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PFIZER, INC. v. INDIA
FOREIGN SOVEREIGNS' STANDING TO SUE FOR TREBLE DAMAGES

The concept of free enterprise in our economy is predicated upon the idea that the competition therein be free and fair.[1] In the late 1800's, however, business practices in the United States had developed to the point where "the individual entrepreneur and the small partnership were steadily replaced by the corporation, the trust, and the cartel as the customary forms of business organization."[2] These larger business organizations were able to drive smaller businessmen out of business while denying other small businessmen the opportunity to compete.[3] In response to this abuse of power by large corporations in denying small businessmen a chance to compete equally, federal antitrust legislation was enacted.

The first attempt by the federal government to solve this problem of unfair conduct was the Sherman Antitrust Act, which was passed in 1890.[4] The language of its two substantive sections[5] reflected a basic policy against concentration of wealth to such an extent that this wealth could be used to suppress competition. The Sherman Act did not, however, effectively resolve this problem. In many cases, the courts refused to find certain conduct to be in violation of the law. There were also certain anticompetitive practices that were not covered by the

1. *See, e.g.*, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) (entering into contracts with independent service stations for exclusive sales of auto accessories, and excluding any other brands, stated a cause of action for violation of antitrust laws).

2. E. KINTNER & M. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 3 (1974).

3. *See id.*

4. This law was passed with the assumption that the public interest lay in maintaining a competitive economy in which corporate self-interest would not be able to control the ability of the small businessman to compete. The intent was to control the sometimes outrageous anticompetitive activities occuring then. *Id.* at 4.

5. The two substantive sections were sections one and two. Sherman Antitrust Act of 1890, ch. 647, §§ 1,2, 26 Stat. 209 (current version at 15 U.S.C. §§ 1,2 (1976)).

Section 1 read in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* at § 1.

Section 2 read in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." *Id.* at § 2.

Act.[6] As a result, there was a public uproar to enact more effective antitrust legislation. Public dissatisfaction against economic abuses increased to the point where the 1912 National Platform of the Democratic Party adopted a statement favoring the enactment of legislation that would strengthen the Sherman Act.[7] Finally, Congress passed the Clayton Act in 1914 which was designed to strengthen the Sherman Act and to make antitrust legislation more effective.

One means of increasing the effectiveness of antitrust legislation was to allow private parties to sue for antitrust violations. Section 4 of the Clayton Act permits any person[8] whose business or property has been injured as a result of an antitrust violation to sue for threefold the amount of actual damages.[9] This treble damage provision serves both as an incentive for private individuals to sue, and as a punitive sanction.[10] This provision was intended to aid in achieving the broad social objective of the antitrust laws, which is to ensure fair competition.[11]

The question, however, arose as to just how broadly the term "any person" in section 4 should be construed. The Supreme Court had held that the United States was not a person under section 4 and consequently, had no standing to sue for

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6. *See* Levy, *The Clayton Law—An Imperfect Supplement to the Sherman Law*, 3 VA. L. REV. 411 (1916).

7. *Id.* at 415 (quoting the National Platform of the Democratic Party).

8. Section 1 of the Clayton Act defines person. Clayton Act of 1914, § 1, 15 U.S.C. § 12 (1976). It reads in pertinent part:

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country.

Id.

9. Clayton Act of 1914, § 4, 15 U.S.C. § 15 (1976) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 4 of the Clayton Act superseded Section 7 of the Sherman Act which contained similar language. Section 7 of the Sherman Act applied only to the Sherman Act, while the Clayton Act covers violations of all federal antitrust laws. Section 7 was repealed in 1955 as redundant. 15 U.S.C.A. § 15, (Historical Note at 161) (1973).

10. *See* Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 286 (1973). The author concluded that criminal sanctions are very weak deterrents and that the treble damage provision "thus becomes extremely important in determining the effectiveness of existing 'punitive' antitrust sanctions and the dimensions of the existing incentive for private enforcement." *Id.* at 287.

11. Karseal Corp. v. Richfield Oil Corp., 221 F.2d at 365.

treble damages.[12] In contrast, the Supreme Court held that domestic states[13] and municipalities[14] were persons under section 4. Furthermore, the express language of the statute provided for foreign corporations to be considered as persons under section 4.[15] The question as to whether the term "any person" should be construed so broadly as to permit foreign nations to sue for treble damages arose in *Pfizer, Inc. v. India*.[16] In Justice Stewart's majority opinion the Supreme Court ruled that the term "any person" did confer standing to sue for treble damages for antitrust violations under the Clayton Act upon a foreign sovereign.

FACTS AND PROCEDURAL HISTORY

This litigation, as well as approximately one hundred and fifty other actions, grew out of two events. One was a Federal Trade Commission proceeding instituted in 1958 against Pfizer and other drug companies to investigate their pricing policies.[17] The other was a criminal antitrust action brought by the United States in 1961 against the drug companies for conspiracy to monopolize and restrain trade.[18] Plaintiffs, the governments of several foreign countries,[19] charged that defendants, six major pharmaceutical firms,[20] had conspired to defraud the United States Patent Office, to eliminate competition, and to fix antibiotic drug prices in violation of sections 1 and 2 of the Sherman Act.[21] Those sections provide that contracts in restraint of

12. United States v. Cooper Corp., 312 U.S. 600 (1941).

13. Georgia v. Evans, 316 U.S. 159 (1942).

14. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906).

15. *See* note 8 *supra*.

16. 434 U.S. 308 (1978).

17. *See* Pfizer, Inc. v. Lord, 456 F.2d 532, 533 n.1, (8th Cir. 1972).

18. United States v. Chas. Pfizer & Co., Inc., 61 Cr. 772, *rev'd* for new trial, 426 F.2d 32 (2nd Cir. 1970), prior *en banc* hearing order vacated, opinion of panel *modified*, and petition for rehearing denied 437 F. 2d 957 (2nd Cir. 1970), new trial determination *aff'd*, 404 U.S. 548 (1972).

The criminal antitrust litigation ended without a finding of guilt. The Second Circuit reversed the criminal convictions and the Supreme Court affirmed the Second Circuit's reversal. United States v. Pfizer, Inc., 404 U.S. 548 (1972).

19. The foreign countries were the Government of India, the Imperial Government of Iran, the Republic of the Philippines, and the Republic of Vietnam. The Republic of Vietnam's complaint was dismissed by the District Court on the ground that the United States no longer recognized the government of Vietnam and this dismissal was affirmed by the Court of Appeals. Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977).

20. The six major pharmaceutical firms were Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, Olin Corporation, and The Upjohn Corporation. *Id.* at 892.

21. The actions were brought separately in federal district courts and were later consolidated for pretrial purposes in the United States District

trade and persons restraining trade or attempting to restrain trade are in violation of the federal antitrust laws.[22] Claiming that, as purchasers of antibiotics, they had been injured in their business or property interests by the alleged antitrust violations, these countries sued for treble damages under section 4 of the Clayton Act.

The drug companies asserted as an affirmative defense that plaintiffs, as foreign nations, were not persons within the meaning of the statute. In response to pretrial motions, the district court held that foreign nations were persons within the meaning of the statute and declined to dismiss the actions for lack of standing.[23] In reaching this decision, the district court relied on its prior decision denying a motion to dismiss a related suit by Kuwait.[24] In that case, the district court held that a foreign government was a person within the meaning of the statute.[25] The court then recognized that this difficult question of statutory interpretation was one of first impression and certified the question for appeal.[26]

The appeal was taken to the Court of Appeals for the Eighth Circuit[27] which affirmed that foreign sovereigns were persons within the meaning of the statute. The appellate court noted that the case turned on statutory interpretation and nothing more.[28] In interpreting the statute, the Eighth Circuit relied on two previous Supreme Court cases dealing with the problem of

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Court for the District of Minnesota. India and Iran alleged that they were foreign states who maintained diplomatic relations and the Philippines alleged that it was a sovereign and independent government. *See* Pfizer, Inc. v. India, 550 F.2d 396 (8th Cir. 1976), *cert. granted*, 430 U.S. 964 (1977); Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975) *cert. denied*, 424 U.S. 950 (1976).

22. 15 U.S.C. §§ 1,2 (1976).

23. India v. Pfizer, Inc., No. 75-48 (D. Minn. 1975) (order denying defendant's motion to dismiss the suits by India and Iran). *See* cases cited in note 21 *infra*.

24. India v. Pfizer, Inc., No. 75-48 (D. Minn. 1975).

25. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 315 (S.D.N.Y. 1971). In this decision the court pointed out that the important thing to keep in mind was the *result orientation* with which the Supreme Court has always approached the area of private treble damage litigation. To make the antitrust laws as effective as possible, foreign governments must be allowed to sue. The court reasoned that not enabling foreign nations to sue would have an adverse effect on domestic competition. It would enable the domestic manufacturers to amass a substantial "war chest" from excessive profits abroad with which they could fight domestic antitrust litigation. It could also prevent either a domestic or foreign manufacturer from entering a foreign market with the intent to become powerful enough to enter the domestic market. The court concluded that for these reasons the fundamental goals of the antitrust laws would be seriously impaired if foreign nations were not allowed to sue.

26. India v. Pfizer, Inc., No. 75-48 (D. Minn. 1975).

27. 550 F.2d 396 (8th Cir. 1976).

28. *Id.* at 397.

whether sovereigns were persons under section 4 of the Clayton Act.[29]

In the first of these cases, *United States v. Cooper Corp.*,[30] the United States was considered not to be a person under the statute. The second decision, *Georgia v. Evans*,[31] held that a state was a person under the statute. In the appellate court's opinion, a foreign nation was held to be analogous to a state rather than the United States government. On that basis, the appellate court held that sovereigns were persons under the statute.[32]

On a rehearing en banc the court of appeals reaffirmed, but noted that there was no controlling legislative history.[33] The Supreme Court granted certiorari stating that foreign sovereigns' standing to sue was an important and novel question in administering antitrust laws.[34]

Opinion Of The Supreme Court

The Supreme Court affirmed the decision of the district court and the court of appeals. The Court also conceded that this was a case of statutory interpretation and that there was no Congressional intent to guide the Court in its interpretation.[35] The *Pfizer* Court, therefore, looked beyond what was explicitly stated in the statute in determining its meaning. In determining the statute's meaning, the Court relied on the purposes and policies of antitrust law to interpret the breadth of the statute. The Court decided that the policies involved in antitrust legislation, the concepts of statutory interpretation, and the interests of comity required that foreign nations be considered as persons within the meaning of section 4 of the Clayton Act. Therefore, foreign governments may sue for treble damages for injury to their business or property caused by a violation of United States antitrust laws.[36]

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29. *Id.* at 398.

30. 312 U.S. 600 (1971).

31. 316 U.S. 159 (1942).

32. 550 F.2d at 399.

33. 550 F.2d at 400. In addition to noting the absence of controlling legislative history, the majority opinion expressed the view that Congress should take some action. At present, there is a bill in the Senate which would limit foreign nations to actual damages. *See* text accompanying notes 135-139 *infra*.

34. 430 U.S. 964 (1977).

35. 434 U.S. at 313.

36. Respondents also sued in a *parens patriae* capacity but that claim was dismissed in a separate appeal and the Supreme Court did not consider the issue. *See* Pfizer, Inc. v. Lord, 522 F.2d 612, 615-20.

Expansive Remedial Purpose

In its decision, the Supreme Court noted the expansive remedial purpose and the broad interpretation previously given the antitrust laws.[37] The breadth of the interpretation was determined by looking at the legislative and judicial history of these laws.[38] In analyzing the legislative history of the antitrust laws, the Supreme Court looked to the Senate debates concerning the Sherman Act and determined that these debates warranted a very broad interpretation of the phrase "any person."[39]

In each debate during the drafting of the Sherman Act, concern was evinced that every American consumer should be protected to the fullest possible extent. Senator Sherman, the sponsor of the bill, wanted every person, no matter how humble, powerless and solitary, to be given an equal chance to compete.[40] It was essential that "any party"[41] who had been wronged should have a cause of action.[42] The use of the phrase "any party" indicated that Senator Sherman felt that the bill had to be drafted in such a way that any citizen would be able to bring an action to protect himself. This concern further manifested itself in Sherman's dissatisfaction with the fact that the bill, at the time these preliminary debates occurred, provided only for double the damages incurred. Senator Sherman felt that this amount was too small and that it would not be a sufficient incentive to encourage a person to sue for redress of a violation.[43] The Sherman Act was passed to relieve the personal

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37. 434 U.S. 312.

38. *Id.*

39. *See id.* at 312-13.

40. I do not care how much men combine for proper objects; but when they combine with a purpose to prevent competition, so that if a humble man starts a business in opposition to them, solitary and alone, in Ohio or anywhere else, they will crowd him down and they will sell their product at a loss and give it away in order to prevent competition . . . then it is the duty of the courts to intervene and prevent it by injunction and by the ordinary remedial rights afforded by the courts.

21 CONG. REC. 2569 (1890) (Remarks of Senator Sherman).

41. *Id.*

42. This debate was concerned with the constitutionality of the bill as it was then written. By itself, it does not show that foreign sovereigns should be allowed to sue, as pointed out by Chief Justice Burger in his dissent. 434 U.S. at 321-22. But this debate was not cited by the Supreme Court as direct evidence to show that there was Congressional intent to permit foreign sovereigns to sue. It was cited merely to show how broad the remedial purpose of the statute was meant to be. *See* 434 U.S. at 312-13.

43. I think myself the rule of damages is too small. It provides double the damages and reasonable attorneys' fees. Very few actions will probably be brought, but the cases that will be brought will be by men of spirit who will contest against these combinations.

21 CONG. REC. 2569 (1890) (Remarks of Senator Sherman).

disadvantages and hardships of the "workingmen all over our land . . . the farmers in their alliances"[44] and all the other "common men" who suffered from the domination of competition by large corporations.

Statutes enacted to relieve hardship and suffering are generally accorded a liberal construction.[45] Since the Sherman Act was enacted for this purpose, it should be given a liberal construction. The Clayton Act, intended to strengthen and supplement the Sherman Act, also should be given a liberal construction.

The legislative history of the Sherman Act is not the only factor militating in favor of a broad interpretation of the antitrust laws. The judicial history of the antitrust laws also shows that the courts have given the laws broad scope. The Supreme Court has held that the Sherman Act was designed to be comprehensive in its terms, coverage, and protection of any victims of prohibited practices.[46] Since the Clayton Act was enacted to strengthen the Sherman Act,[47] the same logic applies to the Clayton Act, *a fortiori*, with regard to judicial interpretation.

Policy Behind Section 4 of the Clayton Act

The legislative history and the judicial history of the Sherman Act demonstrate that the purpose of the antitrust laws warrants a liberal construction so as to protect American consumers from injuries resulting from violations of these laws. As a means of providing such extensive protection, section 4 of the Clayton Act allows private parties to bring actions for treble damages.

Section 4 has two purposes: deterrence of antitrust violators and compensation for victims of these violations.[48] Potential litigants are offered the possibility of recovering treble damages in order to maximize the incentive to sue and thus aid in antitrust

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44. 21 CONG. REC. 2567 (1890) (Remarks of Senator Sherman).

45. "Statutes which are enacted to relieve personal disadvantage, hardship, and suffering are generally accorded generous judicial acceptance and liberal construction." 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 58.04 (4th ed. 1972).

46. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (Jackson, J., dissenting).

47. *See* text accompanying notes 7-9 *supra*.

48. But § 4 has another purpose in addition to deterring violators and depriving them of the "fruits of their illegality," *Hanover Shoe*, 392 U.S. at 494; it is also designed to compensate victims of antitrust violations for their injuries.
Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).

law enforcement. In effect, Congress is encouraging litigants to serve as private attorney generals.[49] Thus, the treble damage provision is an important law enforcement tool. The importance of an effective treble damage provision is apparent in that it has been the most effective means of enforcing the antitrust laws.[50] Therefore, since the treble damage provision is an important method of enforcing antitrust laws, it has been broadly construed by the Supreme Court.[51]

Application to Foreign Plaintiffs

Having emphasized the importance of the policies behind section 4 of the Clayton Act, the Supreme Court decided that the antitrust laws were applicable to foreign trade.[52] The Court noted it was clear that the Sherman and Clayton Acts were not intended to be restricted to American consumers since the definition of person under the Clayton Act *expressly included* foreign corporations.[53] Furthermore, the antitrust laws applied to trade with foreign countries[54] both with regard to imports and exports.[55] For example, the Sherman Act had been held to apply to agreements made among United States companies work-

49. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (since a state could sue for treble damages in its proprietary capacity, it could not recover damages for injury to its general economy).

50. *See* Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 286 (1973); Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U.L. REV. 1, 5 n.28 (1975) [hereinafter cited as Velvel].

51. Just how broadly the treble damage provision has been construed may be illustrated by two cases. In Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Supreme Court refused to recognize the doctrine of *pari delicto* as a defense to treble damage actions. The Court stated that it would be inappropriate to invoke broad common law barriers to relief where a private suit serves such an important public purpose. Although the plaintiff receiving the reward may be no less morally reprehensible than the defendant, he is allowed to sue in order to further the overriding public policy in favor of competition. *Id.* at 139.

In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the Court refused to allow a defense of "passing-on" to vindicate defendant. Defendant had argued that since plaintiff had "passed-on" the higher costs to his customers the plaintiff had suffered no injury and therefore should not be allowed to sue. The Court, in rejecting the argument, stated that it was still possible for plaintiff to be injured. More importantly, the Court stated that if it recognized this defense, then treble damage actions would be substantially reduced in effectiveness. Therefore, the Court was not willing to accept this defense, noting how important treble damage actions were to antitrust enforcement. *Id.* at 494.

52. 434 U.S. at 313-15.

53. 434 U.S. at 313.

54. 15 U.S.C. §§ 1,2 (1976).

55. *See* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 343 (2d ed. 1970).

ing together in foreign markets.[56] It had also been held to apply to agreements between United States and foreign companies working together in foreign markets.[57]

The Supreme Court in *Pfizer* found additional evidence that the antitrust laws were not meant to be applicable only to American consumers in the legislative and judicial history of the Webb-Pomerene Export Trade Act of 1918,[58] passed four years after the Clayton Act. The Webb-Pomerene Act qualified the operation of the Sherman and Clayton Acts in the field of foreign trade by exempting certain agreements that American exporters had entered into regarding foreign commerce that would otherwise violate the Sherman and Clayton Acts.[59] These agreements, however, must not have a restrictive effect on commerce, or be exclusionary, or harmful against American exporters who do not join in the agreements.[60]

Before the Webb-Pomerene Act was passed, there was a thorough investigation of foreign trade by the Federal Trade Commission. The entire emphasis of its report was the desirability of furthering competition between domestic and foreign concerns and not the elimination of competition.[61] This report was presented to Congress, and contributed to the drafting, debating, and passage of the Webb-Pomerene Act.[62] Statements by the sponsors of the Webb-Pomerene Act demonstrated that they thought the Act would strengthen the Sherman Act,[63] because it extended the antitrust laws beyond the boundaries of the United States.[64] Thus, the clear intent of Congress was to apply the antitrust laws beyond American consumers.

The scope of this exemption to the Sherman Act was narrowly construed by the judiciary.[65] A New York federal district

56. United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

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

58. Webb-Pomerene Export Trade Act of 1918, §§ 1-6, 15 U.S.C. §§ 61-65 (1976).

59. *Id.* at § 62.

60. A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 343 (2d ed. 1970).

61. United States v. United States Alkali Ass'n, 86 F. Supp. 59, 68-69 (S.D.N.Y. 1949) (an export association violated the Sherman Act by entering into agreements with foreign companies relating to divisions of world markets, assignment of international quotas and fixing of prices).

62. *Id.* at 69.

63. "It strengthens the Sherman law . . . in so far as unfair practices are concerned beyond territorial lines." 56 CONG. REC. 173 (1917) (Remarks of Senator Pomerene).

64. United States v. United States Alkali Ass'n, 86 F. Supp. at 67.

65. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (the Webb-Pomerene Act does not apply where United States companies and foreign companies agree to divide up a foreign market to limit competition); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947

court held that instead of restricting the application of the antitrust laws abroad, the Webb-Pomerene Act in fact extended the extraterritorial effect of those laws.[66] The Webb-Pomerene Act also enlarged the investigatory powers of the Federal Trade Commission to extraterritorial agreements.[67] Therefore, the Webb-Pomerene Act was evidence that the antitrust laws should apply to trade with foreign countries as well as domestic citizens.[68]

The Supreme Court noted that if the antitrust laws did not apply to a foreign plaintiff, such a plaintiff would be without a remedy and the purposes of section 4, deterrence and compensation, would be defeated.[69] Such antitrust violators would not be liable for violations committed against foreign consumers, thereby significantly diminishing the deterrent value of the treble damages action. The deterrent value would be diminished because it would no longer be available for extraterritorial violations. Since the deterrent value would decline and victims of the violations would go uncompensated, both purposes of section 4 would be frustrated.

The resultant decreased effectiveness of the antitrust laws would not be the only drawback. The *Pfizer* Court noted that the inability of foreign customers to be compensated for injuries caused by antitrust violators could adversely affect American consumers.[70] For example, if several American companies possessing significant monopoly power conspired to fix prices worldwide, then higher prices could result in the United States.[71] More importantly, the inability of foreign plaintiffs to sue could lessen their confidence that they would receive fair

(D. Mass. 1950) (the Webb-Pomerene Act does not apply where United States companies agree to enter upon combined operations in foreign markets which have the effect of restricting imports).

66. "Far from restricting the application of the antitrust laws abroad, the Webb Act made what, at the time of its passage, were wide extensions in the extraterritorial effect of those laws designed to preserve competition." United States v. United States Alkali Ass'n, 86 F. Supp. 59, 67 (S.D.N.Y. 1949).

67. Webb-Pomerene Act, §§ 4,5, 15 U.S.C. §§ 64,65 (1976).

68. *But see* Chief Justice Burger's dissent (Rehnquist and Powell, JJ., joining) in *Pfizer* where he stated that the Webb-Pomerene Act indicated that Congress felt that American consumers' interests could be served at the *expense* of foreign states and consumers. 434 U.S. at 323.

69. "To deny a foreign plaintiff injured by an antitrust violation would defeat these purposes." 434 U.S. at 314.

70. 434 U.S. at 315.

71. "This result occurs because a worldwide conspiracy, so long as it remains effective, eliminates the possibility that foreign suppliers may seek to enter the American market with competitive prices that are beneath the existing domestic price level." Velvel, *supra* note 50, at 8. *See also In re* Antibiotic Antitrust Actions, 333 F. Supp. 315, 316 (S.D.N.Y. 1971).

treatment under American law. This might lead to a reluctance by foreign consumers to invest or purchase in the United States.[72]

The Supreme Court was also cognizant of the fact that the loss of the deterrent factor inherent in the treble damage action could also result in harm to the American consumer.[73] Immunity from treble damage actions by foreign plaintiffs would enable domestic manufacturers to compile substantial "war chests" from excess foreign profits.[74] These "war chests" could then be used to establish and maintain domestic conspiracies and to defend them from potential antitrust actions.[75] Alternatively, if antitrust violators were to be held accountable for their conduct with foreign customers, then American consumers would benefit due to the maximizing of the deterrent effect of treble damages.[76]

The inability of foreign plaintiffs to sue would be detrimental not only to foreign plaintiffs but also to American consumers. Therefore, in order to protect American consumers, foreign plaintiffs should be allowed to sue for treble damages.

Application to Foreign Sovereigns

Although the Supreme Court felt that foreign plaintiffs, individual or corporate, had standing to sue, this did not necessarily imply that foreign sovereigns should be allowed to sue for treble damages.[77] There are differences between corporations and sovereigns. First, it is possible for corporations to possess rights which are denied to sovereigns.[78] Second, foreign corporations are subject to suit in the United States while foreign sovereigns are generally accorded sovereign immunity.[79]

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72. Velvel, *supra* note 50, at 8 n.40. Alternatively, if foreign purchasers feel confident of fair treatment under American law, then they will be encouraged to invest capital and make purchases in the United States.

73. 434 U.S. at 315.

74. *In re* Antibiotic Antitrust Actions, 333 F. Supp. 315, 316 (S.D.N.Y. 1971).

75. Velvel, *supra* note 50, at 8.

76. *But see* Chief Justice Burger's dissent in *Pfizer*. Burger argued that the treble damage provisions were designed primarily as a remedy and not as a deterrent. The Court did not have the power to give a remedy to someone not intended by Congress to receive the remedy. To do so would be to reverse the priorities solely on the basis of some possible beneficial consequences to American consumers deriving from this "maximum deterrent." 434 U.S. at 329.

77. 434 U.S. at 315.

78. *See, e.g.*, Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934) (a corporation was allowed to sue although owned by a sovereign whom the United States did not recognize).

79. In dealing with sovereign immunity the Court has distinguished be-

The main question before the Supreme Court in *Pfizer* was whether the word "person" in the Clayton Act included sovereigns.[80] In order to answer this question, the *Pfizer* Court examined two prior decisions that had dealt with whether a sovereign was a person within the meaning of the antitrust laws.

In the first decision, *United States v. Cooper Corp.*,[81] the Court faced the issue of whether the United States could maintain an action under section 7 of the Sherman Act, which permitted treble damages. Since section 7 of the Sherman Act was replaced by section 4 of the Clayton Act, the logic in *Cooper* was applicable to *Pfizer.*[82] In *Cooper*, the Court maintained that the Sherman Act created new rights and remedies which were available only to those named in the Act.[83] But in deciding who was named in the Act, the Court declined to automatically exclude a sovereign either by a strict construction of the Act or by other traditional canons of construction.[84] The Court felt that the statute should be read in its natural sense and if doubt remained as to its meaning, then such doubt should be resolved by other means of interpretation.[85] Under these criteria the *Cooper* Court held that the United States was not a person within the meaning of the Sherman Act.[86]

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tween situations in which the foreign sovereign was exercising its sovereign powers and situations in which it was acting in a commercial capacity. In the former situation sovereign immunity was held applicable while in the latter situation it wasn't. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976) (a sovereign's refusal to repay accounts receivable mistakenly paid was not an act of state, but merely a commercial transaction and, therefore, sovereign immunity was not a valid defense).

80. The word person did not have a fixed meaning. In section 1 of the Clayton Act, person is defined as *including* various categories. However, the terms *means* and *includes* are not synonymous and categories not mentioned are not to be automatically excluded. Helvering v. Morgan's, Inc., 293 U.S. 121, 125 (1934). Therefore, sovereigns were not automatically excluded from the Act simply because they were not included in the categories mentioned. In dealing with the standing of sovereigns, "there is no hard and fast rule of exclusion." United States v. Cooper Corp. 312 U.S. 600, 605 (1941).

81. 312 U.S. 600 (1941).

82. *See* note 9 *supra.*

83. 312 U.S. at 604. Note that this statement gives rise to an argument that the statute should be construed strictly. The Sherman Act modified the common law with regard to actions in restraint of competition. The general rule is that statutes in derogation of the common law are to be strictly construed. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 58.03 (4th ed. 1972). The Court rejected a narrow interpretation in *Pfizer*, however, saying that the expansive remedial scope of the Act did not permit such a construction. 434 U.S. at 313.

84. 312 U.S. at 605.

85. *Id.* These other aids to construction are purpose, subject matter, context, legislative history and executive interpretation of the statute.

86. *Id.* at 614.

The basis of the decision in *Cooper* was that the United States government had alternative antitrust weapons with which to prosecute violators. The federal government could bring criminal prosecutions,[87] suits in equity,[88] and seize property[89] to enforce the antitrust laws.[90] Therefore, the Court drew a distinction between means of enforcement available to the federal government and treble damage actions available to private parties. The Court held that because it had available alternative remedies, the United States was not intended to be a person under the statute.[91]

In the second decision, *Georgia v. Evans*,[92] the Supreme Court decided that a state was a person within the statute. Unlike the federal government, a state cannot prosecute violations of the Sherman Act.[93] The Court could perceive no reason why Congress would want to deprive a state of any way to protect its interests under federal law. Therefore, since a state, unlike the federal government, has no other federal antitrust weapons available to it, it should be permitted to invoke the same civil remedy of treble damages as any other injured purchaser.[94] After examining the previous decisions involving similar questions of interpretation of antitrust laws, the *Pfizer* Court faced the question of whether *Cooper* or *Evans* should control.

At first glance it would seem that a foreign sovereign is more analogous to the federal government than to a state. Just as the federal government has alternative procedures for combatting antitrust violations, foreign sovereigns have alternative means of protecting themselves.[95] Upon a deeper inquiry, though, this analogy breaks down.

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87. Sherman Act §§ 1-3, 15 U.S.C. §§ 1-3 (1976).

88. *Id.* § 4.

89. *Id.* § 6.

90. In 1955, section 4a of the Clayton Act was enacted giving the United States the right to sue for actual damages when damaged in its business or property by a violation of the antitrust laws. Clayton Act § 4a, 15 U.S.C. § 15(a) (1976) (original version at ch. 283, §1, 69 Stat. (1955)).

91. 312 U.S. at 608. In addition, the Court found evidence in the Congressional Record that the United States government was not intended to be included as a person. *Id.* at 611.

92. 316 U.S. 159 (1942).

93. *Id.* at 162.

94. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act.

316 U.S. at 162.

95. Note, *The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions*, 9 CORNELL INT. L.J. 137, 142 (1975) [hereinafter cited as *Foreign Sovereigns Antitrust Actions*]. These means might include passing their own antitrust laws or using other controls over its commerce,

The United States government has a pre-existing duty to pursue antitrust violators, regardless of whether it has been directly injured or not.[96] Foreign sovereigns have no such duty. As it is difficult for the United States to discover antitrust violations, it is even more difficult for a foreign sovereign to discover such. Foreign sovereigns cannot invoke a grand jury, initiate a prosecution, or seize assets in the United States.[97] While the United States has other incentives to sue for antitrust relief, a foreign sovereign's sole incentive is a monetary reward.[98] As a result, therefore, a foreign sovereign cannot accurately be compared to the United States government. On these grounds, the *Cooper* rationale is not applicable.

If *Cooper* does not apply, the question arises whether *Evans* applies. An analogy may be made between a state and a foreign sovereign. As stated in *Evans*, without the ability to sue for treble damages, states would be without a remedy under the federal antitrust laws for injuries sustained by them.[99] Similarly, if foreign sovereigns were not allowed to sue, they would also be without any effective remedy under the United States antitrust laws.[100]

This analogy, however, is not totally accurate. The decision in *Evans* is based upon the fact that the inability of a state to sue for treble damages would deny the state "*any* redress for injuries resulting from practices outlawed by that Act."[101] While foreign states might be left without any effective remedy under the antitrust laws if they are unable to sue, they still would have other means of obtaining redress.[102] For example, foreign governments could retaliate by forming cartels with regard to natural resources.[103] They could also enact their own antitrust laws and bring criminal or civil actions in their own

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such as pricing and import, export and tariff regulations. *See* text accompanying notes 102-105 *infra*.

96. *Foreign Sovereigns Antitrust Actions, supra* note 95, at 143.

97. Velvel, *supra* note 50, at 21.

98. *Foreign Sovereigns Antitrust Actions, supra* note 95, at 143.

99. 316 U.S. at 162.

100. *See* Velvel, *supra* note 50, at 21; *Foreign Sovereigns Antitrust Actions, supra* note 95, at 143 n.32.

101. 316 U.S. at 162 (emphasis added).

102. In fact, the Supreme Court recognized the fact that foreign sovereigns have alternate modes of action. The Court argued that unless foreign sovereigns were allowed to sue, the actions the sovereigns might take in return would affect American consumers. *See* text accompanying notes 71-72 *supra*.

103. *See* Davidow, *Antitrust, Foreign Policy, and International Buying Cooperation*, 84 YALE L.J. 268, 276 (1974). Such cartels have already been formed for oil and copper. *Id.* at 269 n.6.

courts.[104] Furthermore, they could seize goods located within their countries, increase tariff barriers, withdraw licenses to do business, or refuse to recognize patents.[105] Therefore, if the key to *Evans* was that states had no recourse to violations, this same logic is not entirely applicable to foreign sovereigns.

Alternatively, commentators have argued that since both states and sovereigns lack a primary duty to enforce the antitrust laws, they are analogous.[106] However, there is nothing in *Evans* to imply that it was the lack of primary duty to enforce the antitrust laws that permitted states to sue for treble damages. The emphasis in *Evans* is placed on lack of remedy, not on the lack of a primary duty.[107]

Despite the fact that foreign sovereigns are not totally devoid of remedies, *Evans* is an applicable precedent. Many states do have their own antitrust acts, and hence are not totally lacking in remedies as the *Evans* Court implied.[108] These acts allow states to bring their own actions for violations affecting business within their state.[109] Thus, states do have some recourse, even though without the ability to sue for treble damages they would have no remedy under federal antitrust laws. This strengthens the analogy to foreign sovereigns, since many foreign sovereigns have their own antitrust laws.[110]

There also are practical considerations involved that might put a foreign sovereign in an unenviable situation in prosecuting antitrust violations under United States law. Political remedies such as cartels or boycotts are hardly available to a foreign nation faced with monopolistic control over supplies of medicine needed for the health and safety of its people.[111] These problems leave a foreign government in a position which is no better and possibly worse, than a state in obtaining remedies for

104. Chief Justice Burger, in his dissent in *Pfizer*, noted that several foreign countries have their own antitrust laws, including respondents India and the Philippines. 434 U.S. at 327.

105. Velvel, *supra* note 50, at 11.

106. Note, *The Capacity of a Foreign Government to Bring an Action for Treble Damages Under the Federal Antitrust Laws*, 44 GEO. WASH. L. REV. 287, 291 (1976) [hereinafter cited as *Foreign Government Antitrust Standing*].

107. *See* Georgia v. Evans, 316 U.S. at 162.

108. Velvel, *supra* note 50, at 21 n.83.

109. *See, e.g.*, ILL. REV. STAT. ch. 38, §§ 60-1 to 60-11 (1977).

110. *See Foreign Sovereigns Antitrust Actions, supra* note 95, at 143. The author points out that the analogy between states and foreign sovereigns is strengthened in other ways. For example, foreign sovereigns would have difficulty in applying their own statutory remedies. Also, they would face formidable and expensive discovery problems if suit is brought in the United States.

111. 434 U.S. at 318.

antitrust violations.[112] Therefore, *Evans* seems to be an applicable precedent to support the conclusion that foreign governments be allowed to sue for treble damages.[113]

Diplomatic Considerations

In addition to judicial precedent, diplomatic considerations also militated in favor of the *Pfizer* Court's decision to allow foreign sovereigns to sue under the Clayton Act for treble damages. The Court noted that this decision was consonant with concepts of diplomacy decided by the Court in the past.[114] Generally, foreign nations have been permitted to bring civil claims in United States courts in the interests of comity.[115] To deny foreign nations this privilege would manifest a want of comity and friendly feeling.[116] The policy of comity was so persuasive that it had even been extended to countries towards which the United States had shown animosity.[117] For example, even though Cuba in the early 1960's had severed diplomatic relations with the United States, and the United States had frozen Cuban assets in the United States, Cuba was still permitted to sue in United States courts.[118] The privilege of bringing a suit in domestic courts had been denied only to those governments with which the United States was at war or governments which have not been recognized.[119] Thus, principles of comity seemed to

112. Velvel, *supra* note 50, at 21.

113. *But see* Chief Justice Burger's dissent in *Pfizer*. Burger conceded that the plight of domestic states and foreign sovereigns was roughly comparable when viewed solely in terms of remedies. But he would construe *Evans* narrowly on the ground that denying states the treble damage remedy would effectively deny surrogate protection to American citizens in whose behalf the state acts and who were specifically meant to be protected by the Sherman Act. Since foreign governments do not act for the benefit of American citizens, the analysis in *Evans* should not be applied to foreign sovereigns. There is no proof that Congress intended that the same benefits running to domestic states should be applied to foreign sovereigns.

> Thus while the result in *Evans* is a tolerable taking of certain liberties with the literal language of the statute, the congruence of that result with Congress' purpose can scarcely be doubted. This same logic, however, does not even remotely apply to the situation of foreign nations.

434 U.S. at 326.

Justice Powell, in his dissent, reiterated this logic saying that the decision in *Evans* was predicated on the benefit that would accrue to American citizens. Since allowing foreign sovereigns to sue would not benefit American consumers, *Evans* should not be extended to include foreign sovereigns. *Id.* at 329.

114. *Id.* at 319.

115. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); The Sapphire, 78 U.S. (11 Wall.) 164 (1870).

116. The Sapphire, 78 U.S. (11 Wall.) at 165 (1870).

117. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-09 (1964).

118. *Id.* at 409.

119. *Id.*

require that foreign governments be permitted to sue for treble damages in our courts.[120]

Permitting foreign sovereigns to sue for treble damages was in agreement with Congressional and Executive policies.[121] The Bretton Woods Agreement[122] declared that foreign nations should take steps to eliminate unfair trade practices in international trade.[123] Allowing foreign governments to sue for treble damages would advance this policy.[124] Furthermore, disallowing foreign sovereigns to sue could be interpreted by those and other nations as a hostile action in derogation of treaties already signed with the United States.[125]

In addition to the possibility of alienating other nations, denying foreign sovereigns the right to sue for treble damages would lead to anomalous results.[126] Some nations are organized as corporations under their laws.[127] These nations, suing as corporations, would be permitted to bring suit. However, those nations not organized as corporations would be precluded from suing. Thus, a situation would arise in which some nations could sue while others could not.

A further anomaly would result under the Foreign Sovereign Immunities Act of 1976[128] if suits by foreign governments for treble damages were not allowed. Under this Act, foreign states are not immune from suits regarding their commercial activities.[129] This could make a foreign nation liable for antitrust violations committed in the United States. Unless permitted to sue, a nation could be put in the position of being liable for antitrust violations while being denied the complementary remedy.[130]

In contrast to the above reasons, commentators have raised the argument that since foreign sovereigns, as defendants, are not liable for punitive damages under the Foreign Sovereign Immunities Act of 1976,[131] they should not be able to sue for puni-

120. *See* Velvel, *supra* note 50, at 9; *Foreign Government Antitrust Standing, supra* note 106, at 293.

121. Velvel, *supra* note 50, at 9.

122. 22 U.S.C. §§ 286-286k-1 (1976).

123. *Id.* § 286k.

124. *Foreign Government Antitrust Standing, supra* note 106, at 293.

125. Amicus Curiae Brief for Federal Republic of Germany at 6-8, Pfizer, Inc. v. India, 434 U.S. 308.

126. *Id.* at 4.

127. *Id.*

128. 28 U.S.C.A. §§ 1602-1611 (West Supp. 1977).

129. 28 U.S.C.A. § 1602 (West Supp. 1977).

130. Amicus Curiae Brief for Federal Republic of Germany at 17, Pfizer, Inc. v. India, 434 U.S. 308.

131. 28 U.S.C.A. § 1606 (West Supp. 1977).

tive damages as plaintiffs.[132] The Supreme Court, however, has previously recognized that in antitrust legislation an entity may sue for treble damages even if it cannot be sued for its own antitrust violations.[133] Therefore, this argument, which the Supreme Court in *Pfizer* did not even mention, presents no barrier to the right of foreign sovereigns to sue in the United States.

Allowing foreign sovereigns to sue for treble damages is consistent with the foreign policy espoused by Congress and the Executive branch. In fact, it could improve foreign relations by showing foreign governments that we intend to be fair to them. For these reasons, foreign governments should be allowed to sue for treble damages.[134]

CONCLUSION

In *Pfizer*, the Supreme Court reaffirmed its commitment to ensuring the broad scope of the antitrust laws in order to guarantee healthy competition. Despite the absence of a specific congressional intent to include foreign sovereigns as persons under the Clayton Act, the broad scope of the law required that foreign sovereigns be permitted to sue for treble damages.

The Supreme Court noted that the legislative and judicial history of the antitrust laws disclosed a broad remedial purpose

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132. This argument is based on the theory that to be permitted to sue for treble damages, one must be liable under the antitrust laws for treble damages. Since foreign governments are not liable for treble damages under the antitrust laws, they should not be permitted to sue for treble damages under the antitrust laws. *See* Velvel, *supra* note 50, at 21.

133. In Parker v. Brown, 317 U.S. 341 (1943), the Court held that an attack on a state law as an illegal restraint of trade was an attack on state regulation and that the Sherman Act did not restrain a state's regulation of economic activities. In other words, a state may not be sued for treble damages under the Sherman Act. But in *Evans* the Court decided that a state can sue for treble damages under the Sherman Act. Using the two cases together, the result is that a party need not be suable in order to sue. *Id.* at 21-22.

134. *But see* Justice Powell's dissent in *Pfizer*. Powell noted that whether or not a foreign sovereign should be allowed to sue was a general policy question. Powell stated that general policy questions, especially with respect to foreign affairs, and in the absence of explicit legislative authority, are political questions not to be decided by the judiciary. "A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interest of our country." 434 U.S. at 331. Chief Justice Burger also argued that the policy issue was too delicate and important to be resolved by the judiciary and should be left to the Congress and the Executive. However, these arguments are not totally valid. When the rights of aggrieved parties require resolution, the courts have often decided these controversies on their merits regardless of the fact that foreign relations may be intimately connected. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 207-208 (1972). *See also Foreign Sovereigns Antitrust Actions*, *supra* note 95, at 152.

to protect parties injured by violations of these laws. This protection was not intended to be limited to United States citizens alone. The laws provided that foreign individuals, such as corporations, could also sue if they were injured.

The Court then noted that without the ability to sue for treble damages, foreign sovereigns would be devoid of remedies under federal antitrust laws. Foreign sovereigns possessed none of the alternative weapons which are available to the United States government in dealing with antitrust violations. Whatever means of redress foreign sovereigns had, at best they were no more effective and possibly less effective than the means of redress presently available to a state. The Court reasoned, therefore, that the expansive remedial intent of the law would be best served by permitting foreign sovereigns to sue for treble damages.

Permitting foreign sovereigns to sue provides protection to American consumers by ensuring that victims of antitrust violations can obtain redress and by maximizing the deterrent effect of the antitrust laws. When foreign nations enter into commercial markets as purchasers, they can also be victims of anticompetitive practices. In the absence of other remedies, they should be permitted to sue for treble damages. Furthermore, allowing foreign sovereigns to sue is consistent with diplomatic and foreign policy considerations by displaying comity to foreign nations. These factors combine to form a strong basis for the Court's decision.

After the decision was first announced by the Supreme Court, there were immediate signs of Congressional disapproval. In the Senate an amendment was added to Senate Bill 1874 which would preclude foreign sovereigns from suing under the Clayton Act unless certain conditions were met, and if these conditions were met, foreign sovereigns would still be limited to actual damages.[135] A similar bill was introduced in the House

135. S. 1874, 95th Cong., 2d Sess. (1978). The amendment provides:

Sec. 5. Section 4 of the Clayton Act is amended by adding at the end of that section the following new language:

Provided, however, that suits under this section brought by foreign sovereign governments, departments or agencies thereof, shall be limited to actual damages; and, provided further, that no foreign sovereign may maintain an action in any court of the United States under the authority of this section unless the Attorney General of the United States, within 120 days after the commencement of the action, has certified to the relevant court or a relevant court otherwise finds that—

(1) the United States is entitled to sue in its own name and on its own behalf on a civil claim in the courts of such foreign sovereign; and

(2) such foreign sovereign by its laws prohibits restrictive trade practices.

The amendment made by this section shall apply to any action which is

of Representatives.[136]

At the time of this writing, both bills are in committee in each chamber of Congress. The chances for passage are uncertain. The reason for uncertainty is that although there seems to be general opposition in Congress to the Supreme Court's ruling in *Pfizer*, there is also concern that the bills are being acted upon too quickly to explore adequately the ramifications of the bill.[137] Suggestions have been made to hold hearings on the bill but these were defeated,[138] and at this time, it appears that the bills will be voted upon without a full exploration of the ramifications.

As the bills progressed through their respective houses, the original reaction seems to have been replaced by more thoughtful analyses of the Court's decision and the ramifications of overruling it. For example, the House International Relations Committee, which disagreed with the bill, has expressed concern over the foreign policy implications.[139]

A Congressional overruling of *Pfizer* would be a retreat from the policy of broadly interpreting antitrust laws in order to maximize their effectiveness. This result would stem from a protectionist attitude that does not pertain to today's economic reality of interconnected economies.

If Congress does not disturb the holding in *Pfizer*, it will be assenting to the broad reach that the antitrust laws were intended to have. It will also be recognizing the various foreign policy considerations that prompted the *Pfizer* decision. More importantly, it will reaffirm this country's commitment to the free enterprise system, and it will demonstrate to the Supreme Court that the legislative branch wishes the antitrust laws to be as effective as possible.

Gary M. Shaw

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pending on the date of enactment of this act or which is commenced on or after such date of enactment.

136. H.R. 11942, 95th Cong., 2d Sess. (1978).

137. *See* [1978] 858 ANTITRUST AND TRADE REG. REP. (BNA), A1.

138. *See* [1978] 869 ANTITRUST AND TRADE REG. REP. (BNA), A12; [1978] 870 ANTITRUST AND TRADE REG. REP. (BNA), A1-2.

139. [1978] 876 ANTITRUST AND TRADE REG. REP.(BNA), A15.