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National Cooperative Production Amendments of 1993: Limited Cartelism Invited!

John A. Maher

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ARTICLES

National Cooperative Production Amendments of 1993: Limited Cartelism Invited!

John A. Maher*

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I. General

Virtually unnoticed by the popular press, President Clinton signed the *National Cooperative Production Amendments of 1993* (NCPA)¹ on June 10, 1993. In a purely formal sense, the *Amendments* merely modified the *National Cooperative Research Act of 1984* (NCRA).² In substance, NCPA did far more.

Senator Leahy, as an incident to introducing one of the two 1993 companion bills that matured into NCPA, said its point was to "address the *need* for joint production ventures" and thereby to permit U.S. industry to meet "most serious competitive challenges."³ Congress' ultimate enactment explicitly lamented that "the antitrust laws *may have been mistakenly perceived* as inhibiting cooperative innovation arrangements that promote competition" for which reason a "*clarification* of the law would serve a useful purpose."⁴ Thereafter, NCPA's purpose is described as being "to promote innovation, facilitate trade, and *strengthen the competitiveness* of the . . . [United States] . . . *in world markets*"⁵ by clarifying the applicability of the "rule of reason standard" first communicated in the National Cooperative Research Act of 1982 (NCRA).⁶

Pertinent committee reports contain assurances *against* NCPA working "unnecessary substantive changes" to antitrust laws.⁷ Obviously unable to cope with the policy decision implicit in use of the word "unnecessary," the writer is constrained to observe significant substantive changes. Despite fudge about clarification and avoiding "unnecessary" changes, there are significant effects on federal substantive antitrust rules of decision as well as, more remarkably, state

1. National Cooperative Production Amendments of 1993 (NCPA), Pub. L. No. 103-42, 107 Stat. 117 (1993) (amending 15 U.S.C. §§ 4301-4305 (1988 & Supp. V 1993)).

2. National Cooperative Research Act of 1984 (NCRA), Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at §§ 4301-4305 (1988 & Supp. V 1993)). On yet another formal level, NCRA as amended by NCPA was dubbed National Cooperative Research & Production Act of 1993 (NCRPA). NCPA § 3(a).

3. S. REP. NO. 51, 103d Cong., 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 726 (June 10, 1993) (emphasis added). H.R. 1313, a companion bill, was introduced simultaneously. H.R. REP. NO. 94, 103d Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 176.

4. NCPA § 2(a)(2) (emphasis added).

5. *Id.* § 2(b) (emphasis added).

6. NCRA, 15 U.S.C. § 4302. See generally John A. Maher & Nancy J. LaMont, *National Cooperative Research Act of 1984: Cartelism for High-Tech Ventures (and Others?)*, 7 DICK. J. INT'L L. 1 (1988).

7. See, e.g., H.R. REP. NO. 94, 1, *reprinted in* 1993 U.S.C.C.A.N. 176 (emphasis added).

antitrust laws⁸ and § 5(a)(1) of the Federal Trade Commission Act (FTCA).⁹ Use of the word “unparalleled” to describe such effects is almost warranted by the fact that the substantially similar NCRA and, before it, the formally different Export Trading Company Act of 1982 (ETCA) were limited in industrial scope when compared to NCPA. That the states had no voice in modification of their laws’ applications is a given. It is also a given that Congress’ preemption of the states is beyond Constitutional reproach whether or not one considers NCPA ill-advised.

In these connections, let it be said that President Clinton — oft charged with instinctive tendencies toward what can be charitably styled as less than full disclosure — spoke far more openly concerning NCPA than did Congress. In March 1993, when announcing support for S. 574 (Leahy, Thurmond & Biden) and H.R. 1313 (Brooks, Fish et. al.), the President observed that “[i]t is altogether appropriate to *lift the legal barriers that prevent good companies from playing to win in the global market* — provided, of course, our antitrust laws continue to prevent improper collusion. *Now is the time . . . to strip away outdated impediments* to our growth and potential.”¹⁰

Tycoons of the Beef and Oil Trust eras would have appreciated what is wrought by NCRPA. Predictably, when the word goes forth, investment bankers and would-be tycoons of a new age will be quick to take advantage. NCPA so modified NCRA, and thereby ordinary applications of federal and state antitrust laws plus FTCA, as to commend that almost every new capital-intensive endeavor, every new capital-intensive facility, intended to service selling into foreign and *domestic* markets be cast as a joint venture! Indeed, the tack might appeal to industries that, albeit not capital-intensive in terms of plant, are ill-disposed to competition. In the capital-intensive context, enterprises uncomfortable with substantive partners can limit partners to relative silence as investors in minute percentages of joint production ventures but nonetheless achieve full antitrust-minimizing benefits of NCRPA. It is even possible to argue that commonly-controlled affiliates can joint venture to elude various antitrust norms.

8. NCRA, 15 U.S.C. § 4302, *amended* by NCPA § 3(d).

9. *Id.* § 4301(a)(2).

10. White House Press Release (3/11/93) extracted from S. REP. NO. 51, 103d Cong., 1st Sess., *reprinted* in 64 Antitrust & Trade Reg. Rep. (BNA) 725, 730 (June 10, 1993) (emphasis added). Quite a different case was made in Prof. D.K. Stockdale’s *Antitrust and International Competitiveness; Is Encouraging Production Joint Ventures Worth the Cost?*, 7 HIGH TECH L.J. 269 (1992) but NCPA’s legislative advocates obviously preferred yielding to petitions based on acknowledgedly incorrect perceptions.

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Enacting NCPA, Congress again assumed the role of industrial macro-psychologist as it purported to ameliorate fears of those claiming to be plagued by a spectre of antitrust prosecutions.¹¹ The therapist did not indulge much care for rationality or irrationality of the patients' fears. The solons' principal albeit not exclusive therapy entailed redrawing NCRA's very charitable "rule of reason standard" not only to embrace *production of goods and services* by joint ventures but also to induce a look to "worldwide capacity" as relevant markets are defined in litigation affected by NCRPA.¹² This "rule of reason standard" is not limited to those fearful of prosecutions under the Sherman Antitrust Act¹³ (of which only §§ 1 and 3 are peculiarly associated with a "rule of reason"¹⁴ as well as *per se* rules¹⁵ theoretically contrary if not contradictory to rule of reason analyses). Rather, assuming venturers' qualification as a joint production venture "defined" in NCRPA,¹⁶ the rechristened Act's "rule of reason standard" is imposed on the many substantive antitrust rules of decision to which Brandeis' elegant rule of reason formulation¹⁷ is entirely foreign.

11. The Export Trading Company Act of 1982 (ETCA), tits. III, IV, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified in scattered sections of 15 U.S.C.) cheerfully responded to untested "perceptions" that U.S. antitrust prejudiced export initiatives. H.R. Rep. No. 637(II), 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2489. *See generally* D. UNKOVIC, ET AL., INTERNATIONAL OPPORTUNITIES AND THE EXPORT TRADING COMPANY ACT OF 1982 (BNA, 1984) A-16 & A-17. Passing NCRA, Congress spoke to eliminating "any misconception" that U.S. antitrust laws impeded formation of joint research and development efforts. H.R. REP. NO. 1044, 98th Cong., 2d Sess. 8-9, *reprinted in* 1984 U.S.C.C.A.N. 3133. Congress' recent concern that entrepreneurial complaints presumably addressed by NCPA "may" be rooted in misperceptions has been remarked. *See supra* text accompanying note 4. Ironically, Assistant Attorney General for Antitrust Anne K. Bingaman spoke on August 10, 1993 against the

view that the increased complexity and internationalization of our economy makes antitrust policy less important [T]he converse is true [T]hat some . . . firms which . . . compete with U.S. firms originate in nations with economic systems that differ from ours is not cause to relax . . . enforcement of our antitrust I disfavor creation of new antitrust exemptions.

U.S. Dep't of Justice Press Release re remarks to American Bar Association.

12. NCPA § 3(d) (amending 15 U.S.C. § 4302). That the Justice Department got the message is suggested by Assistant Attorney General Bingaman's subsequent observation that ". . . parochial notions of antitrust enforcement have been rendered meaningless by the expanding global economy." Address on Oct. 27, 1994 before the Fordham Corporate Law Institute as released to press by U.S. Dep't of Justice.

13. Antitrust Amendments (Sherman) Act, 15 U.S.C. §§ 1-8 (1988 & Supp. V 1993).

14. *See generally* Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

15. *See generally* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

16. NCRA, 15 U.S.C. § 4301(a)(6), *amended by* NCPA § 3(b).

17. *See Chicago Board of Trade*, 246 U.S. 231.

Per NCRPA definitions, "antitrust laws" include FTCA § 5(a)(1) but only to the degree it addresses "unfair methods of competition."¹⁸ The same curiosity was observable in NCRA,¹⁹ and a variation is observable in ETCA,²⁰ by reason of which Congress can be described as consistently, albeit presumably unconsciously, setting a trap for the unwary.²¹ Congress' most recent indirect attack on state antitrust laws is extrinsic to the NCRPA definitional structure. As in NCRA, *state* antitrust is subordinated to the NCRPA "rule of reason standard" by the very language enunciating the standard.²²

The implied overall thesis is that *per se* rules are a feature of every one of the NCRPA defined "antitrust laws" plus all state antitrust schemes. Such a thesis is invalid. Antitrust *per se* rules are generated in and have pertinence only to prosecutions under §§ 1 and 3 of the Sherman Act and some states' analogues to the Act. Whether or not successive classes of solons knew what they were doing as they enacted NCRA and thereafter NCPA, the 103d Congress has ordained dramatic changes — always assuming the involvement of venturers in combinations in the form of trusts or otherwise qualifying as joint ventures defined in NCRPA — in *applications* of various federal and state substantive antitrust rules of decision not usually thought to involve Taft and Brandeis' "rule of reason."

It is not the point of this Article to condemn what Congress has done.²³ The author's ambition is merely to describe — on a non-exhaustive basis — many of the departures from prior law worked by the 1993-94 Congress, even as pertinent legislators disclaimed such a

18. NCRA, 15 U.S.C. § 4301(a)(1).

19. *Id.* § 4301.

20. 15 U.S.C. § 4021(6).

21. As enacted in 1914, Federal Trade Commission Act (FTCA), § 5, 38 Stat. 719 (1914), struck at only "unfair methods of competition" to ludicrous effect in *FTC v. Raladam*, 283 U.S. 643, 647-49 (1931). The Wheeler-Lea Amendments of 1938, 52 Stat. III (1938), engrafted "unfair or deceptive acts or practices" with telling effect not at all limited to consumer protection. See *FTC v. Brown Shoe*, 384 U.S. 316, 321-22 (1966); *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972). A curious effect of NCRPA is to subject FTC consumer protection, to the extent it relies on precedent accumulated under the "unfair methods of competition" rubric that stood alone from 1914 to 1938, to the NCRPA "rule of reason standard." Ralph Nader, Esq. & Company need not erect barricades — yet — since the Wheeler-Lea amendments, unaffected by NCRPA and ETCA, will support most consumer protection measures.

22. NCRA, 15 U.S.C. § 4302, *amended* by NCPA § 3(d). The standard's text is set forth as text accompanying note 83 *infra*.

23. The author acknowledges that, in the modern Congress, much is committed to presumably expert and most certainly enormous staffs but legislators' delegation of labor in the vineyards cannot shield them from collective responsibility for statutory consequences and one can make an ethical case for visiting greater responsibility on legislators who attach their names to bills or chair pertinent committees.

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purpose, and thereby to accommodate the bar by suggesting opportunities for venturesome clients as they contemplate commercial values implicit in indulging species of conduct of which some were thought anti-social limitations on free markets for approximately a century.

To achieve deployment of the NCRPA “rule of reason standard” against prosecutions proceeding by reference to conduct *either* ordinarily offensive *per se* to the Sherman Act *or* offensive to antitrust rules to which the classic rule of reason is foreign, little is demanded of NCRPA joint venturers save, to the degree pre-existing facilities are used for production, channeling such production to *goods or services* that constitute “a *new* product or technology.”²⁴ Thus, *if* a joint venturer’s capital contribution is an existing plant for use in service of the venture, care must be exerted to insure that the plant is shifted to a “new product or technology.” Alas, “new product or technology” is not a defined term of art. Since there rarely is anything new under the sun, the term presumably contemplates either a technology new to each venturer or a product or service new to the venturers’ respective lines. In the context of modern realities, the term should be construed to embrace significant improvements on the venturers’ preexisting lines of endeavor. This inevitably will lead to nice fact questions. Would a 1994 Mustang Coupe be found to be a “new product” contrasted with a 1964 Mustang Coupe? Each is essentially an automobile. Distinguishing characteristics are of sorts that drive automobile manufacturers’ annualized Pavlovian marketing, and automotive technology has changed remarkably in twenty years. If the two should be found to be different products with the 1994 version deemed “new,” would the same result have flowed from comparing the 1964 and the 1965 vintage Mustangs? They differ, but thirty years ago would differences such as tail-lights have been regarded as merely fanciful? What if enlightened production planning had changed the production line? Does a dramatically improved production floor lay-out constitute a “new . . . technology?” Surely Congress’ 1993 largess is not explicitly limited to lines of endeavor entirely new to humankind? If “new product or technology” is limited to hitherto unknown product and service lines or to previously untested production technologies, Congress played a malicious game and those caring souls surely wouldn’t do that.

24. NCRA, 15 U.S.C. § 4301(b)(7), *amended by* NCPA § 3(c)(7) (emphasis added). Although main text focuses on implications for would-be production joint venturers who would contribute existing facilities to the venture, note that effect of § 4301(b)(7) is not limited to pre-existing facilities that were controlled by a venturer!

Taking another but not unrelated tack, sophisticated investment bankers and other enterprise consultants should not be slow to appreciate that pan-industrial amalgamations "in [the] form of trust or otherwise,"²⁵ *always paying careful attention to NCRPA's joint venture definition*, are evoked for entrepreneurs uncomfortable with *per se* and other rules who have wit and capacity *either* (a) to assign significantly "new" tasks, or utilization of "new" technologies, to plants contributed to or acquired for joint ventures planned as such; (b) to cause each client heretofore given to individually planning new production facilities to consider generating a "joint venture" per plant per upgraded service or product; or (c) even to consider creeping mergers *via* evolving plant-by-plant joint ventures (to the degree that ultimate capital structures such as the multinationally incorporated Royal Dutch or Unilever would be a comfortable fit). Contemplating these and other potencies, it must be remembered that nothing in NCRPA either demands embodiment of a qualifying joint venture in a legal entity distinct from the venturers themselves or disqualifies a "joint venture" from NCRPA's favorable treatment by reference to percentages of ownership. Thus, a commonly owned entity or other relationship with a 99:1 or 99.99:0.01 control relationship seems technically adequate to achieve the NCRPA "rule of reason standard" but the cautious — worried about limitation of products liability and courts' proper recent tendencies, in antitrust analyses, to honor substance over form²⁶ — may wish to opt for a separately incorporated vehicle and to design an 80:20, 85:15 or some other control ratio comfortable in the contexts of tax laws and state corporate laws' "short-form" merger provisions. The speed with which entrepreneurial appreciations of Congress' invitations to eliminate "horizontal" competition, and also to proceed with vertical integrations, will proceed to implementation should come to be limited on industry-by-industry bases only by references to capital costs naturally restricting ease-of-entry and relative tractabilities of existing plant sites to "new" product and service lines.

Despite cant suggesting desire to improve the domestic industrial base in order to enhance international competition, it must be stressed

25. 15 U.S.C. § 1.

26. *See, e.g., Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984) (wholly-owned subsidiary regarded as an economic entity with its parent for purposes of defeating the focus of the Sherman Antitrust Act's § 1, 15 U.S.C. § 1, on conduct indulged by two or more persons). For those who would dare to cause an NCRPA joint venture of a parent and a wholly-owned subsidiary, a joint venture of two or more wholly-owned subsidiaries, or some combination of these, *Copperweld* is a warning. But it is not a clear warning to those who would cause controlled but not wholly-owned affiliates to be NCRPA joint venturers.

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that the utility of the NCRPA “rule of reason standard” is *not* tied either to joint venturers’ combinations being headquartered in or otherwise tied to the United States. NCPA made a gesture, a very small gesture, toward conditioning *some* benefits of NCRPA to presences within the United States but the qualification runs *not* to liability (concerning which the “rule of reason standard” is operative) but only to damages in the event of liability being established despite the standard’s burden on prosecutors. Shields against treble damages contemplated by federal antitrust statutes and, at the state level, punitive or statutory treble damages are available to joint ventures having “principal” (but, thereby, surely not all) facilities for production²⁷ within the United States “or its territories”²⁸ *if* the venturers choose to file a notice with designated federal authorities.²⁹ Assuming that a joint venture fits into the NCRPA definition, *the election to omit such a filing does not waive applicability of the NCRPA “rule of reason standard” to the basic liability question.* Admitting that a definite article modifies “principal facilities for production,” one wonders how federal courts will distinguish “principal” from incidental facilities when, by reference to everyday industrial conduct, many enterprises can have multiplicities of production “facilities” that are wholly or partially interdependent. If the damage shield is deemed valuable (which should be resolved by a cost/benefit analysis), venture designers will be challenged to provide hall-marks of principality for domestic plants if there are to be plants external to the United States. The price of avoiding treble damage exposure (providing an appropriate “notification” to the authorities plus the location of “principal” facilities in the United States) must be weighed against the commercial intelligence to be provided competitors by the filing.

Sensitivity is a wonderful thing, particularly when possessed by the powerful. However, when sensitivity replaces analysis in business or in government, there is unsettling potential for confusion between empathy and judgement. This is particularly true when the powerful are so caring that they act by reference to intended beneficiaries’ perceptions of potentials for harm when the powerful understand that such perceptions “may” depart from reality. Whether or not mischief ensues from such patronizations depends on the nature of the action or inaction and the circumstances in which it is indulged. Putting Congress’ explicit

27. NCRA, 15 U.S.C. § 4304, *amended by* NCPA § 3(f).

28. NCPA § 7 (to be codified at 15 U.S.C. § 4306).

29. NCRA, 15 U.S.C. § 4305. The U.S. Department of Justice was quick to announce implementation of notice provisions in which the FTC concurred. U.S. Dep’t of Justice Press Release 93-177 (June 28, 1993) (on file with publisher).

predicates³⁰ aside, NCRPA presents a series of nice opportunities for entrepreneurs (as well as a series of policy questions for the future).

That Congress as a whole intended no harm to the competitive marketplace or to the integrity of "antitrust laws" must be a given. That Congress very definitely risked such harm through not merely "clarifying" federal antitrust principles but broadly extending applicability of the NCRA "rule of reason standard" is remarked herein. That recorded purposes of pertinent Committees or their members will not in and of themselves shield against or undo bad societal results of misguided policy embodied in NCRA, as reinforced nine years later by NCPA, also is a given. However, *counsel to entrepreneurs* should understand and advise that, just as Congress has subjected a host of statutory provisions to a "rule of reason standard" alien to them, a later *Congress can backtrack*. Should it do so, E. I. du Pont's experience with its early investment in General Motors³¹ should teach that Congress is not likely to shield, let alone indemnify, those who relied too heavily on NCRPA or the passage of time if Congress changes the rules.

This Article is not an attack on every aspect of the policy implicitly served by NCRPA. The author would be nothing but sympathetic with undoing particulars of what he deems as various irrational antitrust and FTCA precedents but the scope of his sympathy is neither limited to joint ventures nor oriented to end runs favored by shallow office holders of the moment focused on pleasing Political Action Committees. Bringing us NCRPA, Congress has perpetrated an end run. Pre-existence of ETCA and NCRA permit saying "another end run." Assuming compatibility of a venture with the NCRPA "joint venture" definition, Congress has relegated every substantive rule of decision in not only federal "antitrust" but also FTCA's address to "unfair methods of competition" and state antitrust schemes to NCRPA's "rule of reason standard." This, anomalously, includes consumer protection content of "unfair methods of competition" whilst curiously omitting the antitrust-by-analogy precedent under FTCA's address to "unfair . . . trade practices!" Addressing NCRPA, it is the author's charitable thesis that legislators in the NCRA and NCPA vanguards, rather than being corrupt, simply did not know what they were doing. This is not to say that lobbyists for successive bills³² leading to the Act were similarly ignorant but, after all, they were postulants for redress of presumed

30. NCPA § 2.

31. *United States v. E.I. du Pont de Nemours & Co., Inc.*, 353 U.S. 586 (1957) (Government's 1954 attack on du Pont's 1917-19 acquisition of a 23% equity position in GMC).

32. S. 1006, 101st Cong., 1st Sess. (1989); S. 479, 102d Cong., 1st Sess. (1991).

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grievances in a free market for ideas and cannot be criticized if pertinent solons, and their staffs, failed to test any given set of propositions. There can be no credible latter day cry that lobbyists misrepresented unless the solons were reasonable in their reliance and they have gone to great pains to put us on notice that they were not.

What has been done can be changed only by Congress. It is not remarked for quickly owning up to error (unless, of course, confronted by undertakers angry with the FTC; civil service pensioners; social security beneficiaries; or some other numerous group of voters). Thus, the job for lawyers is to look at what Congress wrought and to consider what avenues newly benefitted merchants now can pursue *per* NCRPA without transgressing what amount to new competition rules. The avenues are so many as to resist inventorying and this Article does no more than indicate major boulevards.

A. *Modification of Antitrust Laws' Applications*

It is possible and would be somewhat true to say that NCPA did for joint production ventures what NCRA did for joint research and development (R&D) ventures. Such an observation would be inadequate. As it was once possible to say of NCRA and its "rule of reason standard," NCRPA modifies "application of federal and various state 'antitrust laws' in ways unheralded by popular reports contemporaneous with enactment and immediately subsequent commentaries."³³ This has much to do with the definitional structure of the resulting *National Cooperative Research & Production Act of 1993* (NCRPA).

What benefits are accorded those affiliated in a combination within NCRPA's definition of a joint venture? Deferring to the organization of the amended statute, benefits differ in nature and quality. Two — access to the NCRPA "rule of reason standard" in the liability equation and threatening unsuccessful private attorneys-general with costs³⁴ — inure to the parties to *every* venture falling within the NCRPA definition of a joint venture, whereas another — limitation of injured plaintiffs to single damages — is contingent, *inter alia*, upon the venturers seeing to provision of minimal data disclosures to the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).³⁵

To the degree the explicit NCRPA "rule of reason standard" is pertinent to judicial consideration of an alliance's activities under *not*

33. Maher & LaMont, *supra* note 6, at 3. For a review of NCRA's meaning more than half of decade after passage, see Stockdale, *supra* note 10.

34. NCRPA, 15 U.S.C. § 4304.

35. *Id.* §§ 4303, 4305. See also sources cited *supra* note 29.

only § 1 of the Sherman Act — with which the feared *per se* characterization abbreviating the traditional rule of reason analysis usually is associated — but also statutes concerning which *per se* categorizations are alien, it must be stressed that the NCRPA “rule of reason standard” is achieved by operation of the statutory definition *without need for filing with the DOJ and the FTC*. Filing a notification of joint venture is a condition *only* for achieving a limitation of exposures in law suits to actual rather than treble or, at the state level, other punitive damages. Consequently, the numbers and identities of joint ventures, and venturers, that become known by reason of filings with the DOJ and the FTC will *not* necessarily exhaust the list of those entitled to the benefit of NCRPA’s “rule of reason standard.” Indeed, there can be no certain list of beneficiaries. This was true of the unmodified NCRA. The number of filings under NCRA tell nothing of the potential number of claims to the application of its “rule of reason standard.”³⁶

B. Congressional Irony?

Solons can have a talent for disinformative entitling of legislative acts. This, of course, is not peculiar to the Federal Legislature. However, Congress is awfully good at it. Thus, of ETCA’s substantive provisions, only its Title II³⁷ is concerned with “export trading companies,” whereas pertinence of the “antitrust” modifications effected by ETCA Titles III³⁸ & IV³⁹ are not peculiar to export trading companies operating under Title II. Looking only to NCPA’s title (and, previously, NCRA’s title), use of the word “national” is and has been mysterious apart from solons’ pious incantations about assisting U.S. companies in global competition. NCRA — as opposed to its aspirational legislative history — *neither* encouraged only domestic “cooperative research” *nor* limited benefit of the statute to businessfolk actually or formally “American” *nor* encouraged R & D peculiar to

36. *Per* House Report No. 94 to accompany H.R. 1313, more than 300 research joint ventures in a wide span of industries have been *registered* “[whereas, during] . . . 1976-1979 only 21 research joint ventures were newly formed.” H.R. REP. NO. 94, 103d Cong., 1st Sess., *reprinted in* 1993 U.S.C.A.N. 176, 184. Clearly, this claimed success for NCRA and was indispensable to claims that NCRA had not occasioned abuse. If success there was, it may have been far more pronounced since access to the NCRA “rule of reason standard” was *not* conditioned on filing a notification for which reason both the “300” and the “21” are suspect.

37. Maher & LaMont, *supra* note 6, at 3.

38. ETCA, 15 U.S.C. §§ 4011-21.

39. ETCA, 96 Stat. 1246 (supplying 15 U.S.C. § 6a (1988) 15 U.S.C. § 45 (a)(3) (1988) (also known as “Foreign Trade Antitrust Improvement Act of 1982”)).

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American enterprises. The same is true of NCRPA's major "rule of reason standard" thrust, although there is a gesture, *via* only NCPA's damage limitation provisions, to encourage employment-building "principal" production facilities in the United States. We as a nation don't seem to care who builds or operates those "principal" facilities (which could represent an entirely valid policy decision but, if made, is not one to be camouflaged by the smoke and mirrors of pious claims to be improving the competitiveness of *American industry* vis-a-vis the rest of the world). Yet, NCRA's legislative history made much of a purpose to incentivize cooperative technological research among U.S. firms and, thereby, to improve their competencies to participate effectively in international competition.⁴⁰ NCPA's rationale is no different. That it is possible to provide antitrust relief to firms at least *formally* American was demonstrated only two years before NCRA's passage when Congress adopted ETCA Title III.⁴¹

In 1993, Congress gave a little, just a trace, more credibility to NCPA's use of the word "national" than was the case with NCRA. Those *production* joint venturers *desirous of a shield against treble damages* must not only file appropriate notices with the DOJ and the FTC but also locate "*the principal facilities for . . . production*" in the United States or its territories.⁴² Appended to this minimal price of damage control is another condition only somewhat burdening those not headquartered in the United States. To the degree a joint venturer is not "a United States person" or is controlled by a "foreign person," the law of the foreigner's base country must accord "antitrust treatment no less favorable to United States persons than to that country's domestic persons with respect to participation in joint ventures for production."⁴³ So, we now have the spectre — a remote one, asserts the author — of federal judges sitting in antitrust cases having to deal with questions as to whether or not a given other nation — perhaps, *sub silentio* — permits or denies to American enterprise what the United States would afford foreigners. The formal commitment of a foreign sovereign to accord the weak reed of "national treatment" to U.S. "persons" is *not* a statutory condition precedent to the applicability of the NCRPA "rule of reason standard" to conduct of joint production ventures of, or dominated by, foreigners. However, the DOJ is on record to the effect that the mere

40. See H.R. REP. NO. 686, 97th Cong., 2d Sess. 2, 4, *reprinted in* 1982 U.S.C.C.A.N. 2489; H.R. REP. NO. 637(II), 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S.C.C.A.N. 2444, 2446.

41. ETCA, 15 U.S.C. § 4021(5).

42. NCPA § 7(1) (emphasis added).

43. *Id.* § 7(2).

existence of a Treaty of Friendship, Commerce & Navigation, or similar agreement generally providing "national treatment," meets the NCPA standard.⁴⁴

Almost parenthetically, one must assume that Chinese, Japanese, Korean, and Thai joint venturers — initially lured to locate assembly plants in Saipan by freedom from federal minimum wage standards — have the capacity to qualify for the NCRPA "rule of reason standard" even though there is no filing with the DOJ and the FTC or pretence that explicit reciprocity is available in the venturers' base nation. Most assuredly, foreigners desirous of the shield against treble damages (and minimizing the ability of American taxing jurisdictions to reach "parents" or affiliates) will see to the creation of not only ventures possessed of U.S. juridical personalities but quite probably, intermediate U.S. juridical persons to become investors in qualifying ventures.

Quite a different irony reposes in Congress' definition of "antitrust laws" to include FTCA § 5(a)(1) "to the extent . . . [it] . . . applies to unfair methods of competition."⁴⁵ What a wonderful way to sweep up all FTC precedent pre-dating 1938's Wheeler-Lea Amendments. This is not offered with the thought that some significant part of the FTC's consumer protection jurisdiction has been prejudiced. The author has no doubt that 1938's Wheeler-Lea Amendments will suffice, if needful, for the Commission to tuck consumer protection into "unfair . . . acts or practices" that escaped the NCRPA. But, the Wheeler-Lea Amendments speak to more than consumer protection.⁴⁶

II. Objects of Congressional Sensitivity

Before assessing benefits actually afforded joint production venturers and considering techniques appropriate to maximum enjoyment of benefits afforded, the starting point is to identify Congress' beneficiaries. To do so, it is necessary to consider NCRPA's rather lengthy description of an encouraged joint venture.

44. U.S. Dept. of Justice Press Release 93-177 (June 28, 1993) (on file with publisher). In this respect, the DOJ did not newly break ground. The Senate Judiciary Committee opined that "a country . . . party to an international agreement with the United States that provides national treatment satisfies the requirements of section 7(2)." S. REP. NO. 51, 103d Cong., 1st Sess., 64 Antitrust & Trade Reg. Rep. (BNA) 725, 728 (June 10, 1993).

45. NCRA, 15 U.S.C. § 4301(a)(1).

46. See *supra* note 21.

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A. Defining "Joint Venture"

Section 3 of NCPA⁴⁷ contains a series of amendments to NCRA. Among these are a redefinition in § 3(a) of comprehended joint ventures and a modification in § 3(b) of excluded activities. NCRPA ordains that "joint venture" means

any group of activities, including attempting to make, making, or performing a contract, by two or more persons for the *purpose* of

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,

(B) the development or testing of basic engineering techniques,

(C) the extension of investigative findings or theory of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials, and processes,

(D) the production of a product, process, or service,

(E) the testing in connection with the production of a product, process, or service by such venture,

(F) the collection, exchange, and analysis of research or production information, or

(G) any combination of the purposes specified in subparagraphs (A), (B), (C), (D), (E), and (F) and may include the establishment and operation of facilities for the conducting of such venture, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents and the granting of licenses for the results of such venture, but does not include any activity specified in subsection (b) of this section.⁴⁸

Subsections (D) and (E) did *not* appear in NCRA.

Before proceeding to NCRPA § 3(b), it should be noted that NCRPA's definitions section⁴⁹ does *not* define terms such as "phenomena," "observable facts," "basic engineering techniques," "scientific or technical nature," "models," "process" or "processes," "production" or "product," and "service" with which the "purposes" by which a qualified joint venture are exemplified. On the face of the matter, NCRA's references to analyses, experimentation, and systematic

47. NCPA § 3.

48. NCRA, 15 U.S.C. § 4301(a)(6) (emphasis added).

49. *Id.* § 4301(a)(1)-(5).

study were not limited to physical as opposed to, say, psychological phenomena. NCPA's focus on "production of a . . . service" underscores the point. Pavlovian conditioning and other aspects of "human engineering" were included within the overall R & D concept benefitted by NCRA.⁵⁰ NCPA did nothing to constrain such inclusivity.⁵¹ All of the "purposes" heretofore associated with NCRA *plus* "purposes" newly introduced by NCPA are fair game for the non-exhaustive "combination of . . . purposes" contemplated by NCRPA,⁵² subject only to the (mostly) qualified exclusions of certain species or activities from those permitted NCRPA venturers.⁵³

NCRPA's sixth "purpose" is particularly broad. Doesn't inclusion of the venturers' "collection, exchange, and analysis of research or production information"⁵⁴ embrace studies of not only customer preferences and procurement data but also other factors of minimal if any particular *scientific* or *production* significance albeit susceptible of scientific collection and measurement techniques? Where to stop? Only the explicit exclusions will tell. *Prima facie*, the statute encourages joint ventures for the *production of services* such as banking, insurance, the practice of law or medicine, the production of plays, and the like.⁵⁵ But what of marketing the services?

Here, it is useful to consider NCRPA § 3(b) as it seeks to particularize activities *excluded* from the benefitted *purposes*.

(b) The term "joint venture" excludes the following *activities* involving two or more persons:

(1) exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any

50. See generally Maher & LaMont, *supra* note 6, at 8-9.

51. But see S. REP. NO. 51, 103d Cong., 1st Sess., represented at 64 Antitrust & Trade Reg. Rep. (BNA) 725, 727 (June 10, 1993) in which it is said that the Senate Judiciary Committee "intends that the bill's protections will *not* extend to joint ventures to provide what are *simply* services, such as health care or legal . . . , unconnected to any *concrete* technological innovations, or to joint ventures solely to purchase medical equipment." *Id.* (emphasis added). Of course, such legislative history is traditionally pertinent only to the extent a statute is ambiguous. Even if the history is regarded as limiting, how much ingenuity will be required to link joint ventures to provide services to "concrete technological innovations?"

52. NCRA, 15 U.S.C. § 4301(a)(6)(G).

53. *Id.* § 4301(b).

54. See *supra* text accompanying note 48.

55. Caveat, the legislative history would have it otherwise. See, e.g., S. REP. NO. 51, 103d Cong., 1st Sess. (1993) to accompany S. 5741, 97th Cong., 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 727 (June 10, 1993) in which it was observed that "by including language that covers production of services but not mere provision of a service . . . [t]he Bill's protections will not extend to joint ventures to provide what are simply services, such as health care or legal services, that are unconnected to any concrete technological innovations"

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product, process, or service *if* such information is not reasonably required to carry out the purpose of such venture,

(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a party to such venture of any product, process, or service, *other* than —

(A) the distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such a venture,

(B) the marketing of proprietary information, such as patents and trade secrets, developed through such venture formed under a written agreement entered into before the date of enactment of the National Cooperative Production Amendments Act of 1993, or

(C) the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture formed under a written agreement entered into on or after the date of enactment of the National Cooperative Production Amendments Act of 1993,

(3) entering into any agreement or engaging in any other conduct

(A) to restrict or require the sale, licensing, or sharing of inventions [or developments not developed through] developments, products, processes, or services not developed through, or produced by such venture or

(B) to restrict or require participation by any person who is a party to such a venture in other research and development activities,

that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture,

(4) entering into any agreement or engaging in any other conduct allocating a market with a competitor,

(5) exchanging information among competitors relating to production (other than production by such venture) of a product, process, or service *if* such information is not reasonably required to carry out the purpose of the venture,

(6) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production (*other* than the production by such venture) of a product, process, or service,

(7) using existing facilities in connection with the production of a product, process, or service by the venture *unless* the use is for production of a new product or technology, and

(8) except as provided in paragraphs (2), (3), and (6), entering into any agreement or engaging in any other conduct to restrict or require participation by any person who is a party to the venture, in any unilateral or joint activity *that is not* reasonably required to carry out the purpose of the venture.⁵⁶

Obviously, other than in § 3(b)(4), qualification of exclusions is the order of the day.

Note particularly sub-sections (b)(1) and (5). Is the sole limit a prospect of judicial applications of *ejusdem generis* to restrict information exchanges to hard historical data? This could be done more easily with (b)(1) than (b)(5). But even then, in (b)(1) use of the word "marketing" is contraindicative in that, ultimately, pricing will be a constraint and it must relate to projections of break-even points, minimum ultimate satisfactory margins, and the like, which inevitably entail testing of procurement waters. Equally surely, in the context of (b)(5), it would be insensible to bar partners from procurement planning that is inextricably linked to production planning but inevitably will entail pooling data of value extrinsic to the joint venture.

Will there be an ultimate — surely not current — DOJ attempt to restrict the availability of raw data collections, or processed versions thereof, to the joint venture as such as opposed to the joint venturers? Where is the statutory warrant for such a restriction? Where is it written that a joint venture must have a legal personality or a management distinct from the venturers? Where is it written that there must be a "Chinese Wall" between a NCRPA joint venture and its backers? That Congress knows how to write an unqualified exclusion is made manifest by NCRPA § 3(b)(4), which unqualifiedly aims at good old fashioned market allocation. It is instructive that this anti-allocation provision was added by NCPA and should do much to flesh out the qualification in § 2(b)(8). If NCRPA imposes no real containment on either data exchanges between *ad hoc* partners, or data back flows from the venture management (if there is a singular venture management) to investors,

56. NCRPA, 15 U.S.C. § 4301(b)(1) (emphasis added).

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other than weak references to what is “reasonably required to carry out the purpose of the venture”⁵⁷ in context of the glaring prohibitions of §§ 2(b)(4) and (6), it seems that exchanges of soft and even speculative data is *encouraged* in order that venturers can make sound commercial decisions. Where, then, is the limitation against further use of such data to a market-stultifying effect?

Let’s face facts. What has been blessed is not a limited joint venture but one able to take on *anything* propounded by NCRA as now liberally supplemented by NCPA. There is no restraint against sensible planning, execution against plan, or appraisal of interim results. There is no restraint against partners, otherwise competitors, being frank and open — deferring always to associational laws of the states and other jurisdictions of organization — with data initially elicited to avoid having the joint venture stumble into the myriad of economic traps such as building over-capacity or walking into procurement nightmares. By definition, such frankness — primarily ordained to the health of the venture — will inescapably educate each sophisticated venturer in ways pertinent to the rational conduct of its own affairs whether or not its base line or lines of business is coincident with, complementary to, or quite different from the joint venture’s line or lines of business or those of *ad hoc* partners.

Little of substance in NCRPA is peculiar to NCPA⁵⁸ vice NCRA.⁵⁹ NCPA §§ 2(b)(5) and (c)(5) added what are codified as 15 U.S.C. §§ 4301(b)(6)(D) and (E) and 4301(b)(4)-(8). Assuming proper counseling of would-be joint venturers, there was very little data that could not be made germane to setting policy for, or to the management of, a joint research and development venture contemplated by NCRA. The same is true of production joint ventures under NCRPA. The NCPA extension does not provide against market or product extension joint ventures. Clients’ venture planning will entail identification of opportunities; assignments of priorities among opportunities in contexts of cost/benefit analyses of competing opportunities; and, inevitably, discarding some opportunities while pursuing others. Is it not conceivable that the venture’s abandonment of a significant opportunity will constitute an invitation to one or more of the venturers subject always to making sure that there is no transgression of fiduciary duties to the venture and other investors recognized by the incorporating or other associational jurisdictions? What data exchanges will or should be

57. *Id.* § 4301(b)(1), (5), (8).

58. NCPA, 107 Stat. 177.

59. NCRA, 15 U.S.C. §§ 4301-4305.

off limits for those planning for a joint venture who are expected, in the normal course, to reach out for at least five or ten years? What, at a later stage, will or should be off limits for those appraising the venture's management? What, if a joint venture is embodied in a corporate vehicle, will be off limits to members of the venture's board of directors burdened by corporation codes to provide general management but understandably chosen from employees of venturers or their affiliates? What will be off limits to investors who take advantage of modern corporate codes' invitations for those organizing a statutory close corporation to dispense with a board? What, in a modern world no longer leaning to Luddite presumptions, are "product extension" and "market extension" anyway? Today's competitions among wood, aluminum, steel, and vinyl for residential housing are not necessarily tomorrow's competitions among them (and other materials of which some may be as of yet undreamed). The very innovation that Congress encourages will see to that, just as the unaided marketplace has in the past.

But, query, what is to prevent any given group of persons, otherwise competitors, from taking a page from the book of, say, the "Beef Trust" and putting all of their new eggs into single — of course, adequately "new" — baskets?

The definitions section of NCRPA⁶⁰ incorporates the Clayton Act's definition of "person."⁶¹ For purposes of characterizing NCRPA joint ventures, we know benefitted "persons" by their *activities* and the *purposes* of those activities. It is in entrepreneurs' hands to define their ventures purposefully and to choose the persons with whom they will become affiliated in a NCRPA joint venture.

B. Joint Venture Vehicle — a Protected Person?

Commercial life makes it very likely but not inevitable that, while address of NCRPA's definition of "joint venture" is to "two or more persons" performing or attempting to perform "any group of activities" oriented to making or performing a contract for definition and implementation of one or more of the Congressionally invited purposes *except* as given activities are excluded,⁶² performance of such a contract to form a NCRPA joint venture will entail the creation of a juridical person or other legal entity having a legal personality distinct from the

60. *Id.* § 4301(a)(4).

61. ETCA, 15 U.S.C. § 12(a).

62. NCRA, 15 U.S.C. § 4301(a)(6), 4301(b).

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venturers. Centralized planning, budgeting, procurement, allocation and reallocation of available human and material resources, market testing, quality and environmental controls, performance measurement, warranty administration, and other functions of informed enterprise management — quite without reference to the applicability of one or more specialized regulatory schemes such as Food & Drug “food additive” or “new drug” disciplines — will tend to mandate the definition of discrete cost and profit centers within the overall joint venture. Quite apart from how an investment is carried on a given venturers’ books, each venturer — for its own managerial purposes — may regard the joint venture as a discrete cost and profit center.

Is a NCRPA joint venture itself *necessarily* entitled to whatever protections NCRPA affords? It is a given that activities pertinent to “attempting to make” a contract for a joint venture, even though incomplete or ultimately unsuccessful, are entitled to NCRPA’s “rule of reason standard.” By definition, no qualifying entity separate from the venturers can exist until they agree and implement. What, then, of a successful negotiation contemplating creation of a joint venture vehicle possessed of its own legal personality? Are the consequent venture’s continued existence, its R & D activities, and its production activities within the ambit of “any group of activities including . . . performing the” joint venture contract entitled to the NCRPA “rule of reason?”⁶³ To respond negatively would evoke memory of a Dickens’ line as one concludes that the NCPA amendments and the original NCRA structure are almost pointless. The privilege of burdening a prosecutor with the NCRPA “rule of reason standard” is given to the “two or more persons” who made and are performing the “contract.” What if the venture is so successful that each investor becomes a relatively silent partner, inactive in day-to-day, quarter-to-quarter management but very much a player when it comes to board-level long-range planning and policy definition?

Congress did not see fit to ordain that venturers must operate through the equivalent of a general partnership lest they forfeit the “rule of reason standard” afforded a qualifying “venture.” NCPA amended the NCRA “rule of reason standard”⁶⁴ but surely did not limit it. NCRPA negates application of *per se* rules to the existence and operations of defined ventures as it ordains a “rule of reason standard” for appraisal of “the conduct of *any person* . . . making or *performing*” a contract to carry out defined R & D and production activities.⁶⁵

63. See *infra* text accompanying note 83.

64. NCRA, 15 U.S.C. § 4302.

65. *Id.*

Thus, assuming proper draftsmanship of the base contract by which the venture is granted, persons (including an incorporated joint venture vehicle) literally performing the contract should be protected for purposes of at least the NCRPA "rule of reason standard." Is this a sufficiently satisfying reed?

As noted earlier, nothing in NCRPA precludes use of associational laws to confer a juridical personality on a vehicle embodying a qualifying joint venture. Indeed, in order to permit operation "on a protected and proprietary basis" including unitary licensing,⁶⁶ such organization seems implicitly encouraged. Surely, prosecuting patent applications and licensing technology on behalf of a joint venture would be inconvenienced by embodying the venture in a entity unquestionably capable of performing legal acts *for its own account*. Even if encouragement is not all that glaring, it seems obvious that all functions of a jointly-owned vehicle are themselves "activities" of the contracting parties plainly within the scope of the NCRPA definition of "joint venture." At later points,⁶⁷ it is urged that prudent counseling will see to the creation of an entity, embodying the venture's cost and profit centers, that itself is capable of becoming party to the venturers' base contract and does so with the consequence that it is one of those "making" as well as "performing" the overall agreement.

What of the therapy implicit in the conditional limitation of private parties to single damages? Present address to it only subsumes that a given set of joint venturers may consider such a contingent benefit worth the disclosures to the world implicit in public filings when such filings are not themselves conditions precedent to operation, in the liability equation, of the NCRPA "rule of reason standard."⁶⁸ Insulation of the joint venture vehicle from punitive damages is less certain since the statutory approach to the limitation of damages (and the provision of costs-for-prevailing-party) are less explicit than is the explication of the "rule of reason standard." To the degree that the availability of the treble damage shield is deemed important, it would seem important for not only the venturers but, as substantial investments are made in a

66. *Id.* § 4301(a)(6)(G).

67. *See infra* text accompanying notes 69, 70, 280.

68. The writer suggests that there may be sufficient commercial intelligence value in some disclosures required by filing "a notification" as to discourage filings in various circumstances. NCRA, 15 U.S.C. §§ 4303, 4305. Foregoing relatively minor benefits associated with filings may not represent a significant cost to discreet folks who nonetheless are entitled to application of the NCRPA "rule of reason standard" with would-be plaintiffs threatened by the spectre of costs if unsuccessful. *Id.* § 4304.

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venture having a legal personality distinct from its investors, for the vehicle itself.

The treble damage shield does not specify persons to whom it is available. Rather, the shield looks to compensable injuries caused by offensive *conduct* that is within “the scope of a notification” filed with the DOJ and the FTC.⁶⁹ According to NCRPA, such notifications can be filed by “any *party* to a joint venture, *acting on such venture’s behalf*.”⁷⁰ Assuming a filing, it is easy to argue — and those plaintiffs who succeed in establishing liability despite NCRPA’s “rule of reason standard” surely will argue — that (a) “joint venture” is a term of art embracing only activities of persons contracting to bring ventures into existence and thereafter to maintain them; (b) the detrebling provision should be construed strictly; and (c) Congress intended only to encourage collaborations by principals rather than their creatures’ excesses (e.g., violation by a joint venture vehicle of the Robinson-Patman Act’s strictures on discrimination in price or merchandising supports among competitors of the buyer). A defendant vehicle’s first line of response will stress that the contemplated filing is “on such venture’s behalf.” Secondarily, it will be urged that the Act’s overall definition of venture focuses on *activities* pursuant to a contract oriented to one or more explicitly permitted purposes and that the treble damage shield runs to conduct described in the filed notification *by whomsoever performed* so long as it is on behalf of a qualifying venture.

Note that the filing is of a notification concerning “nature and objectives” that, unlike an application for a COR under ETCA Title III, need not detail specific operations. All of this commends that counsel to venturers, if use of an institutionalized joint venture vehicle is important to the intended activities, not only cause the “notification” to include organization and operation of the vehicle (as part of the venture’s “nature” evoked by NCRPA⁷¹) but, as part of formalizing the overall inter-venturer agreement, *cause the vehicle to become a party to the basic contract* and to clause the initial and all subsequent filings accordingly. It would seem that a joint ventured production vehicle embodied in a limited partnership or a business trust almost inevitably must become a party to the base contract. This is not true of an incorporated venture vehicle. Obvious reasons for causing it to be a formal party are that it is better to insure the availability of the “rule of reason standard” for its unilateral conduct as well as to secure limitation

69. NCRA, 15 U.S.C. §§ 4303, 4305(a).

70. *Id.* § 4305(a) (emphasis added).

71. *Id.* § 4305(a)(2).

to single damages. That there are thrusts of "antitrust laws" that, in the fullness of time, a successful NCRPA-qualified joint venture may seem to ignore — deliberately or unthinkingly — is a given. That is the point of NCRPA. Typically, once a qualifying venture is well beyond start-up, investors will not be involved in low-level decisions as to whether or not, e.g., the "meeting competition" defense to a potential price discrimination charge is available. Yet, proper homework will insulate all concerned.

Boot-strapping? Putting aside the significance of having the vehicle become a party to the base contract, those defending the conduct of a joint venture — that ultimately is held liable despite the NCRPA "rule of reason standard" — will argue that the use of the phrase "acting on such venture's behalf" is simple English plainly indicative of a remedial purpose to shield all activities within the "nature and objectives" of the venture, including its formal manifestation, disclosed in the notification to the DOJ and the FTC. Such an argument might run afoul of strict construction. However, if a suitably formalized vehicle is literally a *party* to the basic contract undertaken within the scope of NCRPA's joint venture definition, it will be most difficult for a court to conclude that the vehicle is unentitled to invoke each and every protection afforded its own investors.

C. *Conduct Within NCRPA's Safe Harbors*

What does NCPA shield? To the definitional structure of NCRA, NCPA added "production of a product, process or service . . . testing in connection with the production of a product, [and] process or service by such venture."⁷² It is a given that conduct in realms beyond production, literally understood, is comprehended.

Earlier, NCRA created a nice question as to whether routinized marketing of a product from a prototypical (but beyond bench-scale) plant was entitled to the original "rule of reason standard" so long as the joint R & D venturers continued tinkering with the plant; i.e., when the production process never would emerge from "development," which is a condition not at all uncommon in the production of chemicals. NCPA put an end to such speculation by, purely and simply, encouraging production joint ventures. It is clear that, subject to an explicit limitation flowing from fears that venturers might proceed from orienting a joint venture's market exploitation to extra-venture market allocation,⁷³

72. *Id.* § 4301(a)(G),(D),(E).

73. *Id.* § 4301(b)(4).

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NCRPA allows collaborative approaches to everything from basic technological and market research through the marketing output of the full-scale production of goods or services. The only obvious hook, beyond fears of anti-competitive conduct extrinsic to proper needs of the investors *qua* joint venturers, is the exclusionary language of NCRPA's § 3(b)(7), as it provides against the use of "existing facilities in connection with the production of a product [or] process of service . . . unless the use is for the production of a *new* product or technology."⁷⁴

Recall that such facilities need *not* be in the United States if *only* the NCRPA "rule of reason standard" is desired. This might provoke speculation as to underlying policy. Why did Congress opt to benefit (and thereby encourage) use of plants "for the production of a new product or technology" outside of as well as within the United States? Only the damage shield looks to requiring that "principal" facilities be in the United States. A principled basis for the distinction is not at all clear. Only after a finding of liability in a damage action does the location of "principal" facilities come into issue when, of course, there has been an appropriate filing of a notification of a NCRPA joint venture.

As suggested earlier, preclusion of "existing facilities" unless for a new product or for using new technology raises some questions. The first is troublesome. NCRPA's focus on "existing facilities" is not explicitly limited to prior ownership *by a party* to the joint venture. Thus, on the face of the matter, it appears that an otherwise qualifying venture's purchase of a pre-existing plant from a third party does *not* free the venture to continue the seller's use of the plant although such use may be entirely new to the venturers. The limitation explicitly addresses the facilities themselves vice historic ownership. So, the scenario seems the same whether or not a pre-existing plant is acquired from a third party or is contributed by a venturer. However, let it be said that the legislative history clearly contemplates the conversion of facilities previously owned by one of the venturers.⁷⁵ Will courts be kind

74. *Id.* § 4301(b)(7) (emphasis added).

75. See S. REP. NO. 51, 103d Cong., 1st. Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 727-28 (June 10, 1993).

"The new product or technology" qualification was incorporated to limit . . . use of existing facilities to those joint ventures intending to produce or process a product not currently being produced or processed *at that facility*, or to those intending to use a new, innovative technology to produce or process an existing type of product However, a process . . . will not qualify as "new" solely . . . [because] the . . . venture produces . . . more efficiently or cheaply *by using existing facilities*.

Id. (emphasis added).

enough to infer the existence of a "their" in the statutory language so that § 3(b)(7) effectively refers to "using their existing facilities," thereby treating facilities newly-acquired by or for an otherwise qualifying joint venture as sufficiently "new" as to end the enquiry? One should not invest substantial dollars in reliance on an affirmative answer.

Let's look at a hypothetical operating situation. Let us pre-suppose that American company A has been manufacturing aqueous solutions of formaldehyde at several plants each having about the same production capacity. Let us further assume that contained water in the solutions have been at levels of 10%, 20%, 30%, and 40% well known and accepted as distinct commodities in merchant markets in which A is an established seller. Now comes Canadian party B, one of A's occasional customers for 40% material, suggesting a joint investment in a Mexican plant to become B's essentially captive supplier of formaldehyde for use as a raw material in others of its Central American manufacturing operations. B's take from the Mexican plant would approximate the current capacity of one of A's existing U.S. plants. There is a suitable plant for sale in Mexico, which has been producing 30% material. Marketing lawyers, familiar with Robinson-Patman practice,⁷⁶ will be quick to ask if party B can take a 35% or 45% solution as opposed to the 40% one it has been using and, if so, whether or not party A could easily gear the Mexican plant to produce such a "new" solution? If a 35% or 45% solution is unknown in merchant markets (although easy to manufacture) and B is willing to take 35% material, would a Mexican-produced 35% solution be a "new product" for purposes of NCRPA? There is a physical difference albeit almost fanciful. When Congress looked to "new" products or technologies, "it did not ordain that every "new" product or technology must be remarkably different from existing materials. More importantly, a new product need not be free from competing materials.⁷⁷ Would the answer change if there are other folks in the world who *could* use 35% solutions but A hitherto elected not to solicit purchasers? Seemingly not.

76. Robinson-Patman Act, 15 U.S.C. § 13(a)-(f). This surely does *not* suggest that the author considers § 2(a) of the Clayton Act to be applicable to sales of goods made abroad when they are sold abroad. Section 2(a) is concerned only with commodities sold for domestic resale or consumption.

77. Indeed, the legislative history suggests otherwise. Thus, the Senate report would bless (a) steel venturers' use of "their" pre-existing facilities to use "a new and innovative technology for manufacturing steel;" (b) chip manufacturers who "integrated facilities . . . [hitherto used to] . . . produce chips by . . . optical lithography . . . [to] . . . joint venture using x-ray lithography;" and (c), most tellingly, semiconductor manufacturers' collaboration to upgrade from one and four MB chips to a "16 megabyte chip." S. Rep. No. 51, 103d Cong., 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 527 (June 10, 1993).

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Would a 35% solution produced by a joint venture of A and B at A's former U.S. plant #9, now conveyed to the incorporated A & B joint venture vehicle, be sufficiently "new" to achieve access to the NCRPA "rule of reason standard" in all respects? Seemingly so. Would the answer differ if the A & B joint venture sold 35% material to not only B but also third parties for use in the United States and discriminated in price against B's competitors? For purposes of NCRPA, seemingly not even though there might be a Robinson-Patman count newly subject, of course, to the NCRPA "rule of reason standard."

It is easy enough to say that commercial worth of various products, and the processes which bring them into being, can be gauged only by permitting the marketplace to test materials yielded by a venture, but this proposition would require that every "new product" be tendered in the merchant market *which surely is not demanded by NCRPA*. It is a given that superficially identical organic chemicals or man-made fibers produced by different processes frequently prove to be anything but fungible, having different commercially significant handling characteristics when introduced to process machinery of customers for such intermediates. In the immediately foregoing example, if B takes 100% of the production of the "joint venture" from A's former U.S. plant #9 now owned by the A & B joint venture, there can be no judgement of the marketplace as to whether or not a 35% or 45% solution is a distinct and, therefore, new product. Yet, there will be a *physically* "new product" in terms of A's former approach to manufacturing and B's former approach to procuring intermediate materials. In other antitrust contexts, mere physical differences do not necessarily rate respect as more than fanciful in the absence of a demonstration of demand for the differentiated product.

In any event, while Congress obviously hoped to promote significant innovations by joint production ventures, statutory language, as opposed to legislative history, does not make it clear that joint ventures to produce upgraded versions of tried-and-true products and services are beyond the purview of the Act's benefits so long as what is produced, or the technology used to produce it, is "new" to the facility central to the process! This is underscored by the Senate Judiciary Committee's willingness to accept a twenty-four megabyte chip as new to producers of lesser megabyte chips.⁷⁸ Products and services new to a joint venturer need not be new to the world economy. In its focus on pre-existing facilities, Congress did not evoke a showing that there is

78. *Id.*

something definitely new under the sun.⁷⁹ Therefore, courts hopefully will not honor plaintiffs' demands to require those who would rely on a product or service being "new" to demonstrate its novelty vis-a-vis the would. If new only in the sense of setting up an additional resource, the social virtue would be to add an actual or potential competitor. It is not unusual to demand that those claiming the benefit of an exemption prove its availability. If venturers are required to prove entitlement to the NCRPA "rule of reason standard" by reference to the novelty of a product or service produced at a pre-existing facility or the novelty of the technology employed, they probably will be required to distinguish substance from form. If they are so burdened, there will be a considerable *albeit indirect* disincentive to set up joint production ventures using one or more of the parties' pre-existing facilities for the purpose of producing mere upgrades of products or services lest the venturers fail to carry the burden of proving entitlement to exemption from unmodified application of rules otherwise watered by the NCRPA "rule of reason standard." However, let it be said that Congress' belief that a twenty-four megabyte chip is "new" compared to a one or four-megabyte chip is a nice start for venturers willing to gamble on mere upgrades being sufficiently "new."

III. NCRPA Rule of Reason

Are availabilities of the NCRA "rule of reason standard" as modified by NCPA and limitation of damages matters of concern in a real world? "Rule of Reason" is an antitrust term of art usually having meaning *only* in the context of judicial applications of §§ 1 and 3 of the Sherman Act and their state analogues. The mere organization or existence of a joint venture for purposes other than those which are fairly and clearly anticompetitive has *never* been characterized as offensive *per se* to the Sherman Act or any other federal antitrust norm. Congress knew that no production joint venture had been held offensive *per se* to the Sherman Act.⁸⁰ Thus, a *quick* reference to NCRPA's "rule of reason standard" might seem to suggest that its principal contribution is

79. S. REP. NO. 51, 103d Cong., 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. 725 (June 10, 1993), is quite charitable in this respect. While not impressed with a plant that merely permits production "more efficiently or cheaply" than existing facilities, examples run to both use of techniques new to venturers and production of upgrades "new" to venturers' product lines. *Id.* at 727. The House Judiciary Committee wrote to the same effect. H.R. REP. NO. 94, 103d Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 176.

80. "Under current law, production joint ventures are generally subject to rule-of-reason analysis" S. REP. NO. 51, 103d Cong., 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 729 (June 10, 1993).

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redundancy, in terms of the 1993 Act's "findings," purely for "clarification."⁸¹ The Senate Judiciary Committee indulged an unobjectionable incantation to preserve "rule-of-reason" analysis for production ventures.⁸² From this it would be permissible to infer that the principal real contributions of NCRPA lie in the conditional detrebling therapy as well as in inducing a certain paranoia in possible private plaintiffs concerning their potential for being assessed the full costs of unsuccessful prosecutions. If these were the sole "benefits" of NCRPA, it would be appropriate to ignore its "rule of reason standard" and to proceed immediately to develop meaningfulness in limitation of liability and allocation of costs. But such is not the case. The quick appraisal would be incorrect and the inference fallacious.

A. "Rule of Reason Standard"

The NCRPA "rule of reason standard" is not a mere clarification. The standard's language must be considered:

In *any* action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of *any person* in *making* or *performing a contract* to carry out a joint venture shall not be deemed illegal *per se*; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets. For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent it is appropriate in the circumstances.⁸³

NCRPA clearly imposes its "rule of reason standard" on much more than the mere organization and operation of ventures defined in NCRA as amended by NCPA. The standard mandates "relevant factors" for rule of reason analyses of persons' conduct under *all* implicated antitrust laws and strongly orients *but does not mandate* fact finders to consider global markets. However, consider the definition of "antitrust laws" set forth in NCRPA.

The NCRPA rule of reason does not address simply §§ 1 and 3 of the Sherman Act. Anomalously, the NCRPA rule of reason implicates federal statutes to which *per se* formulae are quite foreign (see, for example, §§ 2, 3 and 7 of the Clayton Act as well as "unfair methods of

81. NCPA § 2(a)(3).

82. S. REP. NO. 51, 103d Cong., 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 729 (June 10, 1993).

83. NCRA, 15 U.S.C. § 4302 (emphasis added).

competition" made unlawful by § 5(a)(1) of FTCA). The principal thrusts of Clayton §§ 2 and 3 are directed toward the activities of sellers in the domestic marketplace although buyers have some exposure and export trade may be implicated by sub-parts of § 2. Section 7's principal thrust is at the acquisition of significant assets. Nothing in Clayton §§ 2 and 3, or FTCA § 5(a)(1) focuses peculiarly on joint ventures. Of these, only Clayton §§ 2(a), 2(f), 3, and 7 demand some proof of the probability of competitive injury. None of them demand proof of an anticompetitive purpose. The standard itself explicitly implicates state laws "similar" to federal ones as defined in NCRPA and does so without providing a criterion for marking similarity. Thus, various states' "little FTC Acts," essentially collections of early FTC precedent, are as subordinated to the NCRPA "rule of reason standard" as are "little Sherman Acts" and idiosyncratic state antitrust statutes. What of antitrust rules that do not dictate any focus whatsoever on either purpose or competitive injury?⁸⁴ Consider the breadth of FTC consumer protection precedent as it focuses on "unfair methods of competition."⁸⁵ Assuming that there is a valid policy ground for cutting NCRPA joint ventures a break under, for example, §§ 2, 3, and 7 of the Clayton Act, a policy not explained by the pertinent committees, what can be the principled basis for undercutting FTC precedent protecting children from lottery merchandising?

So much for "clarification." These not so rhetorical questions also suggest why great pains are taken in this Article to refer to the "rule of reason standard" set forth in NCRPA as distinct from the rule of reason classically associated with §§ 1 and 3 of the Sherman Act. Only under § 1 of the Sherman Act and various state statutes identical or substantially similar to it have courts characterized certain species of conduct as offensive *per se*. Joint ventures, production or otherwise, never have been characterized as offensive *per se* to the Sherman Act. It must be a given that the existence of a joint venture or other combination is an element of proof in a Sherman § 1 (or § 3) case. Yet "antitrust laws" is a term NCRPA liberally defines to embrace not only the Sherman Act and import-oriented antitrust provisions of the Wilson Tariff Act (which are similar to the Sherman Act) but also the Clayton Act and FTCA § 5 "to the extent that [FTCA § 5(a)(1)] . . . applies to

84. See, e.g., Robinson-Patman Act, 15 U.S.C. § 13(c), (d), (e).

85. And, by all means, do not omit considering NCRPA's deliberate omission of FTCA § 5(a)(1)'s address to "unfair . . . acts or practices," which, although it should be considered by antitrusters in context of *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244-45(1972), also has a considerable consumer protection dimension.

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unfair methods of competition“ that are operative whether or not there is a conspiracy or combination.⁸⁶ NCRPA makes no distinction among legal, equitable, administrative, and criminal applications of the defined “antitrust laws.” Similarly, there is no distinction between administrative remedies immediately available to the FTC staff and matters originally cognizable by courts. There is no explicit pretense that any portion of FTCA is to be regarded as one of the “antitrust laws“ for purposes other than NCRPA, although all FTCA “unfair methods of competition“ are within the NCRPA address to “antitrust laws“ — even the precedent concerning consumer protection. The author is quick to admit that ETCA similarly embraced the “unfair methods of competition“ language of FTCA (1) as one of the “antitrust laws“ for purposes of the *somewhat* shielding “Certificates of Review“ contemplated by ETCA Title III⁸⁷ and (2) in the jurisdiction-affecting ETCA Title IV. From this, the author infers that the omission of “unfair or deceptive acts or practices“ from NCRPA’s restriction of FTCA’s sweep is deliberate albeit unexplained.⁸⁸

The overall effect of the NCRPA “rule of reason standard,” in the context of the definition of “antitrust laws,” is remarkable. For example, most substantive provisions of the Clayton Act condemn particularized species of conduct without necessary reference to actors’ purposes⁸⁹ and some Clayton proscriptions dispense with the need to prove anti-competitive effects.⁹⁰ Yet, excepting only §§ 7 and 8 of the Clayton Act, no substantive provisions of the Clayton Act have any great potential relevance to the formation and operation of joint ventures generally, let alone those defined by NCRPA. It goes without saying that FTC jurisprudence is not marked with great respect for the rule of reason as is known to the Sherman Act. The Supreme Court has encouraged FTC concern with conduct that represents only an incipient violation of antitrust laws writ large.⁹¹ Nonetheless, if the NCRPA “rule of reason standard“ is applicable to challenged conduct, prosecutors of FTCA “unfair methods of competition,” Clayton, and Sherman Act

86. NCRA, 15 U.S.C. § 4301(a)(1).

87. ETCA, 15 U.S.C. §§ 4021, 45(a)(3).

88. The ludicrous NCRPA effect on early FTC consumer protection is not so glaring in ETCA Title III by reason of the detail that must be indulged by *applicants* for Certificates of Review, but then ETCA did not include the FTC in the process of reviewing applications for CORs. *See* ETCA, 15 U.S.C. § 4016(a).

89. *See* 15 U.S.C. §§ 12, 13, 18, 19 (1988 & Supp. V 1993).

90. *See* 15 U.S.C. § 12(c), (d), (e).

91. *See, e.g.,* FTC v. Brown Shoe Co., 384 U.S. 316, 320-22 (1966) in context of FTC v. Sperry & Hutchinson, 405 U.S. 233 (1972).

theories will be in the same boat. All of these prosecutors will be burdened to make out a case in the context of the "rule of reason standard" including anti-competitive effects in relevant R & D or production markets with Congress having a bit more than hinted that the relevant geographic market in which to judge "capacity" is global.⁹²

NCRPA's buckshot approach differs dramatically from what now seem rifle shot provisions implicit in the Sherman and FTC Act jurisdictional tests affected by ETCA Title IV⁹³ as well as the substantively-oriented but administratively-controlled availability of a Certificate of Review (COR) under ETCA Title III.⁹⁴ Unlike the approach adopted in ETCA Title III (which also burdened prosecutors of not only federal but also state "antitrust" theories), the NCRA and NCPA approaches have worked effective albeit indirect amendment of all "antitrust laws" in so far as they otherwise would apply to the formation and everyday activities of joint ventures oriented to *purposes* blessed by NCRPA.

Assuming a jurisdictional nexus, the point of classic *per se* condemnations⁹⁵ under § 1 of the Sherman Act is to relieve prosecutors from developing the malign purposes of the actors, or the highly probable anti-competitive consequences of their conduct, in connection with price stabilization and other well-recognized forms of market rigging in *unexceptional industries* with which courts consider that they have had considerable experience.⁹⁶ The "performing" language of NCRA's § 3, unchanged by NCPA, provoked a question as to whether or not it undid *per se* doctrines to the degree they ordinarily impact licensing of venture-developed technology. The question of whether or not NCRA opened the barn door in the case of, e.g., phony brokerage applications of § 2(c) of the Clayton Act⁹⁷ was interesting but not as glaringly important. The effect of NCRPA, as it *implicitly* invites marketing by a qualifying joint venture, heightens interest concerning the effect on addresses of §§ 2⁹⁸ and 3⁹⁹ of the Clayton Act to marketing techniques as well as the importance of questions as to how the NCRPA

92. NCRA, 15 U.S.C. § 4302.

93. 15 U.S.C. §§ 6a, 45(a)(3) (1988 & Supp. V 1993).

94. ETCA, 15 U.S.C. §§ 4011-4015.

95. The author regards price-fixing and horizontal market-allocation *per-se* doctrines as "classic" but not tying and group boycott doctrines, which can demand proof of defendant's power and purpose.

96. See *NCAA v. Bd. of Regents, U. of Okla.*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

97. 15 U.S.C. § 13(c).

98. 15 U.S.C. § 13.

99. 15 U.S.C. § 14 (1988).

"rule of reason standard" impacts § 7 of the Clayton Act¹⁰⁰ and FTCA § 5(a)(1).¹⁰¹

B. *Sherman Act Implications*

Remarking on NCRPA, there is little point in dwelling on a chicken or egg problem concerning which of the "rule of reason" or "*per se*" doctrine is the essential expression of § 1 of the Sherman Act. Similarly, in context of the 1993 Act, there is no great virtue in complaining about a history of judicial inclusions within the catalogue of *per se* offenses of conduct economically less threatening than competitors' price-fixing or market allocations. Since Congress saw fit to subject *all* prosecutions of NCRA ventures' qualifying activities to the NCRPA "rule of reason standard," no great time and space need be devoted to distinguishing between conduct usually entitled to traditional "rule of reason" analyses under §§ 1 and 3 of the Sherman Act and conduct usually characterized as offensive *per se* to the Act. Reflection concerning how "relevant factors" commended for use by NCRPA adjudicators affect statutes *other* than the Sherman Act will make it very clear that the 1993 Congress indulged more than psychic therapy. Nonetheless, some address to Sherman § 1 decisions is apropos for purposes of background.

1. *Section 1 of the Sherman Antitrust Act.*—Focusing on § 1 of the Sherman Act before there was an ETCA or NCRPA, it goes without saying that prosecution *always* postulates a joint venture of *some sort*. Section 1 addresses restraints on trade effected by "contract, combination . . . or conspiracy,"¹⁰² and the existence of one of them is a jurisdictional fact. Assuming that a combination is admitted or proven, a traditional "rule of reason" prosecutor — if unassisted by precedent confirming the clear availability of a *per se* characterization of the conduct in question — has the burden of establishing an anti-competitive principal purpose of those alleged to have agreed on a course of conduct *or* the probability of the conduct's adverse effect on competition.¹⁰³ Additionally, if the prosecutor is a private person proceeding under §§ 4 or 16 of the Clayton Act,¹⁰⁴ he or she must establish the injury to "business or property" experienced or to be experienced by the plaintiff.

100. 15 U.S.C. § 18.

101. 15 U.S.C. § 45(a)(1).

102. 15 U.S.C. § 1.

103. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238-39 (1918).

104. 15 U.S.C. §§ 15, 26 (1988 & Supp. V 1993).

Although a more recent decision of the Supreme Court may have changed the ultimate burden on triers of fact by a hair,¹⁰⁵ Justice Brandeis' opinion in *Chicago Board of Trade v. United States* continues to be the leading elucidation of the rule of reason:

The true test of legality is whether the restraint imposed is such as merely regulates and *perhaps thereby promotes competition* or whether it is such as *may suppress or even destroy competition*. To determine that question the court must ordinarily consider the facts peculiar to the business, . . . its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and *probable*. The history of the restraint, . . . the purpose or ends sought to be attained, are all relevant This is not because good intention will save an achieved objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to *predict consequences*.¹⁰⁶

The Chicago Board arrangement entailed limited price freezes measured in hours or weekends as incidents of a larger self-regulatory scheme among persons otherwise competitors in the grain pits. The purpose was to provide an even playing field in the sense of competing commodities traders' access to knowledge of pertinent commodities' market prices and availabilities.¹⁰⁷

Assuming an absence of joint venturers' anticompetitive purpose, Brandeis guided us to look beyond immediate effects to the *probability* that a restraint would come to injure competition.¹⁰⁸ This served a later epitomization to the effect that the Sherman Act is predicated upon a conviction that "unrestrained interaction of competitive forms will yield the best allocation of . . . resources, the lowest prices, the highest quality

105. Nat'l Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 686-96 (1978).

106. *Chicago Bd. of Trade*, 246 U.S. at 238.

107. The decades-later *Professional Engineers* decision mayhap unconsciously refined the purpose of the rule of reason analysis to determination of whether the restraint in question has the *net effect* of promoting or suppressing the competitive process. Nat'l Soc'y of Prof. Engineers, 433 U.S. at 688-96. Before *Professional Engineers*, it was common to rely on *Chicago Board* for the short-hand proposition that the rule of reason condemns only arrangements that "on balance" are anti-competitive. It continues arguable that *Professional Engineers* does not prejudice the essentially neutral restraint that improbably promotes or suppresses the competitive process. In any event, decisions after *Chicago Board* tend to adhere to the view that a rule of reason analysis condemns an agreement that has the purpose or the *likely effect* of substantially reducing competition. There is no broad adherence to a philosophy tolerating restraints prejudicing competition because they are complemented by aspirations to achieve some higher good. *Professional Engineers*' concern with a net effect did not alter the theme. Indeed, language in the 1984 *NCAA v. University of Oklahoma* decision reflected a disposition to honor Brandeis' approach. *NCAA v. U. of Okla.*, 468 U.S. 85.

108. See *supra* text accompanying note 106.

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and the greatest material progress.”¹⁰⁹ Has Brandeis’ rule of reason been modified by NCRPA?

One might infer that the NCRPA “rule of reason standard” narrows litigatory focus to actual effects on competition. This has to do with the command that “factors” to be considered include “effects on competition.”¹¹⁰ The author has no such illusion and urges that others avoid it. He submits that the invocation by NCRPA’s “rule of reason standard” of “all relevant factors affecting competition” and its prior reference to judging conduct “on the basis of its reasonableness” do not narrow the *Chicago Board* approach. Factors “affecting competition” inevitably include not only venturers’ purposes and the actual impacts of their conduct but also the *probable* effects on pertinent markets of the R & D or production venture. Actual effects are included among factors to be considered but the inclusion is explicitly non-limiting. While it is inescapable that NCRPA *also* orients fact finders to actual “effects . . . in . . . relevant . . . markets,” equally inescapable is that Congress took care to indicate that the total analysis is “not limited” to such effects in R & D and production markets.¹¹¹

Resort to legislative history (which, the author suggests, is not necessary at this juncture), leaves no doubt that Congress’ particularity with the NCRA “rule of reason standard” was intended to guide courts “in focusing on the major *potential* anticompetitive and procompetitive effects of” comprehended ventures.¹¹² The pertinent committees did *not* suggest that significant anticompetitive effects can be offset by good intentions concerning (or good effects in) contexts other than competitive. NCPA did not change the NCRA “rule of reason standard” in particulars suggesting a change of mind in the nine years since the latter’s passage. Those disquieted by the potential for ordaining a rule of reason that burdens courts with identifying desirable societal goals (other than the promotion of competition), and weighing such goals against injuries to the competitive process, will not be happy with the legislative history’s allusions to *economies of scale*.¹¹³ Unhappiness

109. *No. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

110. *See supra* text accompanying note 83.

111. *See supra* text accompanying note 83.

112. Joint Explanatory Statement of the Committee or the Conference, H.R. Rep. No. 1044, 98th Cong. 2d Sess. 9.

113. “Agreements that go to the heart of competition, such as . . . [the preclusion of] . . . parties from competing with the venture or accomplishing objectives similar to the venture independently, should be reviewed carefully to determine if they have a valid efficiency justification.” S. REP. NO. 51, 103d Cong. 1st Sess., *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) 725, 729 (June 10, 1993). But, contrast this thought with an observation that a process or technology “will not qualify as ‘new’ solely by virtue . . . [of producing] . . . a product more

may be leavened by recognition that, on an explicit level, the NCRPA "rule of reason standard" neither commends nor otherwise purports to authorize courts to balance other values against the protection of the competitive process. However, the NCRPA "rule of reason standard" makes very clear what NCRA only implied; i.e., courts are to be constantly aware that we now live in a global economy.¹¹⁴ Such awareness, of course, does not undo either the wealth of precedent concerning subject matter jurisdiction under the Sherman Act¹¹⁵ or need, in the event non-importing foreign commerce of the United States is involved, to respect the effect of ETCA's Title IV on courts' Sherman Act jurisdiction.¹¹⁶

2. *Import of NCRPA Definitional Exclusions & Qualifications.*—What of conduct ordinarily offensive *per se* to § 1 of the Sherman Act? No labeled inroads are made on *per se* doctrines but nonetheless there are inroads! Consider, e.g., price-restricted licenses among qualifying NCRPA venturers otherwise subject to the *per se* rule of *United States v. Line Material*.¹¹⁷ The manner in which NCRPA qualifies "exclusions" of various activities¹¹⁸ from the definition of "joint research and development venture" is provocative both in isolation and, more appropriately, in the context of the basic "joint venture" definition's liberality. NCRPA § 2(b) is concerned with limiting "activities" of defined venturers. However, it has other implications. Thus, while NCRPA § 2(a)(6) never mentions marketing,¹¹⁹ § 2(b) not only mentions marketing but deals with it by seeming to constrict it.¹²⁰

efficiently or cheaply by using existing faculties." *Id.* at 727. The first sentence is in the concluding paragraph of a reverie concerning a solution for "antitrust uncertainty."

114. NCRA, 15 U.S.C. § 4302.

115. "[W]orldwide capacity . . . [is not intended to] . . . be accorded any special weight in the balancing of all relevant factors. In some cases, worldwide capacity . . . may have little or no relevance" to market definition. H.R. REP. NO. 94, 103d Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 176, 191-92.

116. 15 U.S.C. § 6a.

117. *United States v. Line Material*, 333 U.S. 287 (1948).

118. NCRA, 15 U.S.C. § 4301(b).

119. *See supra* text accompanying note 48.

120. NCRA, 15 U.S.C. § 4301(b)(2). Note, in House Judiciary Committee Report No. 94 to accompany H.R. 1313, a disclaimer of intent to include "marketing collaboration as a type of activity eligible for . . . protections of . . . NCRA with proper disclosure." H.R. REP. NO. 94, *reprinted in* 1993 U.S.C.C.A.N. at 187. However, what the same committee styled a "marketing exclusion" is set forth at NCPA § 2(b)(2) and it looks to not only marketing of intellectual property but also "distribution among the parties of that produced by the venture." NCPA § 2(b)(2) (amending 15 U.S.C. § 4301(b)(2)).

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Note that most of the eight NCRPA § 2(b) exclusions are qualified and that all but the limitation on use of “existing facilities” deal with activities that can occasion a brush with antitrust principles. Potencies for the explicit qualifications to accommodate venturers’ evasion of otherwise strong antitrust Act policies, or otherwise to burden prosecutions under § 1 of the Sherman Act, are considered at this point.

a. Nature of Exclusions.—The *first* exclusion, set forth at NCRPA § 2(b)(1),¹²¹ qualifiedly addresses competitors’ exchanges of costs, prices, and other sensitive data. The exclusion relates to *United States v. Container Corporation*¹²² and various DOJ policy statements.¹²³ The principal thrust of the *second* exclusion is qualifiedly to prohibit conduct “restricting, requiring, or otherwise involving the marketing, distribution or provision by any . . . party to . . . [the] . . . venture of any product, process or service” other than the distribution “among the parties . . . of a product, process or service produced by” the venture or marketing its proprietary data.¹²⁴ It provokes thought of not only allocative, tying, and resale price maintenance *per se* doctrines under § 1 of the Sherman Act but also the strictures of § 3 of the Clayton Act. Focusing on distribution of a venture’s production “among” the venturers, can the distribution be for resale? There is no restraint on resale. Neither is there a restraint on the agreement for distribution “among” the parties providing for how resale is to be accomplished — if it is — except as the fourth exclusion unqualifiedly bans market allocations.

The *third* exclusion also is qualified. It excludes restraints imposed in connection with transfers of “inventions, developments, products processes or services” generated *outside* of the agreed venture as well as restraints on other R & D efforts of parties to the venture.¹²⁵ This has more than an occult relationship to various *per se* applications concerning not only tying in intellectual property areas but also technology transfers generally. The *fourth* exclusion, unqualified, simply excludes “allocating a market” with a competitor. Presumably, this reads on territorial, customer, and use allocations often treated as offensive *per se* to § 1 of

121. See *supra* text accompanying note 55.

122. *United States v. Container Corp.*, 393 U.S. 333 (1969).

123. See, e.g., *U.S. Dept. of Justice Antitrust Guide Concerning Joint Ventures* [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 992 (Special Supp.), at 6 (Dec. 4, 1980); *U.S. Dept. of Justice Antitrust Guide for International Operations*, reprinted in [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 799, at E-1 (Feb. 1, 1977).

124. NCRA, 15 U.S.C. § 4301(b)(2).

125. 15 U.S.C. § 14 (1988).

the Sherman Act. However, it complicates matters in the patent licensing area to the degree it implies distrust of field of use restraints. The *fifth* exclusion qualifiedly looks to production data exchanges of the sort in *American Column*.¹²⁶ The *sixth*, also qualified, looks primarily to mutually arranged production quotas. This qualification somewhat undoes the offensive *per se* categorization of production quotas in that there is an obvious if unintended invitation to use the venture's production capacity as the venturers' balancer to avoid overwhelming markets. Unqualified discouragement of the use of pre-existing facilities for "new" products or technologies is the *seventh*, while the *eighth* is a qualified catch-all to avoid embarrassment by non-germane restrictions.

Although the NCRA § 2(b) qualifications can vary, there are common themes. Not all of the excluded activities are necessarily characterized as illegal by another statutory scheme. Yet, the breadth of the exclusions is such that particular manifestations of comprehended conduct frequently would place combining actors in at least the occasion of violating § 1 of the Sherman Act or other statutory norms. Each qualification operates to permit the undoing of the exclusion it modifies when doing so is germane to serving one or more of the acceptable purposes delineated at NCRA § 2(a)(6). Accordingly, there are repeated potencies for remitting venturers' otherwise suspicious conduct to the NCRA "rule of reason standard."

Availability of the qualifications suggests a judicial procedure somewhat analogous to those involved in establishing the "cost justification" and "meeting competition" defenses to price discriminations otherwise prohibited by § 2(a) of the Clayton Act¹²⁷ or to claiming exemptions from the general prohibitions of the Securities Act of 1933. Those who would claim the benefit of the NCRPA § 2(b) qualifications inevitably will have the burden of proof.¹²⁸ While the "Robinson-Patman" defenses are absolute (even though the shielded discrimination is injurious to competition), the qualifications to the NCRA § 2(b) exclusions are not absolute. All they do is entitle comprehended conduct to the relative safety of NCRPA sheltered but not altogether safe harbors. Conduct permitted by a qualification, along with all other indulgences allowed to a venture defined at NCRPA § 2(a)(6), is nonetheless exposed to prosecution by reference to the NCRA "rule of reason standard."¹²⁹

126. *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

127. 15 U.S.C. § 13(a), (b).

128. *See, e.g., United States v. Borden Co.*, 370 U.S. 460 (1962) (cost justification); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951) (meeting competition).

129. "Section 2(b) excludes classic cartel-like behavior by participants in a joint R&D venture

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Do the qualifications present potencies for undoing *per se* doctrines in terms of conduct indulged on behalf of defined ventures? Response demands detailed consideration of NCRPA § 2(b).

b. Competitors' Data Exchanges.—Thus, the text of NCRPA § 2(b)(1) excludes “(1) exchanging information among competitors relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service if such information is not reasonably required to carry out the purpose of such venture”¹³⁰ from activities permitted a “joint research and development venture” otherwise within NCRPA § 2(a)(6). The basic exclusion seems unconcerned about data exchanges among venturers who are not literal competitors even though they are potential competitors. This is curious given the government’s concerns in other contexts with folks perceived at the edge of a market. In any event, the qualified exclusion demands attention to not only precedent but also DOJ policies concerning data exchanges among *actual* competitors.

*United States v. Container Corporation of America*¹³¹ dealt with competitors’ sporadic exchanges of price data without an agreement to adhere to any pricing mode. Defendants accounted for approximately 90% of corrugated containers marketed from plants in the southeastern United States. The price exchange was *found* “to stabilize prices though at a downward level.”¹³² Justice Douglas wrote for four of a majority of five. He opined that “[t]he continuation of some price competition is not fatal to the Government’s case. The limitation or reduction of price competition brings the case within the ban, for as . . . held in . . . Socony-Vacuum . . ., interference with the setting of price by free market forces is unlawful *per se*.”¹³³ Vital context includes the fact that Justice Fortas, supplying the fifth vote necessary to reinstate a complaint dismissed by a trial judge, concurred in the judgment on the specific understanding that the majority opinion did *not* hold that competitors’ exchanges of price data were offensive *per se*. However, Justice Fortas opted for a half-way house that such exchanges, accompanied by proof of substantial dampening of price competition, definitively made out a rule of reason case in consequence of which there

from coverage under the Act.” H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S.C.C.A.N. 3132.

130. NCRA, 15 U.S.C. § 4301(b)(1).

131. *United States v. Container Corp.*, 393 U.S. 333 (1969).

132. *Id.* at 337.

133. *Id.* at 338.

was "no need to consider the possibility of a *per se* violation."¹³⁴ Writing for the dissenters, Justice Marshall nicely stated the need for a full rule of reason inquiry.¹³⁵

Agreeing that competitors' naked agreements to effect price stabilizations are and should be regarded as offensive *per se* to § 1 of the Sherman Act, it is far from clear that competitors' mere exchanges of data concerning actual costs and prices are inimical to free markets. Does not perfect competition presuppose perfect knowledge? While it would seem occasional data exchanges — without more — are no more the occasion of violations than any other contact permitting competitors to learn of one another's approaches to the marketplace, there is little doubt that the DOJ regards competitors' exchanges of *current* pricing as a *bete noir* of sorts.

In contexts other than NCRPA, DOJ personalities have expressed great concern about price-sensitive data exchanges among persons otherwise competitors in the context of their joinder as applicants for a COR under ETCA Title III. The official form initially pertinent to application for a COR contained a special "note" discouraging data exchanges and suggesting that, if data were to be exchanged, they be processed through an unrelated third party.¹³⁶ Presumably, the third party would perform some sort of a sanitizing process.¹³⁷ DOJ sensitivity translated this into clauses qualifying CORs, presumably pursuant to ETCA § 303(b)(3),¹³⁸ to require minimization of data exchanges. The effect of these clauses is not unlike NCRPA § 2(b)(1).

In any event, NCRA § 2(b) gives vitality to Justice Marshall's dissent in *Container Corporation* and, per NCRPA § 3, data exchanges among otherwise qualified joint venturers "reasonably required" for a permitted NCRPA purpose have escaped Justice Fortas' willingness to accept data exchanges followed by price stabilization as conclusively violative of Sherman § 1. Pursuing an admittedly inexact analogy to exemptions practice in venues such as federal regulation of new securities issues,¹³⁹ venturers who wish to take advantage of the qualification to

134. *Id.* at 339.

135. *Id.* at 340. Note that Justice Marshall was one of a majority later remitting a resale price maintenance case to a rule of reason analysis when plaintiff, terminated in the wake of a competing distributor's complaints about price-cutting, failed to prove that an agreement between the complainant and the master marketer focused on resale pricing. See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

136. U.S. Dept. of Commerce Form ITA 4093P (5/83), D. Unkovic, J. Maher & N. LaMont, *International Opportunities & the Export Trading Company Act of 1982*, B-2202 (1984).

137. See, e.g., *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

138. ETCA, 15 U.S.C. § 4013(b)(3).

139. The availability of a "securities" or "transaction" exemption is a defense to private suits

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NCRPA § 2(b)(1) must anticipate — by prudently preparing a “pro-competitive” brief when forming a defined venture — ultimately having to prove that anticipated data exchanges were “reasonably required” to serve the Congressional-approved purposes set forth at NCRPA § 2(a)(6).¹⁴⁰ This does *not* suggest that NCRPA § 2(b)(1) frees otherwise competing venturers to use NCRPA as a cover for collective albeit indirect fixing of prices they individually charge or pay for goods or services either beyond or comprehended by the venture.

c. *Venturers’ Restrictions Inter Se.*—NCRPA § 2(b)(2) excludes “entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing distribution or provision by any person who is a party to such venture of any product, process, or service, other than —” *distribution* among the parties, pursuant to their permitted agreement, of “a product, process or service produced” by the venture; *marketing* of proprietary data developed by the venture *per* written agreements pre-dating NCPA; or licensing or transferring intellectual property *per* leave of NCPA. So, in effect, NCRPA is retroactive in at least one particular. Unlike §§ 2(b)(1) and (3), the *second* qualified exclusion does not invoke a reasonability standard. Whereas NCRA § 2(b)(1) reads on exchanges of data among “competitors” and is unconcerned with such exchanges among non-competitors, the basic exclusion in § 2(b)(2) looks to restrictions *inter se* agreed upon by parties to a defined venture. By definition, § 2(b)(2) does *not* exclude the imposition of restraints on third parties and, if such restraints serve licensing under § 2(a)(6) and survive other exclusions, they are subjected to only the NCRA § 3 rule of reason analysis!

Once one overcomes the inelegance of the § 2(b)(2) “exclusions,” one finds that § 2(b)(2)(A) is a fairly forthright invitation to capitalize upon the fruits of the joint venture by negotiating restrictions on venturers’ respective discretions to use or market products, processes, and/or services produced by the venture. Similarly, §§ 2(b)(2)(B) and (C) permit restrictions on *how* venture technology is marketed. In NCRA, Congress neither explicitly afford safe-harbors for joint procurement, production, and/or marketing ventures in and of themselves

under § 12(1) of the Securities Act of 1933, 15 U.S.C. § 77(1) (1984).

140. Such homework should proceed with sensitivity to Congress’ intent that the phrase “reasonably required” imports an “objective standard and thus does not refer to the subjective opinion of the participants, but rather to whether the particular circumstances at issue establish the need to exchange the type of information in question and to do so in the planned manner.” S. REP. NO. 427, 98th Cong., 2d Sess. 16, *reprinted in* 1984 U.S.C.C.A.N. 3113.

nor condemned them. There was explicit recognition that such ventures might have "significant procompetitive aspects."¹⁴¹ What do NCRPA § 2(a)(6) and the qualifications to § 2(b)(2) say when they are taken together?

We are taught that statutory construction begins with the statute itself. NCRPA § 2(a)(6) contemplates not only the production of goods and services but research, reductions to practice, development and testing "basic engineering techniques," prosecution of patent applications, licensing of know-how and patents, and testing by or on behalf of a defined venture.¹⁴² There is no limitation on licensees; they can be parties or strangers to the venture. There is no reference to marketing goods and services. Surely Congress could not have contemplated that all fruits of the venture would be consumed by venturers? What beyond the "purposes" identified in § 2(a)(6) is implied by NCRA § 2(b)(2)?

NCRA § 2(b)(2) was focused on permitting marketing of proprietary data.¹⁴³ NCRPA § 2(b)(2) is not so limited. The subsection contemplates "distribution" among "parties" to the venture of non-proprietary products, processes, and services produced by the venture as well as marketing technology jointly developed *before* NCRPA. This is distinguished from agreements restricting commercial conduct re "developments, products, processes or services" developed extrinsic to the NCRPA venture.¹⁴⁴ It is obvious that Congress' purpose included blessing of inter-venturer restrictions on their respective uses of products and services as well as the joint-control of marketing proprietary data developed "through" the venture. Not so incidentally, parties to the formation of a permitted venture are not disqualified from being its licensees. Given the venture's ability to license parties as well as others, it is inescapable that NCRPA permits the imposition of restrictions on parties — even though they are competitors — in much the same way non-parties can be restricted. In effect, Congress blessed parties' allocations *inter se* of the exploitative values of venture developments, products and services, ordaining that such allocations — if challenged — be afforded the NCRPA rule of reason standard. Subsection 2(b)(2)(A)'s permit for inter-venturer agreement concerning "distribution among the parties" is an open sesame for limitations on uses including the marketing by a venturer of a product or service provided by the venture.

141. *Id.* at 15-16, 1984 U.S.C.C.A.N. 3112-3113.

142. NCRA, 15 U.S.C. § 4301(b)(3).

143. *Id.* § 4301(a)(6)(E).

144. *Id.* § 4301(b)(3)(A).

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The subsection can have no other meaning. What, then, of NCRPA § 2(b)(4)?

These freedoms to impose certain restrictions raise a question as to what else normally competing parties to a defined venture can accomplish *inter se*, through agreements or “other conduct” mandating or “otherwise involving” formulation or marketing of venture proprietary data, that otherwise might present significant antitrust difficulties. NCRPA § 2(a)(6) permits collective licensing of proprietary data. There is neither a mandate to license nor a limitation on the terms of licenses nor a compulsion to license persons other than the venturers. On the face of the matter, § 2(a)(6) exists to permit venturers’ collective enjoyment of the fruits of collective investment. Qualifications within NCRPA § 2(b)(2) exist to permit restraints *inter se* on venturers’ marketing the fruits of the venture. How does NCRPA § 2(b)(4) speak to a person otherwise a competitor who is party to the venture? A *per se* prohibition on any and all methods of “allocating a market” would undo not only much of the earlier and later parts of § 2(b). What of venturers’ field of use licensing under U.S. patents? The Legislative history can be discouraging! Explaining what would become NCRPA § 2(b)(4),¹⁴⁵ House Report No. 103-94 reported that it “excludes agreements and conduct allocating any market with a competitor — for example a geographic market, a product, process or service market; or a customer market.”¹⁴⁶ What are field-of-use restrictions if they are not market allocations? A “rule of reason” unanticipated by the solons may be necessary to avoid undoing Congress’ ambition. Traditionally, courts will endeavor to read statutes as internally consistent, particularly when Congress essayed what it deemed a remedial course. An easy out is to read “competitor” as a person in addition to those participating in the venture. The stem of § 2(a) invites this but, the most obvious significance would be to suggest a narrow reading of § 2(a) — the “purpose” language, to prohibit, via §§ 2(b)(4), engagement in the *direct* allocation of geographic territories and/or other fields of exploitation other than as permitted by § 2(a)(6) as refined by §§ 2(b), (2), and (3). Restated, *NCRPA § 2(b)(4) can be read as excluding conduct having no purpose other than market allocation while provisions such as those permitting technology licensing can be read to tolerate allocation as an incident to indulging permitted activities.*

145. *Id.* § 4301(b)(4).

146. H.R. REP. NO. 94, 103d Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 176, 191 (emphasis added).

Looking at § 2(a)(6) in isolation, licensing presumably can use "field of use" and other restrictions common to the practice. Parties to the venture are not disqualified as licensees. In effect, qualifications in §§ 2(b)(2) and (3) confirm venturers' collective ability not only to impose "field of use" and other usual restrictions on third party licensees' enjoyment (including use or marketing) of venture data but to divide particularized turf among the venturers. Such restrictions, of course, are intrinsic to the patent monopoly, and NCRPA § 2(b)(2) can be styled as looking to incentivize investment in anticipation of achieving commercially valuable know-how and trade secrets as well as patents. This, then, would serve § 2(b)(4)'s assault on marketing allocations to read on agreements having an allocation as a *principal* purpose whereas field of use restrictions can be regarded as merely incidental to undoubtedly encouraged licensing.

d. Restraints imposed by NCRPA § 2(b)(3).—It is necessary to consider usual Sherman Act interfaces with technology transfers in order fully to assess the message of NCRPA. Before doing so, NCRPA § 2(b)(3) demands abbreviated consideration since it too deals with such transfers. Section 2(b)(3) excludes parties to defined ventures from

entering into any agreement or engaging in any other conduct —

(A) to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes or services *not* developed through, or produced by such venture, or

(B) to restrict or require participation by any person who is a party to such venture in other research and development activities,

that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.¹⁴⁷

Here, we see the "reasonably required" standard used in a narrower fashion than its use in NCRPA § 2(b)(1).¹⁴⁸ NCRPA § 2(b)(3)(A) obviously relates to § 2(b)(4) and other traditional antitrust norms. The point of the qualification to § 2(b)(3) is to permit venturers to stay within the permissive definition at NCRPA § 2(a)(6), even though they knowingly agree on restricting their freedom of action in specified areas otherwise unrelated to the venture *if* their purpose is to protect against

147. NCRA, 15 U.S.C. § 4301(b)(3).

148. *Id.* § 4301(b)(1).

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misappropriation of proprietary data developed by the venture or contributed to it by a party and if, very importantly, the ancillary restraints are “reasonably related” to the overriding purpose. Species of conduct external to a defined venture that can be restrained via § 2(b)(3) are not only transfers of technology developed outside the venture and participations in R & D independent of the defined venture but, curiously, sales of “products, processes . . . [and] . . . services not . . . produced” by the venture. The qualification, in so far as it relates to licensing technology necessarily including trade secrets, seems entirely sensible in that it does little more than perpetuate a common law disposition to relax the ordinary prejudice against a particularized undertaking of restraints to the degree appropriate to protecting the benefit of an otherwise legitimate bargain. However, it is not so easy to rationalize a relaxation of restrictions on the sale of products produced extrinsic to the venture.

3. Quick Look at Patents & Know-How

a. *Without Reference to NCRPA.*—A quick look at patents and know-how in the antitrust crucible is appropriate before looking further to NCRPA § 2(b). Implicit in a patentee’s absolute power to exclude others from making, using, or selling¹⁴⁹ is the power selectively to allow another or others to practice under one or more of the claims allowed by the patent. Power to license is power to permit others to practice only some of the claims allowed by the patent and otherwise to limit licensees’ practice *within* the patent monopoly. A patent holder can be barred from enforcing it against alleged infringers if the holder is provably using the patent to restrain conduct beyond the ambit of the monopoly conferred by the patent.¹⁵⁰ Conduct may be characterized as patent misuse even though it does not come to violate antitrust laws.¹⁵¹ The misuse defense is available even to infringers not directly affected by the proven misuse. Misuse may be equivalent to an antitrust violation and may confer standing for an affirmative claim.¹⁵² Thus, tying unpatented items to sales of patented machinery is offensive *per se* to the Sherman Act if a “not insubstantial” amount of commerce is

149. 35 U.S.C. §§ 261, 271 (1988 & Supp. IV 1992).

150. *Morton Salt Co. v. G.S. Suppinger Co.*, 314 U.S. 488, 492-94 (1942).

151. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140-41 (1969). See criticism of misuse doctrine in Address by C. Rule, Deputy Assistant Attorney General for Antitrust at The John Marshall Law School, 14-20 (on file with publisher).

152. See *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944).

involved.¹⁵³ Ordinarily, in terms of Sherman § 1, licensing by holders who unilaterally determine how patent pies are to be sliced is subject only to rule of reason analyses. Considerable antitrust implications are evoked by doing multilaterally what a patent holder can do unilaterally. Thus, the fact that a product or process is patented does not bless the holder's combination with competitors in order collectively to fix royalties or to allocate markets, or both, although the holder unilaterally may be able licitly to impose not only such restraints on licensees but to restrict the prices at which they sell patented products.

Since a holder is free to license on a territorially restricted basis within the United States, it is permissible for a holder to refuse to license save on its unilaterally determined terms that effectively allocate geographic markets within the United States.¹⁵⁴ The same is true of product markets unilaterally allocated through technological "field of use" restrictions.¹⁵⁵ Successful attack, under § 1 of the Sherman Act, on such allocations requires proof of agreement to allocate either by the holder with its actual (or potential) competitors or among the licensees with the holder serving as their conduit. Further, both *G.E.* doctrines¹⁵⁶ survive for which reason a patent holder (a) can negotiate with a manufacturing licensee to the effect that the holder will dictate the price of the licensee's own sale of a product covered by the patent¹⁵⁷ and (b) can organize a distribution scheme whereby the holder dictates prices to be exacted by true agents for the purpose of sale (including agents who receive product on consignments).¹⁵⁸

The *G.E.* decision's leave for a patent holder to set its licensees' prices is narrowly construed¹⁵⁹ and a master marketer's decision to market patented or unpatented goods via stocking agents is one that must respect various antitrust ground rules.¹⁶⁰

153. See *International Salt Co. v. United States*, 332 U.S. 392 (1947).

154. *Ethyl Gas Co. v. United States*, 309 U.S. 436, 456 (1940).

155. *Benger Labs., Ltd. v. R.K. Laros Col.*, 209 F. Supp. 639 (E.D. Pa. 1962), *aff'd per curiam*, 317 F.2d 455 (3d Cir. 1963), *cert. denied*, 421 U.S. 988 (1975).

156. See *United States v. General Electric Co.*, 272 U.S. 476 (1926).

157. *Id.* at 489-90.

158. *Id.* at 488. Uses of the consignment device are far from peculiar to the *G.E.* distribution model. See, e.g., *Simpson v. Union Oil Co.*, 377 U.S. 13, 21 (1964) (dicta); *Mesirow v. Pepperidge Farms, Inc.*, 703 F.2d 339, 341-43 (9th Cir. 1983); *Harwick v. Nu-Way Oil Co.*, 589 F.2d 806, 808-11 (5th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979).

159. *United States v. Line Material Co.*, 333 U.S. 287, 299-304 (1948); *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F.2d 646, 647 (5th Cir. 1944), *cert. denied*, 323 U.S. 726 (1944).

160. *Greene v. General Foods Corp.*, 517 F.2d 635, 652-53 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Roberts v. Exxon Corp.*, 427 F. Supp. 389, 391 (W.D. La. 1977).

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Since *G.E.* relied on the existence of a patent to warrant a federally-conferred monopoly being the basis for a price-restrictive license, desires for protection entertained by proprietors of production know-how (and lesser proprietary data such as knowledge of customers' peculiarities) are not so well protected. Equitable and legal remedies normally available to proprietors of trade secrets are for the purpose of avoiding, or affording damages for, tortious invasions of proprietary rights. There is no legal guaranty against the successful reverse engineering of a trade secret. Even if a trade secret or know-how has been resistant to reverse engineering or another legitimate method of impeaching its proprietary value, it always is subject to a licit second discoverer. Patentees' rights, protected for a defined number of years as society's reward for the inventor's disclosures in the application process, are not subject to destruction by another's independent discovery or reverse engineering. Proprietors of trade secrets maximize value by non-disclosure. Inherent in this is a potency for protection well beyond the limited life of a patent. There is no obvious analogy between the absolute legal monopoly for a term of years enjoyed by the patentee and the *de facto* monopoly of the trade secret, which may last forever or dissolve tomorrow. Indeed, the predicates for patent and trade secret protections are philosophically contrary. The patent system's predicate of inducing disclosure is aimed at discouraging maintenance of trade secrets.

Price restrictions in know-how licenses are not justifiable on the thesis that sustained the *G.E.* price restriction holding. On the other hand, restraints against a know-how licensee's further revelation of data are entitled to rule of reason analyses because they are qualified grants of property as are field of use and geographic restrictions. However, those licensing know-how must be alert to attitudinal problems such as that nicely summed in *A. & E. Plastik Pac. Co. v. Monsanto Co.* in which the Ninth Circuit said, "The critical question in an antitrust context is whether the restriction may fairly be said to be ancillary to a commercially supportable licensing arrangement, or whether the licensing scheme is a sham set up for . . . controlling competition while avoiding the consequences of the antitrust laws."¹⁶¹ They also should recall that the classic characterization of *resale* price maintenance as offensive *per se* to § 1 of the Sherman Act came out of a context in which the proprietor of a trade secret sought to enforce a resale price maintenance agreement against one who knowingly interfered with it.¹⁶² This

161. *A. & E. Plastik Pac. Co. v. Monsanto Co.*, 396 F.2d 710, 715 (9th Cir. 1968).

162. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

contrasts sharply with the protection afforded a price-restricted license, *under a licit patent*, against knowing infringement.¹⁶³

With this background, it is useful to consider various precedents concerning technology transfer. Price restraints saved by *G.E.* from per se condemnation have been remarked. It is useful to state what *G.E.* does not protect. *G.E.* does not permit the patent holder to fix prices of unpatented products of patented processes or machines.¹⁶⁴ *G.E.* does not permit fixing *resale* prices.¹⁶⁵ Neither does it permit the holder to be a participant in a concert of holders or licensees, or both, to fix prices.¹⁶⁶

The Supreme Court, in *Line Material*,¹⁶⁷ refused to extend *G.E.*'s teaching concerning a patent holder's unilateral imposition of a price-fix on a manufacturing licensee to a situation involving price-restrictive sublicensing by cross-licensees individually holding patents for an electrical device and an improvement thereon. The improvement patent could not be practiced without infringing on the device patent. While cross-licenses were royalty-free to the respective holders, they granted the improvement patent holder exclusive rights to sub-license third parties on a price-restrictive basis, which restrictions the device patent holder agreed to respect. This joinder, "to maintain prices on their several products," was held to be "unlawful per se."¹⁶⁸

Patentees' unilateral impositions of output ceilings on licensees are subject only to rule of reason analyses¹⁶⁹ but being a party to or a conduit for multilateral adoption of quotas is not shielded by patents.

b. Effects of NCRPA.—Tying has been characterized a *per se* offense if the seller uses a patent position to compel the purchase of other patented or unpatented goods or services as a condition of access to a patent monopoly. Yet, it seems inescapable that a qualified NCRA venture's ties *via* a license from the venture was accorded the NCRA rule of reason, and NCPA has not changed things. The DOJ's long

163. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, *aff'd on reh'g*, 305 U.S. 124 (1938).

164. *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F.2d 646, 647 (5th Cir. 1944), *cert. denied*, 323 U.S. 726 (1944).

165. *Ethyl Gas Corp. v. United States*, 309 U.S. 436 (1940); *United States v. Invis Lens Co.*, 316 U.S. 241 (1942).

166. *United States v. Line Material Co.*, 333 U.S. 287 (1948).

167. *Id.*

168. *Id.* at 293-97, 305-15.

169. *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 226 (D. Del. 1953), *aff'd on other grounds*, 351 U.S. 357 (1956); *Q-Tips, Inc. v. Johnson & Johnson*, 109 F. Supp. 657 (D.N.J. 1951), *cert. denied*, 347 U.S. 935 (1954), *modified* 207 F.2d 509 (3d Cir. 1953).

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antiquated 1980 *Antitrust Guide Concerning Research Joint Ventures*¹⁷⁰ was oriented to minimizing “fears, possibly unwarranted, of exposure to antitrust attack.”¹⁷¹ In the Introduction to the Guide, the DOJ remarked that

it is useful to distinguish between three different kinds of effects on competition. The first is the effect that the essential elements of the joint research project would have in lessening existing and potential competition between the participating firms. If the joint activity has some probably and significant (non de minimis) anticompetitive effect, the question becomes whether the venture is, on balance, pro-competitive, taking into account all aspects economically and technically necessary for its success. Second, the project agreement, or other related agreements between the participants, may contain specific restrictions that restrain competition. If these restrictions are not unreasonably ancillary to the essential elements of the project or are of undue scope or duration, they, too, will present major antitrust concerns. Finally, limitations on access to participation in joint research or to the fruits of that research may present antitrust problems if the effect of those limitations is to create or abuse market power in the hands of the joint venturers. Each of the three kinds of effects will be considered in turn.¹⁷²

Addressing “collateral restraints (non-patent),” the DOJ conceded that their “legality . . . is largely a function of the proximity of their relationship to the essential purposes of the joint research venture, as well as their not having excessive scope or duration.”¹⁷³ The Guide’s examples of usually tolerated “closely related collateral restraints” included “the obligation to exchange any results from research undertaken previously in the field of the joint research, the duty not to disclose results of the joint research to outside parties until patents are obtained, and the division of particular aspects of the research between the venturers.”¹⁷⁴

To some degree, NCRPA § 2(a)(6) and §§ 2(b)(2) and (3)¹⁷⁵ are authoritative restatements of the *Guide*’s position but NCRPA goes much further as it brings products and services into the mix. The *Guide*

170. U.S. Dept. of Justice *Antitrust Guide Concerning Research Joint Ventures*, reprinted in [July-Dec.] *Antitrust & Trade Reg. Rep.* (BNA) No. 992 (Special Supp.) (Dec. 4, 1980) [hereinafter *Research Joint Ventures*].

171. *Id.* at 2.

172. *Id.* at 3.

173. *Id.* at 5.

174. *Id.* NCRA, 15 U.S.C. § 4301(a)(6).

175. NCRA, 15 U.S.C. § 4301(b)(2), (3).

recognized that various restraints are "generally reasonably necessary" for conducting joint research and ordinarily would not have a "significant anticompetitive impact."¹⁷⁶ Agreements to collaborate at a level more remote from "mere research efforts, resulting in projects which closely approximate joint manufacturing ventures or even mergers" were frowned upon.¹⁷⁷ If such agreements were "reasonably necessary," however, limitation "to the results of the joint research," without encompassing "other competing products or services marketed by the cooperating firms," was approved "unless these other joint activities can be justified on their own by a separate joint venture analysis."¹⁷⁸

A stronger line was taken toward any agreement "collateral to research undertaken by competing firms that divides the market as to customers served or fixes prices charged for products and services of the venturers," which was styled "as a per se violation of the antitrust laws."¹⁷⁹ Among cited authorities¹⁸⁰ was *Timken Roller Bearing Co. v. United States*.¹⁸¹ The decree entered in that case was terminated in 1983.¹⁸²

At this point, it is appropriate to remark an important portion of NCRA's legislative history:

The joint granting of licenses or the refusal to grant licenses by participants in a joint R & D program is within the scope of the Act — as are restrictions on such licenses reasonably required to prevent misappropriation of proprietary information contributed by any participant or of the results of the program Joint ventures in production and marketing are not, of course, necessarily anticompetitive; indeed, they may have significant procompetitive aspects. But this legislation is not directed to these joint ventures. However, the sale or licensing of patents, know-how, or other proprietary information that are developed through a joint R & D program may constitute part of the program. Obviously, marketing this intellectual property may be the ultimate goal and a key financial aspect of a joint R & D program and is rightfully viewed as an integral part of it As used [in qualifications to what became the NCRA § 2(b) exceptions] the term "reasonably required" denotes an objective standard and thus does not refer to the subjective opinion

176. *Research Joint Ventures*, *supra* note 170, at 5.

177. *Id.*

178. *Id.* at 5-6.

179. *Id.* at 6.

180. *Id.* at 6 n.1.

181. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

182. U.S. Dept. of Justice Press Release (May 20, 1983) (on file with publisher).

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of the participants, but rather to whether the particular circumstances at issue establish the need to exchange the type of information in question and to do so in the planned manner. For example, under this standard any exchange of information that results in an agreement or that represents concerted action toward an agreement to fix prices for goods or services would never be reasonably required by a joint R & D program Few firms will make significant contributions to joint R & D programs if they cannot be assured that monetary support or technical know-how that they contribute to the program will not be appropriated by others and used outside the joint program against them. For example, one participant in a joint R & D venture might convert what is essentially the product of the joint R & D program to his own exclusive use. Accordingly, the exclusion [to what became NCRA § 2(b)(3)] makes proper allowance for covenants in joint R & D programs that are reasonably required to protect the participants' investments.¹⁸³

These words addressed a precursor to NCRA § 2(b) but the ultimate conference committee explicitly adopted them.¹⁸⁴

NCRPA § 2(a)(6) obviously contemplates that the activities of a defined joint venture, which acquires or achieves patent and other proprietary positions, can include licensing not only third parties but also the ventures themselves. NCRPA § 2(b)(2)(A) reinforces this. Doesn't the venture assume such a personality per NCRPA § 2(a)(6) that the venture individually or, if the venturers have chosen to dispense with centralized management of a joint venture vehicle, the venturers collectively can take advantage of the *G.E.* holding concerning hitherto unilaterally designed price-restricted licenses? Wasn't *Line Material* undone as conduct permitted by the venture defined at NCRPA § 2(a)(6), buttressed by § 2(b)(2)(A), is relegated to the NCRPA rule of reason? That Congress could have ordained otherwise is testified to by the disfavor accorded bald allocations by NCRPA § 2(b)(4).¹⁸⁵

Returning to the DOJ *Guide* as it relates to "collateral restraints (patent and know-how)," there was recognition that cross-licensing of patents and exchange of know-how may be

particularly necessary, for instance, when a 'blocking' patent that would prevent research or development is held by one of the partners. It is not unreasonable under such circumstances to limit the

183. S. REP. NO. 427, 98th Cong., 2d Sess. 15-17, *reprinted in* U.S.C.C.A.N. 3112-3113 (emphasis added).

184. H.R. Conf. Rep. No. 1044, 98th Cong., 2d Sess. 8, *reprinted in* U.S.C.C.A.N. 3132.

185. NCRA, 15 U.S.C. § 4301(b)(4).

use of the contributed patents to that field at which the research is directed if it is a clearly separate field of use.¹⁸⁶

This is consistent with the spirit of the much later NCRPA. The *Guide* went further, on an explicit level, by acknowledging that it is "normally permissible for the partners to agree to exchange all technical information directly relevant to the success of the project gained by their independent research efforts during the pendency of the venture."¹⁸⁷ But, the *Guide* also observed that agreements "in licenses between the venturers such as ones obligating them not to undercut each other's prices or not to solicit each other's customers are *per se* antitrust violations."¹⁸⁸ This was in accord with respected authorities.¹⁸⁹ But, if a joint venture defined at NCRA § 2(a)(6) can impose price restrictions on licensees *and* the venturers themselves are permissible licensees, it seems that *Line Material* is undone in the limited context of NCRPA joint venturers.

Since NCRPA § 2(a)(6) contemplates that venturers may establish "facilities for . . . prosecuting . . . applications for patents and the granting of licenses for the results of such venture[s]," it seems that joint NCRPA venture vehicles so endowed with licensing power have been equated with monoliths such as the licensor in *G.E.* to the effect that such vehicles can negotiate price-restrictive licenses under their own proprietary positions and, through sensibly-defined use restrictions and geographic allocations, can effectively minimize competition among the venturers *and others* to the degree enjoyment of the fruits of NCRA-blessed "cooperative research" are concerned with the entire confidence that judicial testing will be under the NCRPA "rule of reason standard."

4. *Section 2 of the Sherman Antitrust Act.*—There is little point to developing considerable background concerning § 2 of the Sherman Act.¹⁹⁰ It has not occasioned the generation of *per se* theories. Since it is conceivable that activities of a joint venture defined at NCRPA § 2(a)(6) could become subject to attack as monopolization, it is appropriate to note the effect of the NCRPA "rule of reason standard" upon prosecutors of monopolization theories.

Thus, the "presumptive illegality" supposedly implicit in deliberately amassing or defending a 70% share of an appropriately

186. See *supra* *Research Joint Ventures*, note 170, at 6.

187. *Id.*

188. *Id.*

189. *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948); *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

190. 15 U.S.C. § 2 (1988 & Supp. V 1993).

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defined market has gone by the boards in the case of a venture within the definition at NCRPA § 2(a)(6). NCRPA-defined ventures are not to be judged by the possession of monopoly power alone for which reason *United States v. Krasnow*¹⁹¹ and *United States v. National Lead Co.*¹⁹² are not immediately pertinent to NCRPA § 3 prosecutions. The same can be said about *Zenith Radio Corp. v. Hazeltine Research, Inc.* as it addressed exclusive and effectively restraining patent pools in the absence of classic monopoly power.¹⁹³

On the other hand, looking to the "specific intent" element in attempts to monopolize,¹⁹⁴ it would not appear that prosecutors of an attempt theory against NCRPA-defined ventures would be newly burdened. Just as the classic rule of reason enunciated in *Chicago Board* did not operate to shield defendants possessed of anticompetitive ambitions, it seems that NCRPA § 3 has not changed that ground-rule.

C. Clayton Antitrust Act Implications

The Clayton Antitrust Act both amended and supplemented the Sherman Act. Enacted shortly *after* FTCA, the Clayton Act ordained substantive rules of decision as well as providing civil remedies for the violation of substantive rules embodied in the Sherman Act and other statutes including the Clayton Act. Principal substantive thrusts of Clayton were directed at particularized species of commercial conduct to the degree they presented a probability of injury to competition, although some proscriptions introduced well after 1914 are applicable without proof of such a probability. Of the Clayton Act's substantive rules, this part of the Article treats only of §§ 2 (certain commercial discriminations and kick-backs), 3 (certain seller or lessor imposed restraints on "customer" conduct), and 7 (certain acquisitions). Section 2 has subparts that are unconcerned with proof of even the probability of injury to competition.

In qualitative terms, NCRA's principal impact on Clayton Act norms relates to its § 7.¹⁹⁵ Popularly mischaracterized as an anti-merger statute, § 7 looks to acquisitions of not only enterprises and interests in enterprises but also, more starkly, assets. Not unduly limited

191. *United States v. Krasnow*, 143 F. Supp. 184 (E.D. Pa. 1956), *aff'd per curiam*, 335 U.S. 5 (1957).

192. *United States v. Nat'l Lead Co.*, 63 F. Supp. 513, 531-32 (S.D.N.Y. 1945), *aff'd* 332 U.S. 319 (1947).

193. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.8 (1969).

194. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

195. 15 U.S.C. § 18.

by techniques of acquisition, the statute can be applied to joint ventures just as it can be applied to asset acquisitions and mergers. While one might have inferred that NCRA's impact on Clayton § 7 was purposeful and (given the legislative purpose of NCRA) sensible, such inferences concerning Clayton §§ 2 and 7 were more difficult. The situation is the same in the wake of NCPA.

1. *Section 7 of the Clayton Act & Related Applications of Section 1 of the Sherman Act.*—Reference to the DOJ *Research Joint Venture Guide*¹⁹⁶ provides a basis for shifting to preliminary consideration of structuring joint ventures within NCRPA § 2(a)(6). Although it is crystal clear that § 7 of the Clayton Act embraces joint ventures implemented by erection of incorporated or limited partnership or Massachusetts trust vehicles in which venturers receive equity participations in exchange for their investments or pledges of investment, appropriateness of the niceties of § 7 analyses to joint ventures analogous to general partnerships is far from settled. The *Guide* noted that a "joint research project that is purely contractual and involves no acquisition of any asset does not come within the scope of section 7 but would be subject to Section 1 of the Sherman Act."¹⁹⁷ This, of course, was a truism of sorts. Ignoring, for the moment, the fact that NCRA § 2(a)(6) almost cries out for implementation by the creation of an incorporated vehicle that, in its turn, can become a party to the master joint venture agreement, it is clear that — whether or not Clayton § 7 addresses general partnerships — NCRPA permits them to be qualified joint ventures.

What is more remarkable about the interface of § 7 and NCRA is the fact that § 7 condemns comprehended acquisitions when "in any line of commerce in any section of the country, the effects of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."¹⁹⁸ This "competitive injury" standard may be applicable quite without reference to the acquirer's purposes although, if demonstrably anticompetitive, they are relevant. Further, although this "competitive injury" standard looks to probabilities, courts (including the highest one) have seemed to be somewhat fearful of the burdens implicit in qualitative analysis¹⁹⁹ and quite willing to jump from statistics demonstrating a lessening in the number of competitors or a *trend* toward concentration of market power, to a conclusion *phrased* qualitatively.

196. *Research Joint Ventures*, *supra* note 170.

197. *Id.* at 3.

198. 15 U.S.C. § 18.

199. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

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They did so in contexts of perceptions of accelerated trends to domestic concentrations and a belief that a given Congress was in favor of a nation of small entrepreneurs.²⁰⁰ The effect of such decisional processes was what amounted to a substitution of the possibility of injury to the competitive process for the probability of such injury.²⁰¹ Although the Supreme Court belatedly signaled a willingness for lower courts to entertain qualitative defenses to contrived quantitative *prima facie* cases²⁰² and modern versions of the so-called *Merger Guidelines* tend to pay more respect to qualitative considerations than did the courts, unfortunate judicial precedents have *not* been removed from the books and the *Guidelines* are neither law nor even an estoppel on the government.²⁰³

Application of the NCRPA “rule of reason standard” to *all* federal antitrust laws is most significant. Those who would challenge either the organization of a venture defined at NCRPA § 2(a)(6) or the later investment in it by a new venturer would seem burdened quite beyond the loose competitive injury precedents under § 7 of the Clayton Act. While *Chicago Board’s* rule of reason countenances consideration of probabilities, it never was used to permit the substitution of mere possibilities for probabilities nor did it foreclose close attention to defendant’s purposes. No less can be said of NCRPA § 3.

Ordinary applicability of § 7 of the Clayton Act to at least those joint ventures employing an incorporated vehicle is a given. NCRPA § 3 explicitly embraces “antitrust laws” including § 7 of the Clayton Act. It is the NCRPA “rule of reason standard,” rather than § 7 of the Clayton Act and Sherman Act acquisition-testing precedent, under which will be gauged competitive implications of combinations of persons — whether or not otherwise competitors — in joint ventures defined at NCRPA § 2(a)(6).

What is the significance of this displacement of the Clayton Act’s § 7? Literature concerning § 7, and philosophies said not only to underlie it but to guide its application, is legion. There can be little doubt that some successful prosecutions under § 7 were of dubious social value. Although so-called *Merger Guidelines* issued during recent administrations demonstrate greater respect for competition as a

200. *Brown Shoe Co., Inc. v. United States* (Brown Shoe I), 370 U.S. 294, 312-23 (1962).

201. *Cf. Brown Shoe I*, 370 U.S. at 343 with *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963).

202. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

203. Although it cannot be gainsaid that *Guidelines* may embarrass a plaintiff complaining of an acquisition. *See, e.g., Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969).

qualitative concept than is apparent in prior "leading" decisions, unfortunate judicial precedent has *not* been erased by successive sets of *Guidelines*. They do nothing save signal the line of thought pursued by those currently entrusted with part of the federal enforcement power. When one addresses the formation of a long-term combination, reliance on the *Guidelines* is reliance on the circumspection of prosecutors²⁰⁴ as yet unappointed by regimes as yet unelected. Further, and often overlooked, private suitors have not endorsed the *Guidelines*, which purport only to guide enforcement decisions by public officers and cannot change precedent.

While classic applications of § 7 have related to acquisitions in the horizontal and vertical arrays, it also has been applied to so-called conglomerate acquisitions.²⁰⁵ Whether dealing with horizontal, vertical, or conglomerate combinations, prosecutors under § 7 have no need to show the anticompetitive purposes of those acquiring or combining although, most assuredly, such purposes are relevant. Congress' § 7 concern is for competition "in any line of commerce in any part of the country." Hence, given the definition of a relevant product or service market, there is significant potential for artificially maximizing the combination's market share (and, therefore, its presumed threat to competition) by narrowly defining geographic zones of competition.²⁰⁶

Precedent under § 7 reveals little explicit judicial attention to the quality of competition, particularly in connection with horizontal integration. In the context of emphases on market share and other quantitative data including *trends* toward concentration, it often was made to appear that the true § 7 measures of the vitality of competition were the numbers of competitors and relative market shares of those who would survive the acquisition or other combination in question. Thus, if there is a concentration of effective competitors on a given level of the exploitation-refinement-distribution chain, or even if there is a marked *trend* toward such a condition, precedent indicates that the prosecution need prove only a likelihood that the acquisition of an actual or potential competitor will present a greater risk that surviving major participants will have greater market power. Albeit unlabeled as such, such a showing amounts to presumptive illegality.

Congress' generic purpose in enacting substantive provisions of the Clayton Act is said to have been to address, in their incipency,

204. But, *see*, *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (food & drug).

205. *See, e.g.*, *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

206. *See, e.g.*, *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

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arrangements that might mature into Sherman Act violations. Applying § 7 in government prosecutions, judicial concern for the likelihood of injury to competition seems to look to “incipient incipencies” other than those reserved to the FTC²⁰⁷ rather than to realistic probabilities. Should the prosecution lack the ability to sell a perception of industrial concentration or a *trend* to it, prosecutors must be prepared to develop a probability of injury to the competitive process that is considerably more certain than the likelihood of a risk of greater market power becoming available to the acquirer. In the mid-seventies, the Supreme Court indirectly evoked more judicial care by crediting a defensive showing that the quality of competition was unprejudiced despite a dramatically increased concentration in an arbitrarily defined product market.²⁰⁸

While the DOJ’s *Merger Guidelines* have become more sensitive to the concept that quantitative data have meaning only in terms of qualitative effect, practitioners cannot lose sight of the facts that the *Guidelines* neither estop public prosecutors nor have a life necessarily succeeding a given political administration. The latter consideration is accentuated by precedent demonstrating that it is feasible to attack an acquisition decades after the event.²⁰⁹ Further, although the *Guidelines* have potency to embarrass public prosecutors, they do not clearly present such a value vis-a-vis private plaintiffs under § 7.

The NCRPA “rule of reason standard” has great significance in terms of avoiding sloppy precedent elaborating § 7 of the Clayton Act as well as refining addresses of §§ 1 and 2 to joint ventures comprehended by NCRPA. While DOJ merger, joint research venture, and international operations²¹⁰ guides have been sympathetic to joint R&D, they were neither law nor more than politically transitory. NCRPA § 3 is law. It ordains that ventures defined by NCRA § 2(a)(6) are to be tested by the NCRPA “rule of reason standard.” Those who object to either the fact or the progress of a venture defined at NCRPA § 2(a)(6) will be burdened to a degree significantly greater than prosecutors ordinarily entitled to invoke the unvarnished precedent evolved under § 7 of the Clayton Act. Indeed it seems that the rigor of *U.S. v. Columbia*

207. John A. Maher, *Two Little Words and FTC Goes Local*, 80 DICK. L. REV. 193, 211 n.119 (1976) (referring to the effect of *FTC v. Brown Shoe Co.* (*Brown Shoe II*), 384 U.S. 316, 321-22 (1966)).

208. See *supra* note 202.

209. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

210. The Justice Department has announced that it and the FTC invite public comment concerning a proposal to revise the 1988 DOJ Guidelines for international operations. U.S. Dep’t of Justice Press Release (Oct. 13, 1994).

*Steel Co.*²¹¹ is likely to provide guidance for analyses focused on the formation of NCRPA joint ventures.

The NCRPA § 3 rule of reason standard implicitly includes venturers' purposes among "relevant factors affecting competition" just as surely as it includes all other "factors affecting competition" extending, most significantly, to "effects on competition in properly defined relevant research, development product, process and service markets . . . [understood to embrace] . . . worldwide capacity."²¹² Venturers' procompetitive purposes, and probable as well as actual procompetitive effects of their venture, will be as susceptible of defensive use as alleged anticompetitive purposes and potencies are of prosecutorial significance. In this alone is a great difference from precedent under § 7 of the Clayton Act. The magnitude of the difference is accentuated when one recognizes that attack on the fact of continued operation of an NCRPA § 2(a)(6) venture must entail proof *inter alia* of actual (presumably adverse) "effects on competition in . . . relevant research, development, product, process and service markets." Thus, there is a significant displacement of the numbers game played under § 7 of the Clayton Act, particularly when one focuses on joint ventures by persons otherwise competitors, and a Congressional reinvocation of qualitative analyses of not only joint ventures but venture's acquisitions.

2. *Section 2 of the Clayton Act.*—Since § 2 of the Clayton Act is concerned with price and other commercial discriminations, it is not peculiar to joint ventures. However, there is a real potency for NCRPA § 3 to work presumably unanticipated magic on classic "Robinson-Patman" themes.

Unlike §§ 3²¹³ and 7²¹⁴ of the Clayton Act, its §§ 2(c),(d), and (e) lack "competitive injury" standards.²¹⁵ Therefore, in effect, they statutorily define *per se* offenses. But, if a venture defined by NCRPA § 2(a)(b) accommodates the marketing of a product by paying "phony brokerage"²¹⁶ or affording disproportionate merchandising supports to competing customers,²¹⁷ the NCRPA rule of reason is applicable.

211. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (Sherman Act).

212. *See supra* note 82 and accompanying text.

213. 15 U.S.C. § 14 (1988).

214. 15 U.S.C. § 18.

215. 15 U.S.C. § 13(c)-(e).

216. 15 U.S.C. § 13(c).

217. 15 U.S.C. § 13(d), (e).

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Section 2(a) of the Clayton Act, the basic civil price discrimination statute,²¹⁸ burdens *sellers* of commodities. The section has three alternate competitive injury standards of which none deals directly with sellers' purposes. They are concerned with probabilities of injury to the competitive process occurring at the level of the discriminating seller's competitors ("primary level"), at the level of a disfavored customer itself competing with a favored customer ("secondary level"), and at the level of sub-customers ("tertiary level"). While § 2(a) prosecutions alleging injury at the primary level tend to evoke evidence of a seller's anticompetitive purpose as germane to the probability of injury,²¹⁹ discrimination among competing customers tends to speak for itself.²²⁰ The NCRPA § 3 rule of reason, by definition, will burden public and private prosecutions of NCRA-defined ventures under § 2(a) of the Clayton Act. The same is true of prosecutions under § 2(f)²²¹ of NCRPA venturers as buyers who *knowingly* receive the benefit of discriminations prohibited by § 2(a). NCRPA will *not* hamper criminal prosecutions under § 3 of the Robinson-Patman Act since it is defined as an antitrust law in neither the Clayton Act nor NCRPA.

3. *Section 3 of the Clayton Act & Sherman Act "Tying."*—Assuming the requisite probability of injury to the competitive process, § 3 condemns lessor or seller-imposed requirements contracting, tying, exclusive dealing, and granting of price concessions to secure benefitted customers' abstention from using or dealing in commodities of the conceding marketer's competitors.²²²

Like § 2 of the Clayton Act, § 3 is not peculiarly pertinent to joint ventures. However, the NCRPA "rule of reason standard" presents potential for circumscribing the application of § 3 of the Clayton Act to marketing techniques used either by a venture defined at NCRPA § 2(a)(6) or, in certain circumstances, parties to such a venture. This potential arises from not only NCRPA's "rule of reason standard" but also encouragement, *per* NCRPA § 2(a)(6)(G), to the "granting of

218. 15 U.S.C. § 13(a). Note that the penal portion of the Robinson-Patman Act neither is part of the Clayton Act nor otherwise constitutes one of the antitrust laws. 15 U.S.C. § 13a.

219. *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961).

220. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

221. 15 U.S.C. § 13(f).

222. 15 U.S.C. § 14. The purpose of § 3 is to minimize anticompetitive foreclosure of outlets for commodities. Although money was held — long ago — not to constitute a commodity for purposes of a § 3 tying analysis, *United States v. Investors Diversified Serv. Co.*, 105 F. Supp. 645 (D. Minn. 1951), the Supreme Court later took pains to stress that money is a commodity in a Sherman Act tying context when the stress was unnecessary. *Fortner Enterprises, Inc. v. U.S. Steel Corp.* (Fortner I), 394 U.S. 495, 509 (1969).

licenses for the results" produced by defined ventures linked to leave, set forth at NCRPA § 2(b)(2), for venturers to indulge conduct "restricting, requiring or otherwise involving . . . marketing" so long as it is limited to the enjoyment "of proprietary information developed through" the venture or entails distribution *inter se* of fruits of the venture.

Potential for circumscribing § 3 of the Clayton Act via NCRPA § 3 is not as dramatic as the effect of the NCRPA "rule of reason standard" on Sherman Act tying jurisprudence. *Per se* stigmatization of tying, of course, is limited to § 1 of the Sherman Act. The stigmatization is curious. Proceeding under § 3 of the Clayton Act, prosecutors theoretically are required to demonstrate some fairly substantial probability of anticompetitive effect.²²³ This contrasts sharply with the burden implicit in prosecuting *per se* offenses. *Unlike Sherman Act violations, violations of § 3 of the Clayton Act do not expose transgressors to penal consequences.* Alone among the commercial practices addressed by § 3, tying has been stigmatized as also offensive *per se* to the Sherman Act. However, unlike the classic *per se* offenses but somewhat comparable to concerted refusals to deal, both purpose and power are relevant to characterizing tying as offensive *per se* to § 1 of the Sherman Act.²²⁴ Unlike § 3 of the Clayton Act, which condemns certain conduct of sellers and lessors of commodities for use or resale within the United States,²²⁵ the Sherman Act can be applied not only against leveraging buyers, lessees, and licensees but also to transactions in fields such as realty, services and intellectual property²²⁶ without the Clayton Act's limiting jurisdictional reference to use or consumption in the United States. *Dicta* in *Times-Picayune Publishing Co. v. United States* taught that

when the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume . . . in the 'tied' product is restrained, a tying agreement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable' *per se*, to foreclose competitors from any substantial market, . . . tying . . . is banned by § 1 of the Sherman Act whenever both conditions are met.²²⁷

223. *Standard Fashion Co. v. Magrave-Houston Co.*, 258 U.S. 346 (1922).

224. *Jefferson Parish Hosp. Dist. Number 2 v. Hyde*, 466 U.S. 2 (1984).

225. 15 U.S.C. § 14.

226. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (dominance of realty used to tie patronage of rail carriage); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (ties of copyrighted cinema productions).

227. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-09 (1953).

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Writing § 3 of the Clayton Act, Congress burdened prosecutors with proving that “the effect of such lease [or] sale . . . [of a commodity subject to tying or other conditions] . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”²²⁸ The real point was to relieve prosecutors from heavier burdens then demanded of prosecutions under § 1 of the Sherman Act as they might be aimed at tying, exclusive dealing, or requirements contracting (then thought of as tools suitable to would-be monopolists). Only commodity marketers were exposed to § 3 of the Clayton Act. Section 3 liberated prosecutors from necessarily offering proof of commodities marketers’ anticompetitive purposes or their arrangements’ inevitably anticompetitive effects.²²⁹ Yet, Congress did not feel impelled to subject commodities marketers’ tying, exclusive dealing, and full requirements contracting to *per se* prohibitions. By definition, § 3 does not read on either such practices indulged by marketers of services of realty or impositions by powerful customers.

In the 1958 *Northern Pacific Ry. v. United States* decision, the Supreme Court not only held tying by a dominant merchant to be offensive *per se* to § 1 of the Sherman Act but so ordained in a context in which a dominant *real estate* operator tied its *rail carriage* services. Writing for the majority, Justice Black repeated respected theorems that “it is not material that the prices fixed or the markets allocated were reasonable” and purported to relegate “business necessity” to obloquy.²³⁰ Subsequently, mandatory block-booking of copyrighted cinema productions was condemned as tying offensive *per se* to § 1 on the dubious thesis that a copyright is the economic equivalent of a patent in terms of being a licit monopoly itself constituting a dominant market position.²³¹ Thereafter, devolution of dominance over the tying item of commerce proceeded from a “sufficient economic power to impose an appreciable restraint on free competition in the tied product” to, in a case involving promotion of prefabricated housing by the provision of below-market development loans, “some advantage not shared by [the tying merchant’s] competitors in the market for the tying” item of commerce.²³² Thus, assuming that a “not inconsiderable amount of commerce” in the tied item of commerce was foreclosed from the tying

228. 15 U.S.C. § 14.

229. 15 U.S.C. § 14. See also *Standard Fashion Co. v. Margrave-Hudson*, 258 U.S. 346 (1922).

230. *Northern Pac. Ry.*, 356 U.S. at 5.

231. *Loew’s*, 371 U.S. at 38.

232. *U.S. Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*, 429 U.S. 610, 620 (1977).

marketer's competitors,²³³ prosecution of tying under § 1 of the Sherman Act became almost as easy as prosecution of commodity ties under § 3 of the Clayton Act. In 1984 the Supreme Court somewhat retreated from the devolution by indicating that a successful Sherman Act prosecution must include proof of a coercive effect on the customer subjected to the tie.²³⁴ Such coercion is *not* necessarily part of the prosecutor's burden under § 3 of the Clayton Act.

It is conceivable that a joint venture defined at NCRPA § 2(a)(6) may make its product, service, process or licenses of its technology available only on the condition that the buyer, lessee, and/or licensee accept a tie geared to not only the venture's enjoyment of the fruits of its Congressionally-encouraged technological advance but also to quality control (achievable, e.g., by the use of a proprietary catalyst). Whether or not one or more of these business reasons is pertinent, the NCRPA "rule of reason standard" will supplant not only the threat of a *per se* application of the Sherman Act but also the probable injury test of Clayton § 3.

D. Federal Trade Commission Act (FTCA) Implications

Irony truly attends consideration of NCRPA's impact (and the lack thereof) on FTCA. As enacted in 1914, FTCA's principal thrust was directed at "unfair methods of competition."²³⁵ NCRPA's definition of "antitrust laws" explicitly contemplates exactly that thrust of FTCA. However, the Wheeler-Lea amendments of 1938 engrafted "unfair or deceptive acts or practices" onto FTCA § 5's address to "unfair methods of competition."²³⁶ By definition, NCRPA does *not* include FTCA's concern with "unfair . . . acts or practices" among "antitrust laws" conditionally subordinated to NCRA's rule of reason. The legislative histories of NCRA and NCPA fail to explain the rationales for distinguishing between FTCA's disjunctive addresses to "unfair methods of competition" and "unfair . . . acts or practices."

That FTC jurisdiction to condemn "unfair . . . acts or practices" is significant to virtually all exclusionary commercial undertakings cannot be gainsaid since the Supreme Court's 1966 *Brown Shoe II* and 1972 *S&H* decisions. The former authorized the FTC to condemn conflict

233. *International Salt Co. v. United States*, 332 U.S. 392 (1947); *see also Fortner I*, *supra* note 222.

234. *Jefferson Parish Hosp. Dist. Number 2 v. Hyde*, 466 U.S. 2 (1984).

235. 15 U.S.C. §§ 43-45.

236. 15 U.S.C. §§ 41, 44-45. *See generally* D. Unkovic, et al., *supra* note 11, at A-31 to A-34.

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with “the basic principles of the Sherman and Clayton Acts even though such practices may not actually violate” such statutes.²³⁷ *S&H* went further, holding that the FTC’s prosecutorial and judicial roles are triggered by public values beyond simply those enshrined in the letter or in the spirit of the antitrust laws.²³⁸ Violations of FTC § 5(a)(1) do *not* expose alleged transgressors to private suitors. Prosecutions for engagement in “unfair methods of competition” entail proof of “at least a tendency to injure respondent’s competitors.”²³⁹ One of the purposes of the Wheeler-Lea amendment to FTCA § 5(a)(1) was to remove this need for evidence of the potential for injury to competitors of the respondent.²⁴⁰ *Brown Shoe II* and *S&H* speak to judicial respect for this purpose. The decisions defer to FTC expertise and demand nothing remotely reminiscent of a rule of reason analysis.

Although NCRA’s legislative history is less than helpful to understanding why Congress chose to permit FTC to exert its “unfair . . . acts or practices” jurisdiction over not only joint ventures defined by NCRPA but also their activities, a key may be provided by the legislative history for ETCA. Its legislative history betrays misconceptions that only FTC’s “consumer protection” jurisdiction is summed up by “unfair deceptive acts or practices” whereas the Commission’s antitrust jurisdiction is implicit in “unfair methods of competition.”²⁴¹ Long before the Wheeler-Lea amendments, consumer protection played a significant role in the elaboration of “unfair methods of competition.”²⁴² The Wheeler-Lea amendments to FTCA § 5(a)(1) did not spring solely from a need to add consumer protection to antitrust. *S&H* and *Brown Shoe II* were not “consumer protection” cases. Nonetheless, the amendment of FTCA § 5(a) by ETCA Title IV burdened only the prosecution of “unfair methods of competition” cases,²⁴³ and the COR shield made available under ETCA Title III is ineffective against FTC attacks on “unfair . . . acts or practices.”²⁴⁴ A conceptual error implicit in ETCA has been brought forward — *sub silentio* — into NCRPA’s definition of the “antitrust laws.” This

237. See *Brown Shoe II*, *supra* note 207, at 321-22.

238. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

239. *FTC v. Raladam Co. (Raladam I)*, 283 U.S. 643, 647-49 (1931).

240. 80 CONG. REC. 6588 (1936). Note that, when conditionally providing for exemption of joint R&D by small businesses from antitrust laws and FTCA § 5(a)(1), Congress did not see fit to discriminate between “unfair methods of competition” and “unfair or deceptive acts or practices.” 15 U.S.C. § 638(d)(3) (1988).

241. H.R. REP. NO. 686, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S.C.C.A.N. 2493.

242. See *Raladam I*, *supra* note 239.

243. 15 U.S.C. § 45(a)(3).

244. ETCA, 15 U.S.C. § 4012(6).

NCRPA anomaly is not confined to FTC jurisdiction but, as developed later, also impacts at the state level.

FTC jurisdiction over "unfair . . . acts and practices" has eluded NCRPA's net. Thus, the NCRPA rule of reason will not burden the FTC (if the political context changes sufficiently to encourage Commission prosecutions under or elaborating *Brown Shoe II* and *S&H*). The author submits that this is unfortunate as it may come to cause NCRPA venturers to think the FTC is inevitably burdened by the NCRPA "rule of reason standard." Failure to immunize ventures defined at NCRPA § 2(a)(6) from FTC "unfair . . . acts or practices" jurisdiction presents, of course, a trap for those who ignore the likelihood that a now politically-constrained FTC is only a sleeping giant in terms of not only prosecutorial but rule-making potencies.²⁴⁵

E. State Implications

While many federal antitrust statutes and much of the FTC's jurisdiction reach conduct only affecting interstate or foreign commerce, there is not a generalized preemption of state ability to adopt and enforce antitrust, unfair trade, and comparable statutes. States' police powers include the ability to regulate intrastate commerce. The Supreme Court respects state antitrust jurisdiction over local manifestations of interstate commerce.²⁴⁶

Many states have antitrust statutes resonating basic themes of the Sherman Act. Many states, without necessary reference to whether they have antitrust laws, have unfair trade practice statutes (a/k/a "little FTC Acts") which tend to be far more particularized than FTCA § 5(a)(1). Several states have "unfair sales acts" or similar statutes dealing with price discrimination or sales below cost.²⁴⁷

It is impractical herein to remark on state statutes and precedents at length. Various states seek to encourage private enforcement by the provision of treble damages. Earlier, it was noted that state competition laws have *not* been subjected to general preemption. ETCA, NCRA and NCPA, present species of particularized preemption. Title III of ETCA contemplates that conduct described in a COR is shielded against public or private enforcement of "any state antitrust or unfair competition

245. The FTC has authority to promulgate "trade regulation rules" by reference to its jurisdiction over "unfair . . . acts or practices." 15 U.S.C. § 57a(a)(1)(B) (1988).

246. *Standard Oil of Ky. v. Tenn.*, 217 U.S. 413, 422 (1910).

247. See R. Fellmoth & T. Papageorge, *A Treatise on State Antitrust Law and Enforcement*, [July-Dec.] 892 Antitrust & Trade Reg. Rep. (BNA) Supp. No. 1, at 20 (Dec. 7, 1978).

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law.”²⁴⁸ NCRA and NCPA present another species of particularized preemption but their collective address to state law differs from ETCA.

ETCA Title III includes pertinent state laws within its definition of antitrust laws. NCRPA does not do so. Rather, NCRPA’s “rule of reason standard” subjects “any State law similar to the antitrust laws” defined in NCRPA to its “rule of reason standard”²⁴⁹ and, to the extent a defined venture has availed itself of notification procedures, NCRPA limits recoveries under “any State law providing damages for conduct *similar* to that forbidden by the antitrust laws” to actual damages.²⁵⁰

As noted, NCRPA’s definition of “antitrust laws” calculatedly avoids the embrace of FTCA’s address to “unfair or deceptive acts or practices.” State unfair trade practice statutes (to the extent they avoid adoption of the “unfair methods of competition” legend) are not necessarily similar to the “antitrust laws” defined in NCRA. Consequently, standards guiding the application of such state statutes are not necessarily preempted by NCRA’s rule of reason and, to the degree states afford (or permit) greater than actual damages to those injured by conduct violating state unfair trade practices acts, the limitation explicit in NCRPA may be inapplicable. Whether these consequences were intended by legislative and other sponsors of NCRA is not disclosed by the legislative history. Such intention is unlikely. Failures to preempt probably were unanticipated, relating more to a slovenly failure to consider what was involved in ETCA’s inclusion of only part of FTCA § 5(a)(1) when the ETCA definition of federal “antitrust laws” was carelessly lifted for use in what became NCRPA.

NCRPA’s failures to preempt may have significances beyond state unfair trade practices statutes. Thus, surviving state “unfair sales acts” tend to have more in common with the penal § 3 of the Robinson-Patman Act (which criminalized certain price discriminations) than they do with § 2(a) of the Clayton Act. Section 3 of the Robinson-Patman Act is not one of the “antitrust laws” as that term is defined by NCRPA. Since state unfair sales acts are of relatively little consequence in this day and age, they are not developed herein save to note that it is quite arguable that they are not to be held “similar to . . . antitrust laws” addressed by either NCRPA’s rule of reason or its limitation of liability.

In any event, those who organize a venture defined at NCRPA § 2(a)(6) must consider potencies for applications to its operations of not

248. ETCA, 15 U.S.C. §§ 4016(a), 4021(b).

249. NCRA, 15 U.S.C. § 4302.

250. *Id.* § 4303(c) (emphasis added).

only FTC rule-making and prosecutions concerning "unfair . . . acts or practices" but also, at least, state unfair trade practices statutes.

IV. NCRPA Limitation of Damages

NCRPA's "detrebling" provisions²⁵¹ require more of a joint R&D venture than does the NCRA "rule of reason standard." Whereas existence and activities of all joint ventures within NCRPA § 2(a)(6) — subject to NCRA § 2(b) — are entitled to analysis under the NCRPA "rule of reason standard," there is a price attendant upon the achievement of a limitation of liability. Affirmative acts are exacted from qualified venturers desiring prospective protection. Notifications conforming to standards in NCRPA must be filed with the DOJ and the FTC.²⁵²

Limitation is not available to a defendant if the challenged conduct is violative of a "decree or order, entered *after* October 11, 1984, in any case or proceeding under" NCRA-defined federal antitrust laws or State laws challenging such conduct as part of a joint venture.²⁵³ Disqualification from detrebling can occur although the prior decree does not read on conduct intrinsic to the joint venture conduct latterly challenged.

The point of NCRPA seems to be to allow every venture at least one bite. Disqualification from the detrebling NCRPA relatively safe harbor keys on the existence of a "decree or order" vice a judgement. In this one respect, NCRPA can be characterized as more rigorous than ETCA Title III since a COR is *not* necessarily prejudiced by a loss in any proceeding other than a formal revocation. On the other hand, under NCRPA, only limitation of liability is prejudiced by a prior decree; applicability of the NCRPA "rule of reason standard" is unabated by a prior decree.

It should be noted that, as some sort of moral recompense to plaintiffs who proceed to a damage award, NCRA mandated and NCPA continues payment of interest from "the earliest date for which injury can be established . . . [until] . . . date of judgement, unless and to the extent the court finds an award of interest unjust."²⁵⁴

251. *Id.* § 4304.

252. *Id.* §§ 4303, 4305.

253. *Id.* § 4303(e) (emphasis added).

254. *Id.* § 4303(d).

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A. *Invasion of State Sovereignty*

Turning from the one-almost-free-bite rule, the three limitation provisions seem, at a glance, to be straightforward. However, there is a disproportion between federal and state limitations as impingement on state remedies proceeds well beyond detrebling. Two of the three provisions focus on claims asserted by persons²⁵⁵ and states²⁵⁶ under §§ 4 and 4c of the Clayton Act.²⁵⁷ The third looks to the person proceeding under state laws, “providing damages for conduct similar to that forbidden by the [NCRPA-defined] antitrust laws.”²⁵⁸ While NCRPA is true “detrebling” as it relates to §§ 4 and 4c of the Clayton Act, the address to state power goes much further. It provides that a successful plaintiff under a pertinent state law “shall not recover in excess of the actual damages sustained.”²⁵⁹ This preempts states not only to the extent they afford treble damages but also to the degree their courts might permit recovery of punitive damage awards as part of the states’ continuing evolution of discrete approaches to tort litigation.

The consequence is a substantial invasion of states’ otherwise sovereign powers not only to legislate unfair competition rules and remedies but to permit courts of general and original jurisdiction — courts very different from federal courts — to evolve forms of relief appropriate to the torts before them.

B. *The NCRPA Disclosure Regime: The Price of Damage Limitation*

There is a cost for the limitation of liability under NCRA § 4. The relatively sheltered harbor is prospective. Damages are limited for injurious conduct indulged — after effectiveness of an initial “notification” filed with the FTC and the DOJ (as well as appropriate supplements thereto) on behalf of a defined venture²⁶⁰ — but only to the degree such conduct “is within the scope of” the notification.²⁶¹ However, potential plaintiffs cannot be charmed by the paucity of required data and consequent ability for the “scope” to be broad indeed.

All that is evoked are (a) the identities of parties to the venture including, *if* the NCRPA venture is for production as opposed to R & D, the nationality of such parties and the folks who control parties plus (b) a disclosure of the nature and objectives of the venture.²⁶² Any lawyer

255. NCRA, 15 U.S.C. § 4303(a).

256. *Id.* § 4303(b).

257. 15 U.S.C. § 15, 15c.

258. NCRA, 15 U.S.C. § 4303(c).

259. *Id.*

260. *Id.* § 4305(a).

261. *Id.* § 4303(a)(1), (b)(1), (c)(1).

262. *Id.* § 4305(a).

who has conjured with the values implicit in sometimes drawing a detailed corporate charter, and other times being content with a charter having the vaguest purpose clause, will recognize the challenge. For NCRPA purposes, cover the waterfront in generalities; include language embracing that NCRPA permits without at all limiting commercial spheres of endeavor!

C. Presumed Point of Disclosure

The presumed point of the NCRPA disclosure regime is to provide not only early warnings of sorts to the DOJ and the FTC, but also, through notices in the Federal Register that describe "in general terms the area of planned activity of" comprehended ventures,²⁶³ advices of lesser quality to venturers' competitors and others (including, quite conceivably, securities analysts). However, the damage control shields address the scope of the notification filed with the DOJ and the FTC rather than the scope of the Federal Register notice. The published notice need not be coextensive with the filing.

When they opt to file a notification, venturers must make a "judgement play" of sorts concerning the organization and content of the "notification." Warning that NCRA protections are "based on the contents of" notifications, the DOJ and the FTC avoided the role of SEC reviewers of registration statements and accepted the role of notice editors.²⁶⁴ This was consistent with Congressional recognition that notifications need not be all that informative:

A joint R&D venture need not specifically notify [the DOJ] and . . . the FTC that it intends to engage in the activities described in Section 2(a)(6) of the bill, provided that the venture supplies [the DOJ] and . . . the FTC with the notification described in section 6(a). Thus, unless a venture has notified [the DOJ] and . . . the FTC to the contrary, any activity within the definitions of section 2(a)(6) is within the scope of any venture as to which notification has been filed under Section 6(a). For example, unless the venture has indicated otherwise, efforts to market the results of the venture, such as through licensing, will automatically be considered within the scope of a properly notified joint R&D venture.²⁶⁵

263. *Id.* § 4305(b).

264. See U.S. Dept. of Justice Statement of Dec. 11, 1984, *reprinted in* Trade Reg. Rep. (CCH) ¶ 4513 in context of NCRA, 15 U.S.C. § 4305(b).

265. H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S.C.C.A.N. 3137.

D. Arrival in NCRPA § 4 Safe Harbors

Assuming the effectiveness of a “notification,” the NCRPA sheltered harbor is limited to conduct within the scope of the notification.²⁶⁶ However, a plaintiff has no right to examine the notification before commencing litigation.²⁶⁷ Even when litigation commences, discovery of federal resources is limited.²⁶⁸ NCRPA provides against the DOJ or FTC release of any part of a filed notification except “the information published” in the Federal Register.²⁶⁹ So, while venturers are deciding whether or not to file a notification, they may not have to be all that concerned with the adequacy of disclosure *via* the Federal Register to the public. The same covertness is true of data developed by the DOJ or FTC “in the course of any investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by” the venture concerning which notification was filed.²⁷⁰ “Catch 22” seems too modest an accolade for this ingenious deterrence to a potential private plaintiff’s sensible cost-benefit analysis before daring to commence litigation burdened by the NCRPA “rule of reason standard.”

At the outset of this Article, extended reference was made to the requirement that “detrubling” is contingent on “principal” production facilities being in the United States and the amenability of a foreign investor’s home nation to giving a U.S. company “antitrust treatment no less favorable . . . than” the treatment given its own citizens’ *in re* joint production ventures.²⁷¹

The author is not all that persuaded that damage control is necessarily worth the Federal Register notice and DOJ/FTC early warning requirements. However, those who wish the relatively safe harbor are not encouraged to indulge crypticisms. Rather, mindful of the potency of review by trial judges, notifications and modifications alike should be drawn in such manner as to inform a semi-sophisticated reader of not only liberally-stated commercial parameters of the undertaking (paying great care to qualifications concerning otherwise excluded conduct)²⁷² but also aspects of the contemplated operation that might be offensive to normal antitrust norms (e.g., interlocking boards of an

266. See NCRA, 15 U.S.C. § 4303(a)(1), (b)(1), (c)(1).

267. *Id.* § 4305(d).

268. *Id.*

269. *Id.*

270. *Id.*

271. NCPA § 3(g).

272. NCRA, 15 U.S.C. § 4301(b).

incorporated joint venture vehicle and incorporated venturers). The phrase "semi-sophisticated" serves a conviction that the 1984 and 1993 Congresses did not seek to replicate a standard akin to the "average investor" supposedly addressed in prospectuses qualified under the federal Securities Act of 1933.²⁷³ Notifications under NCRA are not aimed at the public or any segment of it. Official addressees, the DOJ and FTC, must be presumed to possess legal and economic sophistications beyond the average investor. Trial judges, later to be called upon to measure the "scope" of notifications, must be presumed to possess the legal sophistication of the average lawyer.

NCRPA affords the DOJ and FTC power only to determine the "general terms" of the Federal Register notice.²⁷⁴ The adequacy of the notice is not germane to the effectiveness of the notification and achievement of NCRPA damage control. Whether the agencies will strain to develop an "average competitor" standard for the notices is doubtful. Publications through 1992 did not remove the doubt. On a theoretical basis, the DOJ and FTC are helpless to resist the effectiveness of a notification that informs them that an NCRPA § 2(a)(6) venture will embark on missions or use techniques the authorities would prefer not to countenance. "Theoretical" is stressed since, unlike an ETCA Title III COR,²⁷⁵ NCRPA does not constrain DOJ and FTC uses of investigative powers. Like ETCA, NCRPA fails to constrain FTC powers either to investigate or promulgate rules as to "unfair . . . acts or practices" or to prosecute such acts or practices. Thus, while there is a temptation to regard the DOJ and FTC as paper tigers when confronted with a plainly anticompetitive NCRPA notification, the temptation should be resisted. If one considers only their investigative powers, the agencies continue to have weapons to harass and, thereby, greatly magnify venturers' overhead. Looking beyond agency investigatory powers, the DOJ and FTC can prosecute. Even were this not so, prudent planners will not provide incentives for judges trying a damage action to discover species of conduct beyond the scope of the venture disclosed to the DOJ and FTC.

V. NCRPA & Attorney's Fees

Like ETCA,²⁷⁶ NCRPA threatens losing private plaintiffs with liability for defendants' attorney's fees. This threat, however, is not as

273. *In re Universal Camera Corp.*, 19 S.E.C. 648 (1945).

274. NCRA, 15 U.S.C. § 4305(b).

275. ETCA, 15 U.S.C. § 4013(a)(3).

276. ETCA, 15 U.S.C. § 4016(b)(4).

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significant as in ETCA. NCRPA directs the court to favor “a *substantially* prevailing” defendant with an award of “the cost of suit . . . , including a reasonable attorney’s fee, if the claim or . . . claimant’s conduct during . . . litigation . . . was frivolous, unreasonable, without foundation, or in bad faith.”²⁷⁷ Awards are subject to being offset to the extent a court finds that the prevailing party burdened the litigation frivolously, unreasonably, without foundation, or in bad faith.²⁷⁸ The process of awarding costs to successful defendants is *not* linked to the existence or adequacy of a notification under NCRA § 6.

ETCA anticipated NCRA and NCPA in its concern for defendants but explicitly limited plaintiffs’ exposure to situations in which there is a finding that defendants did not violate standards enunciated in ETCA.²⁷⁹ That NCRPA is not so limited is obvious. Yet, if one ignores the “Catch 22” implicit in compelling a suit to discover the context of a notification,²⁸⁰ NCRPA does not indicate a dedication to punishing zealous “private attorneys-general.”

VI. Organizing & Maintaining NCRPA Ventures

Prior to recommending approaches to organizing and thereafter maintaining a venture qualified for the maximum use of NCRA safe harbors, certain elemental questions must be addressed. On the face of the matter, commonly controlled persons are not excluded from forming NCRPA joint ventures. That such an eventuality was not contemplated by Congress seems a given but this does not preclude NCRPA joint ventures by commonly controlled focus with or without “outsiders.”

Assuming a conforming venture,²⁸¹ what of its activities neither included nor excluded by NCRPA? What of agreements between or among venturers that are excluded by NCRA § 2(b)?²⁸²

It is easy enough to say that such conduct is not entitled to judicial application of the NCRPA “rule of reason standard.” The rule of reason standard keys on conduct indulged “in or performing a contract to carry out” an NCRA-defined venture and such a venture is recognized by reference to activities permitted it. But such a response would ignore very real questions and thereby be too simplistic.

277. NCRA, 15 U.S.C. § 4304(a)(2).

278. *Id.* § 4304(b).

279. ETCA, 15 U.S.C. § 4016(b)(4).

280. *See supra* text accompanying notes 262-65.

281. NCRA, 15 U.S.C. § 4301(a)(6).

282. *Id.* § 4301(b).

Does an otherwise conforming venture lose its character as one defined by NCRA § 2(a)(6) when it engages in activities *beyond* the scope of NCRA § 2(a)(6)? Will the answer vary by reference to whether the additional activity is anti-competitive? What is anti-competitive for such a company? Whether or not indulgence in additional activities disqualifies *pro tanto* combines from being NCRPA joint venturers, thereby debarring them from the NCRPA "rule of reason standard" and damage control, what is the effect of venturers' side agreements that are quite apart from their NCRPA venture but run afoul of the exclusions spelled out by NCRPA definition? What if two of ten NCRPA venturers have a side agreement (unknown to the other eight) that would be excluded by NCRPA § 2(b)? Is the joint venture so tainted as to deny all other ventures and the venture itself the benefits of NCRPA?

Once again, the starting point is the statute. NCRA equates a contemplated "venture" with "activities" undertaken for enumerated purposes.²⁸³ There is no limitation against engagement in activities additional to those coincident with explicitly approved purposes save as excluded by NCRPA § 2(b).²⁸⁴ If Congress intended to limit permissible activities of a defined venture to those particularized in NCRA, it would have been easy enough so to write. What Congress did, through its repeated use of "joint venture" as a defined term of art in NCRPA, was clearly to bless activities serving identified purposes as eligible *prima facie* for the safe harbors. Activities serving purposes within the particularizations of sub-parts (A) through and including (G) of NCRPA § 2(a)(6) and the qualifications to the subparts of NCRPA § 2(b) are clearly eligible for the safe harbors. All such conduct is to be judged within the NCRPA rule-of-reason. However, the NCRPA "rule of reason standard" is broader as it reads on "conduct of" persons "performing a contract to carry out a joint venture." Any other construction would be insensible since, in effect, it would hamper the organization and operation of an incorporated or unincorporated joint venture vehicle as a cost and profit center (or as a series of such centers geared to discrete R&D goals) in order to effect its own enterprise planning, production planning and control procurements, marketing, hiring, firing, and other entrepreneurial activities in a businesslike fashion to serve national purposes.

So, responding to the not too rhetorical questions posed some paragraphs ago, activities of not only a defined venture but also the

283. *Id.* § 4301(a)(6).

284. *Id.* § 4301(b).

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venturers therein are subject to usual antitrust norms only to the degree that such activities are clearly excluded by the qualifications of NCRPA § 2(c) from activities permitted by the Act. Indulgences in such “ultra vires” activities, even should they be subject to characterization as anticompetitive or otherwise violative of antitrust laws or FTCA § 5(a)(1), do not deny NCRA safe harbors for other activities either clearly serving purposes approved by NCRPA § 2(a)(6), falling within the qualifications to its excluded activities, or being entirely unaddressed in explicit terms.

Planners will do well to define commercial objectives and proceed from there through discrete analyses of (a) what can be done without prejudice to obtain the benefit of the NCRA rule of reason and (b) what must be done to achieve safe harbors triggered by filing. Clients must be told that filing a “notification” is *not* a price of access to the NCRPA “rule of reason standard.”

Assuming neutrality of all other factors such as securities regulation and tax regulations, a venture vehicle possessed of the capacity of self-management always will be best to accommodate day-to-day management including licensing. The same conclusions follow if there is sensitivity to one or another venturer deriving an unfair advantage and to the extent there is a need perceived to avoid occasions of rawer manifestations of conduct. A distinct vehicle, preferably but not necessarily organized as a corporation, would be able to contract with suppliers and customers as well as to guard itself and its property from unauthorized exploitations by venturers. It is quite conceivable that the master agreement between or among venturers would invoke the data exchange qualification to NCRPA in order to guard against individual venturers’ ability to abuse the overall licit relationship. The real world provides a sufficient history of suppliers, customers, and licensors’ negotiating to achieve access to reciprocals’ books for the proper purpose of keeping other organizations honest. Why should data exchanges, designed to keep joint venturers honest with one another and society at large, be any different?

Earlier, it was recommended that the vehicle be made a party to the base contract. This recommendation stands whether or not a filing appropriate to the safe harbors is to be made. It is also commended that counsel to NCRPA venturers and, ultimately, ventures examine state unfair practice laws and the FTCA § 5(a)(1) “unfair . . . acts or practices” jurisdiction in the context of the venturer’s purposes and implementation thereof. Such sensitivity should extend through licensing and marketing. Failure, induced by what may be only a passing enfeeblement of the FTC, to consider the power implicit in the Commission’s jurisdiction over “unfair” acts will serve clients poorly

indeed if the Commission is reinvigorated and staffed with folk disdainful of NCRPA.

VII. Conclusion

The starting point is the statute. In the case of NCRPA, legislative history of NCRA and NCPA is more concealing than revealing. What has been blessed is international, not merely national, cooperation. American entrepreneurs definitely are not benefitted to a degree beyond non-Americans. The number of filings with the DOJ and FTC will not tell us anything more than a minimum number of firms claiming the *full* benefit of NCRPA. The NCRPA "rule of reason standard" well may come to be invoked by non-filers. What benefits will flow from NCRPA will depend entirely on the sagacity of affiliates in multinational as well as domestic joint ventures. We have been sent, all too carelessly, to voyage on uncharted seas somehow or other reminiscent of those once dominated by robber barons as later refined by Japan, Inc.