, at 1007. The FTC reports that between 1972 and 1978 there were 1083 joint ventures to approximately 11,318 mergers, a substantial increase from the fairly limited use in the 1950s. FEDERAL TRADE COMMISSION, STATISTICAL REPORT ON MERGERS AND ACQUISITIONS 1978, at 25, 228 (1980).

21. See, e.g., C. KAYSEN & D. TURNER, *supra* note 15, at 136 (describing a joint venture formed to share unusual risks that would not be undertaken by any single firm; and the joint venture which enables the participants to achieve economies of scale in the performance of certain functions . . . which are most efficiently carried on by units much larger than could be supported by any individual firm).

22. Cf. M. HOWARD, *supra* note 6, at 240 (distinguishing a joint venture from a pooling arrangement "in which firms in a market collectively determine their operations and pool their profits. Such arrangements pool income, not assets.").

23. See, e.g., *Associated Press v. United States*, 326 U.S. 1, 17 (1945); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 397 (1912); M. HOWARD, *supra* note 6, at 242-43.

with much larger companies.²⁴ In addition, the combined and complementary expertise employed in joint research allows the venture to work efficiently and avoids the needless and wasteful duplication of efforts that would be probable if the parties were to act separately.²⁵

Another major advantage of the joint venture is that of spreading the risks of undertaking the research among the participants in the venture. Basic research is an inherently risky activity; costs are high and profitability is speculative.²⁶ Unless patented or cloaked in secrecy, the research work product can be appropriated by competitors with little, if any, research expenditures.²⁷ A company can thus use a joint venture to increase its return on its research investment by ensuring that those profiting from the research also share in its costs.²⁸ The joint venture also permits research that would be too costly to pursue independently to progress through the combined resources of the joint structure.²⁹ Thus, with its ability to spread the costs and the risks of an expensive activity, the joint venture is particularly well-suited to conducting research and development. While the joint venture has its advantages for the business community, it is not without significant antitrust problems.

A joint venture must be carefully organized to avoid the sanctions of several applicable antitrust laws.³⁰ The Sherman Act,³¹ in broad terms, proscribes monopolies, attempts to mo-

24. See, e.g., *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 600 (1972).

25. See Baker, *Application of the Antitrust Laws to Joint Ventures*, in EIGHTEENTH ANNUAL ADVANCED ANTITRUST SEMINAR 125, 141 (1978).

26. *Id.* at 142; cf. M. HOWARD, *supra* note 6, at 250 (noting that the sharing of these costs and risks within the joint venture structure is an advantage to society because it induces more firms to undertake research).

27. Brodley, *Joint Venture and Antitrust Policy*, *supra* note 6, at 1570.

28. *Id.* at 1571.

29. Note, *Joint Research Ventures Under the Antitrust Laws*, 39 GEO. WASH. L. REV. 1112, 1113 (1971); see Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1571.

Brodley states: "If in the absence of the joint venture no firm would undertake the task, an important function will go unperformed." Brodley, *The Legal Status of Joint Ventures under the Antitrust Laws: A Summary Assessment*, *supra* note 6, at 468. This is especially true "where the joint venture market is highly concentrated and the parents' market [is] relatively less [concentrated]." *Id.*

30. See U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES 10 (1980) [hereinafter cited as RESEARCH GUIDE].

31. 15 U.S.C. §§ 1-7 (1976). The provisions are, in relevant part:

nopolize, and conspiracies in restraint of trade. The Sherman Act was the only antitrust statute relevant to the joint venture until *United States v. Penn-Olin Chemical Co.*³² where the Supreme Court held that the Clayton Act³³ was applicable to joint ventures.³⁴

Section 7 of the Clayton Act prohibits corporate acquisitions and mergers whose effect may be to reduce competition substantially.³⁵ The prohibition embodied in section 7 is, therefore, implicated at the inception of the joint venture, since its formation usually involves the acquisition of stock or assets.³⁶ In addition, the Clayton Act provides the statutory treble damages remedy for private litigants injured by antitrust violations.³⁷

Enforcing the antitrust laws in the context of joint ventures presents the formidable task of reaching a balance between encouraging much-needed research and maintaining a competitive environment in which to conduct it.³⁸ Simply interposing the label of "joint venture" will not save a business entity from inspection under the antitrust laws; courts will look closely at the

§ 1 Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

§ 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony

Id. at §§ 1-2.

32. 378 U.S. 158 (1964), *on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd*, 389 U.S. 308 (1967). *See supra* note 3.

33. Clayton Act § 7, 15 U.S.C. § 18 (1976 & Supp. V 1981) (original version at ch. 323, § 7, 38 Stat. 730, 731-32 (1914)).

34. *Penn-Olin*, 378 U.S. at 168-69.

35. *See supra* note 4. Section 7 now applies to acquisitions by noncorporate entities as well as corporations. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6, 94 Stat. 1154, 1157-58 (1980).

36. Clayton Act § 7, 15 U.S.C. § 18 (1976 & Supp. V 1981). Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, *supra* note 6, at 472.

37. Clayton Act § 4, 15 U.S.C. § 15 (1976 & Supp. V 1981) (original version at ch. 323, § 4, 38 Stat. 730, 731 (1914)). The section provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained." *Id.*

38. *See Baker, supra* note 25, at 164; Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1571; *cf. M. HOWARD, supra* note 6, at 251 (restraints need to be more than offset by any gains to competition).

purposes and the actual effects of the entity within the relevant market.³⁹ Although the majority of joint ventures seem not to be in conflict with the antitrust laws,⁴⁰ even a significant minority of questionable practices would give rise to a considerable problem. While the terminology may differ,⁴¹ courts and antitrust commentators have identified three principal areas of antitrust concern relating to joint ventures: the "bottleneck" monopoly,⁴² the presence of unreasonable collateral restraints,⁴³ and the elimination of potential competition.⁴⁴

The problem created by the "bottleneck" monopoly is that of the joint venture which restricts access to a facility that is *essential* to successful competition in a market. By denying access to a facility, a joint venture effectively excludes market competitors from the market itself.⁴⁵ This denial of access can be in the form of preventing entry into the market⁴⁶ or restraining movement backward to the source of supply.⁴⁷ That a

39. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-99 (1951).

40. M. HOWARD, *supra* note 6, at 244 (citing K. Ewing, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Justice, Federal Antitrust Enforcement: A Partnership with the Private Bar, Remarks before the North Carolina Bar Foundation, Raleigh, N.C. 3 (Jan. 19, 1980) (noting a 90% rate for joint ventures cleared under the Department's business review procedure)).

41. Compare Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1530-33 (market exclusion and access discrimination, collusion, and loss of potential competition) with Baker, *supra* note 25, at 130 (bottleneck, ancillary restraints, and elimination of present competition), U.S. DEP'T OF JUSTICE, *ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS* 23 (1977) [hereinafter cited as INT'L GUIDE] (essential facility, collateral restraints, elimination of existing significant competition), and M. HOWARD, *supra* note 6, at 244-50 (bottleneck, market sharing, ancillary restraints, spillover problem, and potential competition).

42. See, e.g., *Associated Press v. United States*, 326 U.S. at 18; *United States v. Terminal R.R. Ass'n*, 224 U.S. at 409.

43. See, e.g., *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 618 (C.D. Cal. 1969) (consent decree), *aff'd in part and appeal dismissed in part*, *Grossman v. Automobile Mfrs. Ass'n*, 397 U.S. 248 (1970); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 961-62 (D. Mass. 1950).

44. See, e.g., *Penn-Olin*, 378 U.S. at 172-74.

45. See, e.g., *United States v. Terminal R.R. Ass'n*, 324 U.S. at 409 (the defendant, by denying a competitor railroad company access to its switching station, was taking an action tantamount to preventing the competitor from entering the market at all).

46. See, e.g., *Associated Press v. United States*, 326 U.S. at 18; *United States v. Terminal R.R. Ass'n*, 324 U.S. at 409.

47. See INT'L GUIDE, *supra* note 41, at 58-61. The *Int'l Guide* gives the hypothetical example in Case M, of a joint venture of American and European oil companies estab-

joint venture has "bottleneck" characteristics, however, does not make the venture unlawful per se; if an entity of that size and character is necessary to achieve the economies needed for the function it performs, antitrust problems may be alleviated by requiring the joint venture to make its essential facility available to competitors on reasonable terms.⁴⁸

The danger of unreasonable collateral restraints⁴⁹ accompanying (or developing with) a joint venture presents another serious problem. A joint venture, in this regard, poses a danger to competition that is greater than that of an outright merger of the participating companies.⁵⁰ To avoid antitrust liability, the joint venture must be careful to limit the scope and duration of restrictions between participants,⁵¹ and any restrictions must be reasonably ancillary to the essential elements of the venture.⁵² Even with careful structuring, this can prove to be difficult.

After becoming accustomed to cooperating in the joint venture, the parent companies may "by outright agreement or tacit convention" continue to cooperate in other areas and activities.⁵³ For instance, the parents may be more inclined to fix prices or to divide markets than they would have been in their previous capacity as outright competitors.⁵⁴ There is also a tendency for the joint venture to be stifled by a parent company when that parent's progeny threatens to expand into products or markets already handled by its parent(s).⁵⁵ A statement in *United States v. Minnesota Mining & Manufacturing Co.*⁵⁶ regarding the effect of such spillover restraints illustrates how the collateral restraints may evolve: "The intimate association of the principal

lished for the purpose of maintaining a backup supply of oil. The exclusion of a United States firm with a history of unpredictable and independent market behavior from the joint venture is an example of a bottleneck monopoly that restrains backward movement to supply. *Id.*

48. See C. KAYSEN & D. TURNER, *supra* note 15, at 137 (describing *Terminal R.R. and Associated Press* as leading to such a conclusion).

49. That is, the restraints are greater than are reasonably necessary to achieve the legitimate objectives of the joint venture.

50. Pitofsky, *supra* note 1, at 1013-14.

51. RESEARCH GUIDE, *supra* note 30, at 4.

52. *Id.*

53. Pitofsky, *supra* note 1, at 1013-14.

54. See *id.*

55. *Id.* at 1014 (resulting in "less than full competitive vigor vis-à-vis its parents").

56. 92 F. Supp. 947 (D. Mass. 1950).

American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter sese* in the American market."⁵⁷

Finally, the concern that the venture will eliminate potential competition requires that the joint venture created to enter a new market be examined under the relevant standard: would one or more of the participants in the venture probably have entered the market separately, absent the joint venture?⁵⁸ If the answer is in the affirmative, it is likely that the joint venture has, as effectively as a merger, foreclosed competition in the market.⁵⁹

Thus, the policy problem presented by the potential competition doctrine is that of ensuring that the joint venture is not a substitute for competitive efforts that would otherwise occur, and is not a "vehicle for nurturing monopoly."⁶⁰ This involves looking at the totality of the market.⁶¹ In remanding the *Penn-Olin* case, the Supreme Court noted a seemingly endless list of factors⁶² for the district court to consider in determining

57. *Id.* at 963 (dictum). The concern that competition will be impaired is typically present only when it occurs within the United States. When a claim arises that a practice or acquisition forecloses an American firm from an opportunity abroad, the Clayton Act is probably inapplicable. It would be hard to imagine that a case which forecloses an export opportunity abroad may have the effect of lessening competition in the United States, yet that is what must be proved. Fox, *Application of the Clayton Act to International Mergers, Acquisitions and Joint Ventures*, *supra* note 6, at 478.

58. *Penn-Olin*, 378 U.S. at 173; see M. HOWARD, *supra* note 6, at 248.

59. "The difference, of course, is that the merger's foreclosure is present while the joint venture's is prospective." *Penn-Olin*, 378 U.S. at 173-74. The competition is nonetheless eliminated.

60. M. HOWARD, *supra* note 6, at 251.

61. *Penn-Olin*, 378 U.S. at 177.

62. *Id.* The factors included:

[T]he number and power of the competitors in the relevant market; the background of their growth; the power of the joint ventures; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through *Penn-Olin*; the effect, in the event of this occurrence, of the

whether a reasonable probability existed that competition between the parent companies would be lessened.⁶³ Nevertheless, there is some doubt about the feasibility of proving a case under the potential competition doctrine, even using a comprehensive list of factors relevant to the market.⁶⁴ On remand in *Penn-Olin*, the district court found that there was not a reasonable probability of either "competitor" individually entering the market and dismissed the case.⁶⁵

With these limitations (the bottleneck monopoly, the presence of unreasonable collateral restraints, and the elimination of potential competition) constraining the lawful purposes and effects of joint ventures, businesses are hesitant to engage in joint research activities despite the many advantages offered by such arrangements.⁶⁶ The risks to competition generated by a research joint venture are similar to those raised by other joint ventures, although the degree of risk may differ.⁶⁷ Furthermore, there is genuine concern that American industry, hindered by the "assurances" of free competition that are embodied in the antitrust laws, is unable to meet the challenge to its markets from foreign competition, where such cooperation is encouraged as an incentive for rapid innovation.⁶⁸

other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market.

Id. Cf. M. HOWARD, *supra* note 6, at 251-52 (giving a similar comprehensive list, relating to research joint ventures).

63. *Penn-Olin*, 378 U.S. at 177.

64. See Fox, *Application of the Clayton Act to International Mergers, Acquisitions and Joint Ventures*, *supra* note 6, at 481. Fox maintains that the two theories of potential competition (edge effect and entry effect) are rarely proved. *Id.*

65. *United States v. Penn-Olin Chemical Co.*, 246 F. Supp. 917, 928, 934 (D. Del. 1965), *aff'd*, 389 U.S. 308 (1967).

66. See *supra* notes 23-29 and accompanying text.

67. Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1572. The danger of the research joint venture excluding competitors from the relevant market by denying them access to "indispensable knowledge input" gained through the joint research, and the danger of collusion involving parental stifling of marketing or production stages, so that "end-product rivalry between the parents could be inhibited" are clearly present. *Id.* The danger of collusion is greatest in cases where the parents compete in production or marketing of the end-product. *Id.*; see C. KAYSER & D. TURNER, *supra* note 15, at 139. But see, Fox, *Joint Research and Patent Pools*, *supra* note 6, at 360-61, who discounts the probability of the product of basic research ever being an essential facility.

68. See, e.g., Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1571 (decline in basic research in recent years); Connolly, *Updating Antitrust Laws to Permit Joint R & D*, 55 ELECTRONICS 66 (1982) (supporting previously proposed reform of anti-

Faced with this need for joint research and the constraints imposed by the Sherman and Clayton Acts, the Department of Justice published two antitrust guides⁶⁹ to aid industry in properly structuring joint ventures.⁷⁰ The guides illustrated to the business community the Department's lenient enforcement policy regarding joint ventures of limited scope and duration⁷¹ and those involving smaller companies with a less dominant hold on the market.⁷² Although the Department tried to create the impression of being "sympathetic"⁷³ to joint ventures that might realistically be seen as procompetitive, it very clearly told the business world that joint research projects by firms with dominant market positions would be subject to Department enforcement actions.⁷⁴ The government, while admittedly trying to en-

trust law aimed at creating incentives for research and development).

The Supreme Court is becoming increasingly aware of the need for incentives to innovate in American industry. In construing a section of the Patent Code the Court recently stated:

The policy of free competition runs deep in our law. It underlies both the doctrine of patent misuse and the general principle that the boundary of a patent monopoly is to be limited by the literal scope of the patent claims. But the policy of stimulating invention that underlies the entire patent system runs no less deep. And the doctrine of contributory infringement . . . can be of crucial importance in ensuring that the endeavors and investments of the inventors do not go unrewarded.

Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 221 (1980); cf. M. HOWARD, *supra* note 6, at 251 n.36 (noting a difference of point of view between the academic and business communities regarding secrecy).

69. INT'L GUIDE, *supra* note 41; RESEARCH GUIDE, *supra* note 30.

70. Four of the fourteen hypothetical case studies examined in the *Int'l Guide* concerned joint ventures. Case D involved a research joint venture. INT'L GUIDE, *supra* note 41, at 23. Indicating the concern over the situation regarding research joint ventures, the Justice Department devoted the entire *Research Guide* to the subject. It provided eight hypothetical examples, summaries of 21 research joint ventures cleared by the Department between 1968 and 1980, and a brief explanation of the Department's Antitrust Division Business Review Procedure. RESEARCH GUIDE, *supra* note 30.

71. RESEARCH GUIDE, *supra* note 30, at 10.

72. See *id.* at 11.

73. Fox, *Application of the Clayton Act to International Mergers, Acquisitions and Joint Ventures*, *supra* note 6, at 483-84. The *Research Guide* was designed to show industry the flexibility offered by the antitrust laws in designing research joint ventures. While the Department of Justice considers alternatives that are less competitive than the chosen joint venture, it "does not engage in gratuitous second-guessing of business decisions." RESEARCH GUIDE, *supra* note 30, at 24.

74. See, e.g., Connolly, *supra* note 68, at 66. Connolly suggests that the effect of the *Research Guide* in the business community was muffled "because of the caveat inserted by Sanford M. Litvack, then Assistant Attorney General for antitrust matters," stating

courage businesses to undertake socially valuable joint research,⁷⁵ pointed out its concern that under certain circumstances joint research ventures could become devices to "retard rather than to stimulate innovative efforts."⁷⁶ The *Research Guide* conveyed mixed signals.⁷⁷ Hence, while there is general agreement that much joint research would be acceptable under the antitrust laws, American industry is looking for further assurances.

III. H.R. 3641

In an attempt to provide these assurances, H.R. 3641⁷⁸ was introduced to reduce "the extent of liability for violations of Federal and State antitrust laws which arise from carrying out research and development programs jointly with other persons."⁷⁹ Section 1 of the Bill states this purpose and the means of accomplishing it: for antitrust violations stemming from joint research and development, potential liability would be limited to actual damages, the cost of suit, attorney's fees, and interest.⁸⁰ This would reduce potential liability from the treble damages otherwise available under section 4 of the Clayton Act⁸¹ to only those damages actually sustained by the claimant by reason of the joint venture's violation of the antitrust laws.⁸²

Section 2 mandates an award of attorney's fees to the joint research and development venture if a claimant brings an unsuccessful action against it.⁸³ Currently, a private party bringing a successful antitrust claim under the Clayton Act is entitled to a

that the views expressed in the *Research Guide* would not bar government enforcement actions. *Id.*

75. "The analysis indicates that much joint research may be engaged in without violating the antitrust laws." RESEARCH GUIDE, *supra* note 30, at 2.

76. *Id.* at 11.

77. See *supra* notes 73-74 and accompanying text.

78. H.R. 3641, 98th Cong., 1st Sess., 129 CONG. REC. 5548 (1983). See Appendix for the complete text of the proposed Bill.

79. *Id.* at Preamble.

80. *Id.*

81. See Clayton Act § 4, 15 U.S.C. §§ 15, 15c (1976 & Supp. V 1981) (original version at ch. 323, § 4, 38 Stat. 730, 731 (1914)).

82. See H.R. 3641, *supra* note 78 and Appendix.

83. *Id.* § 2.

reasonable attorney's fee as part of the damage award.⁸⁴ There is no corresponding provision for a joint venture that successfully defends an action brought by a private claimant. The Bill would supply one.

Section 3 provides a successful claimant with an award of simple interest on actual damages in lieu of interest otherwise authorized by the Clayton Act.⁸⁵ At present, the court is given discretion to award interest to successful litigants; this imposition of interest depends upon a consideration of whether either party acted intentionally for the purpose of delay.⁸⁶ The Bill would remove the court's discretion in claims arising from joint research and development programs and would mandate the award of interest.⁸⁷

Section 4 supplies definitions for the terms used in H.R. 3641.⁸⁸ For the purposes of the Bill, the term "antitrust laws" includes, in addition to the provisions referred to in the Clayton Act,⁸⁹ section 5 of the Federal Trade Commission Act⁹⁰ insofar as section 5 relates to unfair competition.⁹¹ The Bill borrows the definition of the terms "person" and "state" from the Clayton Act.⁹² In addition, the term "research and development program" is given a rather encompassing definition,⁹³ including basic and applied research and experimental production.⁹⁴

IV. Analysis

The primary focus of H.R. 3641⁹⁵ is on mitigating the threat and consequences of private enforcement actions authorized by

84. Clayton Act § 4, 15 U.S.C. § 15 (1976 & Supp. V 1981).

85. *Id.* §§ 15, 15a, 15c (1976 & Supp. V 1981).

86. *Id.*

87. See H.R. 3641, *supra* note 78 and Appendix § 3.

88. *Id.* § 4.

89. See Clayton Act § 1, 15 U.S.C. § 12(a) (1976).

90. 15 U.S.C. § 45 (1976 & Supp. V 1981).

91. H.R. 3641, *supra* note 78 and Appendix § 4(1).

92. *Id.* §§ 4(2), 4(4); see 15 U.S.C. §§ 12(a), 15(g)(2) (1976).

93. H.R. 3641, *supra* note 78 and Appendix § 4(3); see *infra* notes 112-18 and accompanying text.

94. *Id.*

95. H.R. 3641, 98th Cong., 1st Sess., 129 CONG. REC. 5548 (1983). See Appendix for the complete text of the proposed Bill.

section 4 of the Clayton Act.⁹⁶ It is intended to strike an equitable balance between the interests of companies striving to find the most efficient means to undertake needed research and development and parties claiming damage as a result of decreased competition. The costs accompanying private treble damage actions and consumer class actions⁹⁷ deter companies from undertaking ventures that would involve questionable antitrust practices. The importance of this deterrent cannot be overstated.⁹⁸

H.R. 3641 concentrates on three areas of the costs of private antitrust actions: interest, attorney's fees, and, most importantly, damages. These costs must currently be calculated as a business risk in the creation of a joint venture with possible antitrust exposure. The perceived risks have dominated the equation too often in the past.

To mitigate the very favorable award a successful private litigant receives, the interest provision of section 3 would require an award of simple interest on actual prejudgment damages if the antitrust liability arises from a research and development joint venture.⁹⁹ This provision would supplant the discretionary award of interest that is applicable for liability arising from other antitrust violations.¹⁰⁰ While the mandate of an award of interest would seem to be an advantage to a claimant in an antitrust suit, removing the court's discretion to award interest could actually work to the detriment of the claimant. Existing law makes the award of interest dependent upon the court's determination of whether such an award is "just" under the circumstances.¹⁰¹ This turns on whether either party engaged in

96. Clayton Act § 4, 15 U.S.C. §15 (1976 & Supp. V 1981) (original version at ch. 323, § 4, 38 Stat. 730, 731 (1914)). By its terms, the Bill limits the amount of liability to actual damages sustained by a "claimant." H.R. 3641, *supra* note 95 and Appendix § 1. Although, literally, this would include suits by the United States, in addition to those by natural persons, corporations, associations, and state attorneys general as *parens patriae*, the change would not be a noteworthy one concerning suits brought by the United States. Unlike the private actions in which treble damages are authorized, the United States is already limited to actual damages. Compare 15 U.S.C. §§ 15, 15c (1976 & Supp. V 1981) with 15 U.S.C. § 15a (1976 & Supp. V 1981).

97. Class actions are authorized by Fed. R. Civ. P. 23.

98. See Steinhouse, *Private Antitrust Litigation*, in TWENTY-THIRD ANNUAL ANTI-TRUST LAW INSTITUTE 607 (1982).

99. H.R. 3641, *supra* note 95 and Appendix § 3.

100. 15 U.S.C. §§ 15, 15a, 15c (1976 & Supp. V 1981).

101. *Id.*

delaying tactics or otherwise acted in bad faith.¹⁰² Removing this discretion would also remove one of the only incentives for the defendant to expedite the litigation or to reduce its costs. Thus, a defendant joint venturer would be encouraged to delay and to increase the costs of the suit; with the risks predetermined, it would be closer to a "nothing-to-lose" situation.¹⁰³

The provisions of section 2 allow a successful research and development joint venture defendant to recover a reasonable attorney's fee attributable to defending the claim.¹⁰⁴ These provisions would guarantee that the oppressive costs involved in protracted antitrust litigation would be borne by the losing party, acting as a disincentive to frivolous and nonmeritorious claims. Under existing law, there is no provision for the transfer of these costs to the unsuccessful claimant.¹⁰⁵ H.R. 3641 seems to take a more equitable approach than the current practice of burdening the venture with the costs of defending its actions whether or not its business practices are found to be a violation of the antitrust laws.¹⁰⁶

Although the interest and attorney's fee sanctions are important facets of the Bill, its major goal is to emasculate the sting of treble damage awards available under section 4 of the Clayton Act to private antitrust litigants challenging the actions of a research and development joint venture. The Bill accomplishes this purpose in two ways: first, it limits recovery to actual damages; second, it defines the protected joint venture very broadly.

By its automatically punitive nature, the treble damage award is a potent deterrent to activity of questionable antitrust

102. *Id.*

103. The converse could also happen. A claimant could be encouraged to delay as long as possible and increase the costs to the challenged joint venture in order to induce a favorable settlement. This, however, would require a claimant with the financial resources to afford the delay.

104. H.R. 3641, *supra* note 95 and Appendix § 2.

105. An unsuccessful defendant is liable for its adversary's attorney's fee. See 15 U.S.C. §§ 15, 15a, 15c (1976 & Supp. V 1981).

106. *Cf. Favretto, Panel Discussion: International Acquisitions, Joint Ventures, and Other Agreements - The Applicable Substantive and Procedural Law*, 50 ANTI-TRUST L.J. 489, 492 (1982) (Favretto commenting that the threat of a treble damage suit, that of getting involved in costly litigation, is a greater threat than that of an adverse courtroom result).

significance; any prospective joint venture would be wise to proceed with caution.¹⁰⁷ There are numerous private parties which have the additional incentive of treble damages to press claims of antitrust violation:

Terminated and disgruntled distributors continue to have an incentive to sue their suppliers, particularly during these recessionary times; more and more large corporations are suing each other for alleged monopolistic and predatory practices; the antitrust class action is still alive and well, *Illinois Brick*¹⁰⁸ notwithstanding; . . . and we are now seeing actions filed by states attorneys general in their *parens patriae* capacity.¹⁰⁹

Prospective joint researchers must carefully judge how the venture and its effects will be perceived by each of its potential adversaries.¹¹⁰ This concern, understandably, creates a tendency on the part of prospective joint researchers to balk. By eliminating two thirds of the penalty for violations of the antitrust laws, H.R. 3641 seeks to encourage joint research that would otherwise be foregone as too risky in light of potential penalties. Increased joint research would, in turn, spark much-needed innovation and allow American industry to remain competitive in an international context.¹¹¹

Although the proposed legislation would reduce the applicable penalties and thereby spur the desired increase in the use of the joint venture for research and development, the Bill introduces an interesting complication in its definition of the "re-

107. Cf. Favretto, *supra* note 6, at 466 (antitrust violation in an international context).

108. *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers generally lack standing to recover treble damages).

109. Steinhouse, *supra* note 98, at 607 (footnote added). See, e.g., Favretto, *supra* note 6, at 475.

110. Favretto, *supra* note 6, at 475. Favretto stated:

You must anticipate how a transaction will be viewed when challenged by a disgruntled competitor, by a disgruntled customer, or by a disgruntled supplier. If you can think of a less restrictive way to achieve the desired and legitimate business objective, you better darn well have good reasons why that is not an effective way to approach this particular transaction, and you better document your decision.

Id.

111. See *supra* note 68 and accompanying text; cf. Favretto, *supra* note 6, at 492 (because of the threat of treble damages, joint ventures in the international context are "underutilized, and unfortunately so").

search and development" programs to be affected by its provisions.¹¹² Section 4 defines the term "research and development program" as:

(A) theoretical analysis, exploration, or experimentation, or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes, and may include the establishment of facilities for the conduct of research, the collection and exchange of essential research information, and the conduct of such research and development on a protected and proprietary basis¹¹³

The threshold problem presented by such an encompassing definition is that it ignores any distinction between basic¹¹⁴ and applied¹¹⁵ research; it classifies them, for purposes of the Bill, as one. Antitrust scholars have drawn a sharp distinction between the two types of research and the level of antitrust concern each raises.¹¹⁶ This distinction is not one of function, but rather of the respective effects on competition within the market. Because of the distance between basic research and the application of its findings in the marketplace, there is little concern regarding its potential to restrain competition even when conducted jointly.¹¹⁷

112. The definitional problem is more interesting in the sense that much of the joint research activity encouraged by the Bill would *currently* be seen as lawful. See notes 69-75 and accompanying text. The Bill would simply address the perception that there is great antitrust risk in the formation and operation of such a venture. The Bill's definition of what programs are to be encouraged, on the other hand, presents a clear break with established law and antitrust policy.

113. H.R. 3641, *supra* note 95 and Appendix § 4(3).

114. See, e.g., Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1572 n.168. Brodley defines basic research as original investigation or inquiry for scientific knowledge that, if obtained, would have no immediate commercial application. *Id.*

115. See Note, *Joint Research Ventures Under the Antitrust Laws*, 39 GEO. WASH. L. REV. 1112, 1113 n.6 (1971). Applied research goes beyond basic research in that it is directed "toward the commercial application of existing technology and the marketing of successful innovations." *Id.*

116. See, e.g., Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1572-73; M. HOWARD, *supra* note 6, at 251; Fox, *Joint Research and Patent Pools*, *supra* note 6, at 364; RESEARCH GUIDE, *supra* note 30, at 3.

117. See Fox, *Joint Research and Patent Pools*, *supra* note 6, at 357-58, 364; cf. RESEARCH GUIDE, *supra* note 30, at 2 (public enforcement equally unconcerned: Antitrust Division has never challenged a pure research joint venture, without ancillary restraints and even very few of those *with* ancillary restraints).

Basic research conducted by a joint venture raises significant antitrust problems only when it appears likely to eliminate all competition from the research field,¹¹⁸ since this would remove the competitive spur to innovate.

Applied research and development, on the other hand, presents a more direct danger to a competitive market when conducted by a joint venture.¹¹⁹ The application of research and the development and experimental production of products, embodied in H.R. 3641, are much closer to the actual commercial exploitation of the basic research. Hence, when conducted jointly, they create antitrust dangers¹²⁰ that the Bill largely ignores. When the scope of cooperation between parent companies to the joint venture includes research and design of a specific product, the minor risks of the basic research joint venture are "augmented by a possible loss of production and marketing competition in the research-connected end product."¹²¹ This closer causal connection between the research and its market impact gives rise to justifiable antitrust scrutiny. It is troublesome that H.R. 3641 would cover activities that run such a risk of reducing competition.

Congressional approval of H.R. 3641 would give what amounts to congressional imprimatur to the operation of a joint venture that engages in experimental production of products, processes, and equipment. There appears to be little reason for such an approach. When the joint activity of parent firms that are, or are likely to be, in the research market is close to the commercial exploitation of the innovative research, there is substantial danger of cooperation developing between the parents in

118. Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1572. Brodley advocates limiting enforcement proceedings regarding basic research joint ventures to cases in which: (1) there is no current competition in the particular research area, and (2) there are no significant researchers in the field (other than the participants in the joint venture), or entering the market. *Id.*

119. See RESEARCH GUIDE, *supra* note 30, at 3.

120. See Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1572-73.

121. *Id.* at 1573. Antitrust concern over a joint venture conducting research and development is "most acute when: (1) one or both parents are already engaged in the research field, and each could undertake the research even in the absence of the joint venture; (2) there are few other research competitors; and (3) the parents are dominant competitors in the same product market." *Id.*

areas outside the scope of the research.¹²² In addition, an applied research joint venture among firms that are dominant in the market could very well hinder new access to the market, adversely affecting competition.¹²³

While allowing both the basic research *and* development to be conducted on a joint basis¹²⁴ will almost certainly encourage the formation of the joint ventures and the innovation imperative to successful competition in the international market, it will probably do so at the expense of domestic competition. Under the provisions of the Bill, businesses will be encouraged to refrain from competing in the product development and testing spheres of research, in favor of allowing the joint ventures to conduct this research more efficiently, with the knowledge that little productive research is being conducted elsewhere. This tendency could, however, actually retard the desired goal of the Bill: increased innovation. As one observer noted: "the more competitive the industry, the greater the incentive to innovate is likely to be."¹²⁵

V. Conclusion

Although the joint venture has become an important vehicle for conducting the research necessary for American industry to keep pace with its foreign challengers, the cooperation inherent in a joint venture must still be examined in light of the antitrust

122. See, e.g., *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969) (consent decree); see also *supra* text accompanying notes 49-57.

123. See *supra* notes 45-48 and accompanying text. But see Fox, *Joint Research and Patent Pools*, *supra* note 6, at 360 (problem of access to market rarely provable with a research joint venture since inclusion would not be *essential* to successful competition); cf. Brodley, *Joint Ventures and Antitrust Policy*, *supra* note 6, at 1571 (though the absence of competition in research would be undesirable, there is a "substantial basis" for the conclusion that optimal progress in innovation occurs under market conditions that are less than the competitive ideal).

124. The joint basic research and development have been "allowed," in the sense of being lawful all along, but they carried substantially greater risk (or so it was perceived) than that which would be entailed if H.R. 3641 were to become law. See *supra* notes 69-75 and accompanying text.

125. RESEARCH GUIDE, *supra* note 30, at 3. "The more rivals an industry includes, the more independent centers of initiative there are, and the more likely it is that some entrepreneur will consider the development of a potential new product worthwhile." *Id.* at 3 n.1 (citing F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 428-29 (2d ed. 1980)).

policy of preserving industrial competition. H.R. 3641¹²⁶ addresses the perception that there is a risk of antitrust liability in conducting joint research by limiting the potential liability of the offending venture. It does not go so far as to immunize a venture from all liability arising from its operations, but it is a step, albeit a small one, toward encouraging the creation of joint ventures to engage in much-needed research. Even though the Bill's effect would be largely innocuous, since most activities of a research joint venture are currently permitted, it remains somewhat disturbing that the Bill draws no distinction between basic and applied research. Though both these stages of the research process have their beneficial aspects, applied research, when conducted jointly, presents a clearer danger to a competitive environment. The Bill would be welcome if it distinguished between the two so as to encourage only basic research.

J. Patrick Ovington

APPENDIX

H.R. 3641

A bill to reduce the extent of liability for violations of Federal and State antitrust laws which arise from carrying out research and development programs jointly with other persons, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be liable under the antitrust laws, or under any State law similar to the antitrust laws, for an amount in excess of the actual damages sustained by the claimant by reason of the violation of any such law, the cost of suit (including a reasonable attorney's fee), and any interest awarded with respect to such damages if such liability results from attempting to make, making, or performing a contract to carry out a research and development program jointly with another person.

SEC. 2. In any action which is brought under the antitrust laws and which includes a claim that results from attempting to

126. H.R. 3641, 98th Cong., 1st Sess., 129 CONG. REC. 5548 (1983). See Appendix for the complete text of the proposed Bill.

make, making, or performing a contract to carry out a research and development program jointly with another person, the court shall award to the defendant against whom such claim is made a reasonable attorney's fee attributable to such claim if the claimant fails to prevail on such claim.

SEC. 3. Notwithstanding sections 4, 4A, and 4C of the Clayton Act (15 U.S.C. 15, 15a, 15c) and in lieu of any interest authorized to be awarded under any such section to a claimant with respect to liability under such section resulting from attempting to make, making, or performing a contract to carry out a research and development program jointly with another person, the court shall award, with respect to all such liability, simple interest on actual damages for the period beginning on the date of service of the pleading setting forth the claim and ending on the date of judgment.

SEC. 4. For purposes of this Act—

(1) the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 relates to unfair methods of competition,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)),

(3) the term "research and development program" means

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- (A) theoretical analysis, exploration, or experimentation, or
 - (B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes,

and may include the establishment of facilities for the conduct of research, the collection and exchange of essential research information, and the conduct of such research and development on a protected and proprietary basis, and

(4) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).