The American Antitrust Institute

March 29, 2010

Hon. Christine A. Varney
Assistant Attorney General for Antitrust
United States Department of Justice
Washington, DC 20530

Dear Assistant Attorney General Varney:

We write to you on behalf of the American Antitrust Institute to ask you to consider making greater use of the government's power under Section 4A of the Clayton Act to seek treble damages when the federal government is a victim of an antitrust violation, as AAI recommended in its transition report. Congress created Section 4A in 1955 when it amended the Clayton Act to give the United States a cause of action for single damages. In 1990, Congress further amended the statute to give the United States a cause of action for treble damages. However, research suggests that the Antitrust Division has been strangely reluctant to use this power, and has not brought a single case under Section 4A since 1994. As discussed below, this existing but underutilized statutory power is an additional way for the United States to further deter cartels and other serious anticompetitive conduct and to obtain compensatory relief for taxpayers.

Brief History of Section 4A

Every year the federal government purchases billions of dollars of goods and services. At times the government itself is the direct target of serious antitrust violations such as price fixing, bid rigging or market allocation. Concern about overcharges to the United States as a result of antitrust violations goes back to World War II, if not earlier.

In the early days of World War II, the United States brought a civil action under Section 7 of the Sherman Act (the predecessor to Section 4 of the Clayton Act) against eighteen defendants to recover treble damages because of injuries resulting from an alleged unlawful agreement to fix prices charged to the government for automobile tires it purchased. The defendants successfully moved to dismiss the action and the Second Circuit affirmed. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Supreme Court affirmed the dismissal, holding, as a matter of statutory construction, that the United States was not a "person" entitled to sue under Section 7 of the Sherman Act.

Congress responded to *Cooper* in 1955 by adding Section 4A to the Clayton Act.[1] It believed that a federal civil damages remedy was necessary so that "injury to the coffers of the Treasury resulting

[1] Section 4A of the Clayton Act provides in relevant part as follows:

> Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for 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 it sustained and the cost of suit.

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from violations of the law" would not "remain uncompensated."[2] As originally enacted, Section 4A only authorized the United States to sue for single damages, and not treble damages, because Congress believed that the government needed no extra incentive to bring suit as the United States was already charged by law to enforce the antitrust laws. S. Rep. 84-619 (1955), *as reprinted in* 1955 U.S.C.C.A.N 2328, 2330. By contrast, Congress believed that private litigants needed treble damages "so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws." *Id.*

In 1990, Congress amended the statute to increase the amount of damages available to the United States from single to treble, even as it was substantially raising criminal penalties. *See* Antitrust Amendments Act of 1990, Pub. L. 101-588, 104 Stat. 2879. In amending the statute, Congress noted that the rationale for distinguishing between civil recoveries by the United States and other persons was suspect because it "ignore[d] the tremendous deterrent value of treble damage actions, regardless of the status of the plaintiff." S. Rep. No. 101-288 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4119, 4119. As a consequence, the amended Section 4A effectively put the United States on the same footing as other private and state governmental plaintiffs.[3]

Decline of Section 4A Cases

How and whether the Department has sought compensation for antitrust injuries to the United States has changed over time. In the 1960's and 1970's, the United States actively pursued damages claims under Section 4A, bringing cases in industries as diverse as electrical equipment, dairy products, and broad spectrum antibiotics. The use of Section 4A then slowed to a trickle in the 1980's and dried up completely in the 1990's. Professor Harry First notes that the Justice Department brought 66 cases under Section 4A between 1970 and 1979, but between 1980 and 2009 – a period of nearly 30 years – it brought only five cases, the most recent being in 1994. *See* First, *supra*, at 50. One competitive impact statement after 1994 stated that the government had "considered" bringing a Section 4A case, but had determined that injunctive relief was sufficient. *See United States v. Mercury PCS II, L.L.C.*, No. 98-2751 (D.D.C. filed Nov. 10, 1998) (PCS auction).[4]

The Division's recent record thus shows a clear retreat from its statutory authority to file civil damages actions. The government has not brought 4A civil damages actions as a follow on to criminal cases, nor sought damages in civil injunctive cases in which it was the main victim, nor brought civil damages claims when it was one of many victims. One explanation for the drop in suits in the 1980's is the Supreme Court's *Illinois Brick* decision in 1978 barring indirect purchaser suits for damages under the Clayton Act, as many of the cases brought in the 1960's and 1970's apparently involved claims by the United States as an indirect purchaser. But *Illinois Brick* cannot

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[2] Harry First, *Lost in Conversation: The Compensatory Function of Antitrust Law*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579343, at 50 (forthcoming St. John's Law Rev. 2010) (quoting H.R. Rep. 84-422).

[3] In *Georgia v. Evans*, 316 U.S. 159 (1942), the Court distinguished *Cooper* and held that a state was a "person" within the meaning of § 7 of the Sherman Act, and therefore entitled to sue for treble damages.

[4] Apparently, it was also once customary for the Division to file companion civil injunctive cases when criminal cases were filed, even when the United States was not a victim. *See, e.g., United States v. American Oil Co.* (filed April 8, 1965 in Newark, N.J.) Cr. No. 153-65 (criminal) and Civil No. 370-65 (companion civil case).

fully explain the decline in the number of cases because the United States is often the victim of antitrust violations as a direct purchaser.

Other Remedies

It is true that the government sometimes obtains compensation through other forms of relief. In criminal cases, restitution is a possible alternative, but it lacks the deterrent and compensatory benefits of treble damages.[5] And it does not appear to us that even restitution is always sought in criminal cases when the United States is a victim, which is difficult to explain in light of the Division's policy on restitution. In cases involving guilty pleas where private parties are victims, the Division favors restitution in theory, but rarely seeks it in practice because private treble damages cases are typically filed on behalf of victims.[6] In cases where the government is a victim, we have seen that civil damages actions are generally not filed, so there appears to be little justification for not seeking restitution.

The False Claims Act, 31 U.S.C. § 3729, represents another possible avenue for the government to obtain compensation. The Act generally prohibits the presentation of false claims to the United States government for payment, knowingly submitting false records or statements in order to get a false claim paid, and conspiracies to defraud the government by getting a false claim paid. The False Claims Act permits treble damages as well as civil penalties for each false claim.

Recoveries for the federal government in general have grown dramatically since Congress amended the Act in 1986 to encourage greater use of its *qui tam* provisions. Unquestionably, the False Claims Act has provided and continues to provide a useful tool for the government to recover in bid-rigging and price-fixing conspiracies in which the United States is the principal victim. And in fact the Civil Division has intervened in a number of cases where the underlying conduct involved an antitrust offense. For example, it settled with seven freight forwarding firms in 2008, and with two German moving companies in 2009. According to the DOJ press releases, these cases arose out of two *qui tam* lawsuits; the freight forwarding settlement also followed a guilty plea in a criminal antitrust case.[7] Very recently, the media reported that the Civil Division has intervened in a *qui tam* action brought by a relator named Douglas Farrow. The original complaint, filed in 2005, appears to have led to criminal prosecutions in marine hose, foam-filled marine fenders and buoys, and plastic sea pilings. *See United States ex rel. Douglas Farrow*, No. ED-CV-05-381 (E.D. Va. filed Jan. 16, 2008).

While False Claims Act actions in general, and *qui tam* complaints in particular, are an important alternative to 4A claims, they are not an adequate substitute in many situations. Not all cartel and bid rigging cases in which the government is a victim will give rise to an action under the False Claims Act, particularly when the government makes open-market purchases and is but one of many victims of a cartel.

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[5] Moreover, as Professor First notes, criminal fines paid to the U.S. Treasury go into a Crime Victims Fund for the benefit of all crime victims, and do not compensate the government or taxpayers. *See* First, *supra*, at 58.

[6] *See Antitrust Division Manual, Fourth Edition*, IV-90-92. The Division's Model Plea Agreement makes clear that "[i]n most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages."

[7] *See* http://www.justice.gov/opa/pr/2008/July/08-civ-629.html; http://www.justice.gov/opa/pr/2009/June/09-civ-618.html.

Section 4A Should Be Used More Often

The fact that the Department of Justice has been reluctant to use the powers given to it by Congress is striking. Professor First notes that the failure to sue under Section 4A stretches over many different administrations and therefore does not appear to be based on partisan politics or differing views of antitrust that different administrations might take. *See* First, *supra*, at 53. He suggests that there may be other reasons for the failure to sue under Section 4A: for example, the Antitrust Division may feel ill-equipped to handle civil litigation for damages or that it could better deploy its resources for other purposes. But his conclusion is that there appears to be no good justification for the Justice Department to be ignoring its authority to get compensation for the damages that the United States has suffered as a result of antitrust violations.

A wider use of the government's treble damage remedy is likely to have several important benefits. First, it would promote deterrence of egregious antitrust violations. There is reason to believe that the current set of criminal and civil remedies are, in fact, not wholly adequate to deter cartels. *See, e.g.,* John Connor, *The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals*, AAI Working Paper No. 08-02 (2008); *see also* American Antitrust Institute, *The Next Antitrust Agenda* 42, 230 (Albert A. Foer ed., 2008) (noting that combined criminal and civil monetary sanctions against vitamins cartel did not exceed 80% of the overcharges in real terms). In any event, as Congress made clear when it added the treble damages remedy for the government, expected sanctions against anticompetitive behavior when the U.S. is a victim should not be any less than the expected sanctions when it is not, which may be the practical import of the government never bringing a suit under 4A.[8]

Equally important, use of Section 4A would compensate the United States government, as well as federal entities themselves in appropriate cases, for the harm from cartels or other antitrust offenses, which helps reduce the budget deficit and promotes popular support for antitrust enforcement. As Professor First concludes, "it is quite likely that current enforcement practice is leaving taxpayer money on the table . . . ." First, *supra*, at 60.

There are other benefits as well. As an institutional matter, more actions under Section 4A would provide additional litigation experience for Division attorneys in the civil sections, and provide more opportunities for its economists to estimate damages from a cartel or a monopolist. Moreover, Section 4A suits would not hurt, and might actually benefit, the Division's Leniency Program, for the Division could adopt a stated policy of not seeking damages against a leniency applicant in cases where the government is a victim, while other cartel members would continue to face the possibility of treble damages actions as well as joint and several liability. Finally, Section 4A suits would further highlight the economic harms caused by cartels and other antitrust violations.

The Division Should Encourage *Qui Tam* Actions and Consider Other Options

The Division should encourage the greater use of the *qui tam* provisions of the False Claims Act in antitrust cases. This could be done through speeches and other public documents. By encouraging more *qui tam* cases, the Division could help uncover additional cartels, further supporting its

[8] To be sure, the Sentencing Guidelines provide for an enhancement of penalties for bid-rigging, and many cases in which the government is a victim involve bid-rigging. However, there is no reason that civil sanctions for bid-rigging should be any lower when the government is the victim, and not all cases where the government is a victim involve bid-rigging.

mission. The recent successful *qui tam* actions are an encouraging development that should be promoted.

The Division should also consider other measures that would allow private claimants to pursue damages on the United States government's behalf. Currently, private class actions at times include (or do not exclude) the federal government in the class definition. In the past, the Civil Division has notified private attorneys that they are precluded from representing the United States in such actions. By statute, the Attorney General has exclusive authority to conduct and supervise litigation in which the United States is a party. *See* 28 U.S.C. §§ 516 and 519; *see also* 28 C.F.R. § 0.40 (Assistant Attorney General, Antitrust Division given responsibility, *inter alia*, for "civil actions to recover . . . damages for injuries sustained by the United States as a result of antitrust law violations"). If the Antitrust Division is unwilling to bring its own cases under Section 4A, it should explore other options that would allow private counsel to bring cases on its behalf even when the *qui tam* provisions of the False Claims Act do not apply. (Such would be the case, for example, when a violation is first alleged in a publicly filed case or is uncovered through the Leniency Program.) Options could include "deputizing" private counsel in existing cases or supporting new legislation that would expand *qui tam* authority. *See The Next Antitrust Agenda*, *supra*, at 42.

Conclusion

It appears to us that the Antitrust Division may be missing a significant opportunity to obtain treble damages when the United States or a federal agency or instrumentality is the victim of an antitrust offense. We are not aware of any policy at the Division as to why such cases are not brought more often, and indeed the lack of any cases since 1994 sends the wrong signal to potential violators and the public. In addition to bringing 4A cases, we suggest that the Division take additional steps to support the highly successful *qui tam* mechanism of the False Claims Act so that private attorneys general would have the incentive to bring treble damages actions on behalf of the United States.

Sincerely,

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