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# False Claims Act - The Civil War Antitrust Sword: United States v. Beatrice Foods Co.

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to classifications other than race which might be constitutionally suspect. However, how much disparity must be shown to warrant a finding of invidious discrimination remains to be seen.

*John L. Carter*

## False Claims Act — The Civil War Antitrust Sword: *United States v. Beatrice Foods Co.*

The United States brought an action for damages and injunctive relief against Beatrice Foods Company for an alleged antitrust conspiracy and the submission of false claims. Count I of the Government's complaint alleged that the defendant entered into a conspiracy with other dairies to fix, raise, maintain, and stabilize prices and discounts; to submit rigged bids; and to allocate, rotate, and divide the dairy product business in the state of Utah and parts of Idaho and Colorado. Because the Government claimed the conspiracy resulted in its paying higher prices, it was contended that the Government was entitled to damages under section 4A of the Clayton Act.[1] In the alternative, count II of the Government's complaint sought double damages under the False Claims Act,[2] as well as the statutory punitive damages of $2,000 for each false claim presented.[3] The decision dealt only with the defendant's motion to dismiss count II of the Government's complaint. *Held, motion denied*: Although the Government cannot recover for the same injuries under both the Sherman Act and the False Claims Act, the Government is not precluded from seeking forfeitures and double damages under the False Claims Act for violations of the Sherman Act. *United States v. Beatrice Foods Co.*, 330 F. Supp. 577 (N.D. Utah 1971).

### I. THE STATUTES

*The False Claims Act.*[4] The original Act was passed in 1863 to alleviate the fraudulent use of Government funds during the Civil War.[5] The debates prior to passage of the Act indicated that the intent was to reach all types of fraud that might cause the Government financial loss.[6] Whether the fraud involves

[1] 15 U.S.C. § 15A (1971).

[2] 31 U.S.C. §§ 231-35 (1971).

[3] The defendant denied all allegations of conspiracy. It further denied that the Government had suffered any damages under either the Clayton Act or the False Claims Act. Defendant also asserted affirmative defenses under the Sherman Act, 15 U.S.C. § 1 (1971), pursuant to the provisions, among others, of the Capper Volstead Act, 7 U.S.C. § 291 (1971), section 6 of the Clayton Act, 15 U.S.C. § 17 (1971), the Agriculture Marketing Act, 12 U.S.C. § 1141 (1971), the Cooperative Marketing Act, 7 U.S.C. § 45 (1971), and the Agricultural Marketing Agreements Act, 7 U.S.C. § 608B (1971).

[4] Any person not in the military . . . who shall make . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent . . . or who enters into an agreement, combination, or conspiracy to defraud the Government . . . shall forfeit and pay to the United States the sum of $2,000 and, in addition, double the amount of damages which the United States may have sustained . . . .

31 U.S.C. § 231 (1971).

[5] CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863).

[6] *Id. See also* United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

improper vouchers for labor charges,[7] padded payrolls,[8] or a conspiracy to defraud,[9] the Government has the benefit of a broad interpretation of the word "claim." "This remedial statute reaches beyond 'claims' which might be legally enforced to all fraudulent attempts to cause the Government to pay out sums of money."[10]

The False Claims Act provides for criminal,[11] as well as civil, sanctions. Only the civil liability sections have remained unaltered. Related to the criminal concept is the *qui tam* provision, which enables an informer to bring suit and share in the proceeds with the Government.[12] Originally, the informer was entitled to one-half of the damages collected.[13] With this procedure the United States would still at least be made whole because of the double damage provision.[14] Other features of the False Claims Act are: (1) each false claim subjects the guilty party to a $2,000 penalty without proof of damages;[15] (2) a six-year statute of limitations period runs from the submission of the false claim;[16] and (3) the burden of proof is the same as in a common-law action for fraud—unequivocal and convincing evidence (but not proof beyond a reasonable doubt).[17]

The submission of false claims by contractors is probably the most common offense that occurs in Government contracting.[18] However, these offenses are not so prevalent when only the conspiracy aspect of the False Claims Act is considered. The courts are not consistent in their treatment of conspiracy to defraud the Government. There is authority for the view that the statute covers only a conspiracy in which the elements of fraud are proved;[19] that is, the representation must be believed and acted upon by the deceived party to his injury.[20] A paid claim, not merely a bid, has been held to be a necessary pre-

[7] United States v. Ueber, 299 F.2d 310 (6th Cir. 1962).

[8] United States v. Greenberg, 237 F. Supp. 439 (S.D.N.Y. 1965); United States v. Sanders, 194 F. Supp. 955 (D. Ark. 1961).

[9] United States v. American Packing Corp., 125 F. Supp. 788 (D.N.J. 1954).

[10] United States v. Neifert-White Co., 390 U.S. 228, 233 (1968). This decision casts doubt upon prior cases that restrictively interpreted the word "claims." *See, e.g.*, United States v. McNinch, 356 U.S. 595 (1958); United States v. Cochran, 235 F.2d 131 (5th Cir.), *cert. denied*, 352 U.S. 941 (1956).

[11] These have been altered and codified at 18 U.S.C. §§ 287, 1001 (1971).

[12] The *qui tam* provision is codified at 31 U.S.C. § 232 (1971). The following provision rationalizing the use of informers accomplishes a result comparable to the treble damage incentive of antitrust law:

> [The statute] was passed upon the theory . . . that one of the least expensive and most effective means of preventing frauds . . . is to make the perpetrators liable to actions by private persons, acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885).

[13] United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943). Under the current statute the informer is only entitled to one-fourth of the proceeds of the damages and forfeiture plus his expenses and costs. 31 U.S.C. § 232 (1971).

[14] *See* note 4 *supra.*

[15] United States v. Cherokee Implement Co., 216 F. Supp. 374 (N.D. Iowa 1963).

[16] Woodbury v. United States, 232 F. Supp. 49 (D. Ore. 1964), *aff'd in part and rev'd in part on other grounds*, 359 F.2d 370 (9th Cir. 1966).

[17] United States v. Ueber, 299 F.2d 310 (6th Cir. 1962).

[18] 3 CCH GOV'T CONT. REP. ¶ 24,210 (1967).

[19] Cahill v. Curtiss-Wright Corp., 57 F. Supp. 614 (W.D. Ky. 1944).

[20] United States v. Farina, 153 F. Supp. 819 (D.N.J. 1957). *But see* Cato v. United States, 263 F.2d 697 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959), and United States v.

requisite to the applicability of the statute.[21] On the other hand, there is authority distinguishing fraud from conspiracy to defraud.[22] The significance of this is that only the intent to defraud and some overt act (not the actual defrauding act) would be required to come within the statute;[23] that is, one can be proved without the other.[24] This latter view is the more plausible, especially in view of more modern language giving effect to a broad interpretation of the statute.[25]

*Section 4A of the Clayton Act.*[26] In 1890 the original Sherman Act contemplated an action for damages by the United States as well as other enforcement methods.[27] The amended version retained the damage suits for private parties, but omitted the reference to that remedy for the Government.[28] In an effort to ease the Government's burden of enforcement, treble damages for private litigants were provided.[29] The Clayton Act was subsequently enacted in part to provide further incentive to private litigants.[30] Section 4 of the Clayton Act restated the right to treble damages, attorney's fees, and also added that costs will be provided for any *person* victimized by antitrust practices.[31]

The Supreme Court in 1941 held that the United States was not a "person" under the treble damages provision.[32] Congress responded to this situation in 1955 by amending sections 4 and 5 of the Clayton Act. Section 4A gave the United States the right to sue for single damages.[33] The amendments also set up a four-year statute of limitations.[34] In the instance of a conspiracy this limitation period begins from the commission of the last overt act causing injury.[35] To insure private litigants the use of prima facie evidence[36] established by the Government in prior injunctive or criminal actions, a suspension of the limitations period and a one-year extension after termination of the Government suit were granted.[37] The amendments also provide for the United States' use of its own evidence established in a criminal or injunctive suit as prima facie proof in

Ridglea State Park, 357 F.2d 495 (5th Cir. 1966) (emphasizing the fact that investigation costs the Government money even though none is paid out on a claim itself).

[21] 153 F. Supp. at 821. *See also* United States *ex rel.* Weinstein v. Bressler, 160 F.2d 403 (2d Cir. 1947); United States *ex rel.* Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942).

[22] United States v. Walburg, 47 F. Supp. 352 (S.D. Cal. 1942).

[23] United States v. American Packing Corp., 125 F. Supp. 788 (D.N.J. 1954).

[24] United States v. Ben Grunstein & Sons, 147 F. Supp. 907 (D.N.J. 1955).

[25] United States v. Neifert-White Co., 390 U.S. 228 (1968).

[26] 15 U.S.C. § 15A (1971).

[27] S. REP. No. 619, 34th Cong., 1st Sess. 2 (1955).

[28] *Id.*

[29] 15 U.S.C. § 15 (1971); *cf.* note 12 *supra.*

[30] Section 5 of the Clayton Act makes judgments and decrees rendered in any Government civil or criminal proceeding prima facie evidence against the same party in a private action. 15 U.S.C. § 16 (1971). *See also* New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965).

[31] 15 U.S.C. § 15 (1971).

[32] United States v. Cooper Corp., 312 U.S. 600 (1941). This was true despite the fact that both municipalities (Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)) and states (Georgia v. Evans, 316 U.S. 159 (1942)) were held to be "persons."

[33] 15 U.S.C. § 15A (1971).

[34] *Id.* § 15B.

[35] Peto v. Madison Square Garden Corp., 384 F.2d 682 (2d Cir. 1967), *cert. denied*, 390 U.S. 989 (1968).

[36] 15 U.S.C. § 16(a) (1971).

[37] *Id.* § 16(b). The Government was statutorily excluded from the benefit of this extension for a section 4A damage suit.

a subsequent section 4A damage suit.[38] However, this provision is a detriment rather than an advantage.[39] The criticism is that the same evidence between the same parties should give rise to the application of the doctrine of collateral estoppel and make that evidence *conclusive* in the subsequent damage suit.[40]

## II. Legislative Intent and the Exclusiveness of Remedies

The billions of dollars spent in Government contracting eventually affects the American taxpayer.[41] With the amendments to the Clayton Act Congress sought to remedy the unfairness to the public in not allowing the Government an opportunity to reclaim the tax dollars.[42] However, section 4A of the Clayton Act evinces an intent for restitution only. The Government has other tools for the punishment of violators.[43] Treble damages increase the private incentive to sue and provide a punishment. In the case of a Government damage suit, however, they have been considered superfluous.[44]

A comparison of the False Claims Act with antitrust laws reveals an overlapping intent not only to punish violators, but also to protect the public coffers.[45] This intent is manifested in the statutes by the treatment of conspiracy. While the Clayton Act and the Sherman Act deal with conspiracy in restraint of trade[46] and the False Claims Act with conspiracy to defraud the Government, the utility of both appears to run simultaneously. Arguably, a conspiracy under one statute would in most cases also constitute a conspiracy under the other. Despite this fact, the two have seldom been used together by the Government

[38] *Id.*; United States v. Grinnell Corp., 307 F. Supp. 1097 (S.D.N.Y. 1969).

[39] Prima facie evidence may be rebutted, and this causes unnecessary duplicity when the subsequent action is between the same parties.

[40] For a comprehensive analysis of this problem see Langsdorf, *The United States as Antitrust Damage Plaintiff*, 16 ANTITRUST BULL. 187 (1971).

[41] "The United States is by far the largest single purchaser of goods in this country. Its procurement bill amounts to billions of dollars annually." H.R. REP. NO. 422, 84th Cong., 1st Sess. 4 (1955).

[42] The American taxpayer is entitled to full value for his tax dollar. He should be protected against it going into the pockets of wrongdoers in the form of excessive prices and profits gained through violation of the antitrust laws. If he were spending the money himself, he could sue for triple damages. Surely, he is entitled to protection from actual loss where the Government spends it for him. By permitting the United States Government to recover the provable damages resulting from unlawful practices engaged in by those with whom it does business, H.R. 4954 would afford those safeguards necessary to the Public Treasury and at the same time severely deter those who would conspire in their dealings with Federal departments.

*Id. See also* S. REP. NO. 619, 84th Cong., 1st Sess. 3 (1955).

[43] "The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." S. REP. NO. 619, 84th Cong., 1st Sess. 3 (1955).

[44] It should be noted, however, that the bill would grant to the Government the right to recover only actual, as distinguished from treble, damages. The committee believes this modification wise in view of the disastrous impact of triple damages upon concerns doing a large proportion of their business with the Government. Likewise, unlike the situation with respect to private persons, there is no need to furnish the Government any special incentive to enforce the antitrust laws, a heavy responsibility with which it is already charged.

H.R. REP. NO. 422, 84th Cong., 1st Sess. 4 (1955).

[45] "The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side . . . ." United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885).

[46] 15 U.S.C. § 1 (1971).

in the same suit.[47] After *United States v. Cooper Corp.*[48] in 1941 all of the conspiracy damage suits were of necessity under the False Claims Act. While the Government was successful with these suits,[49] after section 4A was enacted in 1955 there was a noticeable decrease of false claims conspiracy actions.[50] Whatever the reason for this, it certainly was not because Congress made it clear that section 4A pre-empted the conspiracy field.[51] At least one group of defendants in *United States v. Ward Baking Co.*[52] was willing to settle for $44,000 rather than test the vitality of the conspiracy provisions of the False Claims Act.

Another case that considered both the Clayton and the False Claims Acts was *Rutherford v. United States.*[53] There the court held that the antitrust immunity statute[54] under a section 4A count extends to a False Claims count because "[t]he similarity between the two claims is patent, and the proof required to establish them is virtually identical."[55] The court brushed aside the argument that the False Claims Act requires proof of intent to defraud while fraud is not an element of antitrust violations. It also found insignificant the allegation that while collusive and noncompetitive bidding was essential to both counts, under the False Claims Act the bidders would also have to represent that the bids were in fact competitive and noncollusive. While these distinctions are subtle and unimportant to the immunity question in *Rutherford*, the Government has lost conspiracy cases under the False Claims Act because there was no misrepresentation[56] or intent to defraud.[57] Nowhere in *Rutherford* was there the slightest

[47] This phenomenon is difficult to explain since both the False Claims Act and the Clayton Act are used separately quite extensively. Even the Internal Revenue Service treats the effect of damages paid under either statute identically for tax deduction purposes. *See* Commissioner v. Tellier, 383 U.S. 687 (1966).

[48] 312 U.S. 600 (1941).

[49] *See, e.g.*, United States v. American Packing Corp., 125 F. Supp. 788 (D.N.J. 1954).

[50] This is not to say that nonconspiracy actions did not continue to flourish under the False Claims Act. *See, e.g.*, United States v. Neifert-White Co., 390 U.S. 228 (1968).

[51] Only one reference to the False Claims Act can be found in the legislative history of section 4A, and that is inconclusive. This occurred during an exchange between Mr. H. Graham Morrison, Assistant Attorney General, and Chairman Cellar before the Subcommittee on the Study of Monopoly Power, Committee on the Judiciary of the House of Representatives. The exchange took place in *Hearings on H.R. 3408 Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 3, at 5-6 (1951) (preceding H.R. 4954, the base for section 4A):

> Mr. Morrison. [We] have no objection to limiting the Government's recovery to actual damages. In fact, we strongly support this provision and urge its prompt enactment . . . .
>
> The Chairman. Before you get to your summary would you care to answer the following: Is there anything new or novel in triple damage suits?
>
> Mr. Morrison. No, Mr. Chairman, this is not novel to this extent: The Civil Fraud Statutes of the United States do not provide for triple damages, but they provide for double damages, plus $2,000 civil penalty for each separate violation and transaction.
>
> The Chairman. That may amount to far more than triple damages, may it not?
>
> Mr. Morrison. Yes indeed; and that, may I say, Mr. Chairman, goes far beyond the origins of the Sherman Antitrust Act. That goes back to Civil War days.

[52] 376 U.S. 327 (1964). The Government proceeded with the suit for injunctive relief under section 1 of the Sherman Act. 15 U.S.C. § 1 (1971).

[53] 365 F.2d 353 (9th Cir. 1966), *cert. denied*, 385 U.S. 987 (1967).

[54] 15 U.S.C. § 32 (1971).

[55] 365 F.2d at 357.

[56] United States *ex rel.* Weinstein v. Bressler, 160 F.2d 403 (2d Cir. 1947).

[57] United States *ex rel.* Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942). Both *Brensilber* and *Bressler* might be mitigated by the Second Circuit's professed distaste for *qui tam* actions. *See* note 12 *supra*, and accompanying text.

indication that the passage of section 4A of the Clayton Act precluded the operation of the False Claims Act.

## III. UNITED STATES V. BEATRICE FOODS CO.

The ultimate question in *United States v. Beatrice Foods Co.*[58] was whether the Government's sole remedy for violations of the Sherman Act was an action for single damages under the Clayton Act to the exclusion of the more severe remedies under the False Claims Act. In answering this question, the court noted both conceptual and practical considerations.

*Conceptual Considerations.* The defendant's strongest contention was that both *Cooper Corp.* and the subsequent legislative history of section 4A of the Clayton Act indicated an intent that the Government be limited to single damages.[59] The language of the legislative history to the effect that the Government should not need a financial incentive to enforce its own laws[60] would seem to cast serious doubt on the double damages and forfeitures of the False Claims Act. This was met squarely by Judge Christensen with the statement that it would have been an easy matter for Congress to indicate an exclusive remedy of actual damages regardless of other existing rights and remedies.[61] But it should be noted that the double damage provision in the False Claims Act was originally meant as a *private* incentive (*i.e.*, the Government and the informer would split the proceeds in a *qui tam* action),[62] and, thus, Congress may have always intended that the Government recover only actual damages (its half of the double damages in the *qui tam* action).[63]

The defendant also contended that the interpretation of both acts should be resolved with the more specific provision (section 4A) being construed to prevail over the more general one (the False Claims Act). The court answered this argument by saying: "[I]t would seem that the False Claims Act was passed for the specific purpose of giving the United States the right to recover double damages . . . ."[64] When statutes are harmonious and no intent has been manifested to repeal or limit the prior one, their construction may be merely affirmative, cumulative, or auxiliary.[65]

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[58] 330 F. Supp. 577 (N.D. Utah 1971).

[59] While there is no specific mention of the False Claims Act (except that in *note* 51 *supra*), the defendant apparently relied on the following and similar language: "The United States is, of course, charged by law with the enforcement of the antitrust laws, and it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings." S. REP. NO. 619, 84th Cong., 1st Sess. 3 (1955).

[60] *Id.*

[61] Statutory language to this effect was the distinguishing feature of a case upon which defendant relied. Schaefer v. First Nat'l Bank, 326 F. Supp. 1186 (N.D. Ill. 1970).

[62] *See* note 12 *supra.*

[63] Difficulty with this is found in the current statute, which allows a private informer only one-quarter of the proceeds. 31 U.S.C. § 232 (1971). Also, if the Government brings the suit without the aid of a *qui tam* informer, it can still claim double damages. So the Government will recover either one-and-three-quarters damages or double damages in any case. Compounding this is the Government's ability to collect $2,000 for each false claim. *See* note 15 *supra.* While this type of collection is obviously punitive and not meant as a governmental incentive, nonetheless, the total amount paid might easily exceed treble damages. *See* note 51 *supra.*

[64] 330 F. Supp. at 582.

[65] United States v. Borden Co., 308 U.S. 188 (1939); United States v. Rohleder, 157 F.2d 126 (3d Cir. 1946).

An alternative construction offered by the defendant was that double damages and forfeitures could be recovered for false claims when *only* fraud was involved, but that only single damages could be recovered when both fraud and conspiracy were involved. The court did not find this to be a reasonable interpretation.[66] It would be illogical indeed for a court to award double damages for a fraud on the Government, but limit the recovery to single damages when the injury of fraud was compounded by conspiracy.

*Practical Considerations.* The court apparently would have rendered the same decision on this preliminary motion to dismiss the false claim count without even considering legislative intent. Regardless of the double damage question, the court was of the opinion that the Government would have been unnecessarily stripped of a remedy altogether had the defendant's ultimate arguments prevailed. The defendants denied any conspiracy in restraint of trade, and claimed statutory exemptions from antitrust liability as well as a statute-of-limitations bar. Even if these denials had been proved, the Government might still have been able to establish a conspiracy to defraud under the False Claims Act to which the above defenses would not apply.[67] The defendant's futile attempt to set up res judicata as a defense to the False Claims count and then defeat the Clayton Act count on the merits was not so much a symptom of the weakness of section 4A of the Clayton Act as it was an indication of the strength and utility of the False Claims Act.

The court's enunciation of the practical reasons for its decision was unnecessary in light of its persuasive legal considerations. The Government's case was capably established under legislative intent and statutory construction grounds. The court's superfluity seemed to indicate a desire to retain the False Claims count as insurance in the event that the Government was later precluded from recovery by one of the defendant's affirmative defenses to the Clayton Act count.

*Choice of Remedies.* Since *Beatrice Foods* involved only a preliminary motion, the interrelationship between the two statutes was not explored. The court offered only a distinction without a difference to distinguish the acts.[68] Practical differences include questions of proof, damages, and time.[69]

While there will be considerable overlap in the elements of proof, the purposes are different. In their overlapping area both statutes involve conspiracy, but the False Claims Act requires a conspiracy with intent to defraud[70] while section 4A requires a conspiracy in restraint of trade.[71] The False Claims Act

[66] 330 F. Supp. at 581. *See* General Motors Acceptance Corp. v. United States, 286 U.S. 49 (1932); United States v. American Motor Boat K-1231, 54 F.2d 502 (2d Cir. 1931).

[67] Unlike *Ward Baking Co.*, which was only an antitrust injunctive action, the defendants here will probably not be able to settle the False Claims Act count alone without ultimately settling the entire case. *See* note 51 *supra.* Judge Christensen indicated that the Government would be able to recover under one or the other on the merits, but not both. 330 F. Supp. at 583.

[68] "Section 4A was adopted for the purpose of affording the Government the right to sue for damages arising from anti-competitive practices injuring its business or property. The False Claims Act was adopted almost one hundred years earlier 'to protect the funds and property of the Government from fraudulent claims.'" 330 F. Supp. at 582.

[69] Also to be considered are the various affirmative defenses in antitrust law. *See, e.g.*, note 3 *supra.*

[70] *See* notes 19-24 *supra*, and accompanying text.

[71] 15 U.S.C. § 1 (1971).

would be advantageous when the Government could definitely prove the fraud but might have trouble establishing a conspiracy or a restraint of trade, since the Act also applies to frauds by individuals acting alone or perhaps to an intracompany conspiracy between employer and employee that affects only the Government and not trade in general.[72] On the other hand, when the Government could not show misrepresentation or intent to defraud, but there was a definite restraint of trade, the Clayton Act would be more useful, since under section 4A it would make no difference whether the Government had prior knowledge of collusive bidding or acted in reliance on a misrepresentation.[73]

The key advantage of the False Claims Act in the area of proof is in the use of the collateral estoppel doctrine for evidence established in a prior antitrust injunctive or enforcement action. Under a section 4A damage suit the Government is ironically denied the use of this doctrine because of the peculiar construction of section 5 of the Clayton Act[74] that makes previously established evidence only prima facie evidence.[75] Since prima facie evidence is rebuttable, delay and duplicity are the natural results.[76] Under present law there is nothing to indicate that in a subsequent action under the False Claims Act the same evidence would not be conclusive.

Section 4A compares unfavorably with the False Claims Act on the question of damages. While the former allows only actual, proved damages, the latter allows double actual, proved damages plus $2,000 for each false claim submitted even if there is no proof of actual damages.[77]

In *Beatrice Foods* another of defendant's allegations was that the Government had not suffered any injury. This was another incentive for the motion to dismiss the False Claims count, because even if the Government could not show damages, it could still recover the $2,000 penalties if the other elements were proved.[78]

In addition, the False Claims Act provides for a six-year limitation period,[79] while section 4A provides for only a four-year period.[80] The significance of this difference lies not so much in the benefit of a longer period before a claim is totally barred, but in the extra time by which to measure damages for continuing violations (which are not uncommon in the antitrust field).[81] Because of the longevity of most antitrust actions and the peculiarities of the Clayton Act, the limitations statute has proved inadequate for section 4A damage actions.[82]

[72] United States v. Koenig, 144 F. Supp 22 (E.D. Pa. 1956); United States v. Gardner, 73 F. Supp. 644 (N.D. Ala. 1947).

[73] *See* notes 20, 21 *supra*, and accompanying text.

[74] 15 U.S.C. § 16 (1971).

[75] In United States v. Grinnell, 307 F. Supp. 1097 (S.D.N.Y. 1969), the Government was required to answer exhaustive interrogatories concerning evidence it had, for the most part, already established against the same defendant in an earlier enforcement action. This evidence would have been conclusive and the defendant collaterally estopped but for section 5 of the Clayton Act.

[76] *Id. See* Langsdorf, *supra* note 40.

[77] United States v. Rainwater, 356 U.S. 590 (1958).

[78] *See, e.g.*, United States v. Rohleder, 157 F.2d 126 (3d Cir. 1946) (recovery allowed despite efficient, reasonable work pursuant to noncompetitive bids).

[79] 31 U.S.C. § 235 (1971).

[80] 15 U.S.C. § 15(b) (1971).

[81] The statutory period for computation of damages in continuing violation cases is found by measuring backward from the date of the action.

[82] Again, the Clayton Act is worded to the disadvantage of the Government so that there

## V. CONCLUSION

No small measure of the criticism of antitrust laws[83] has been aimed at the inability of the Government to cope with the enormity of the problem.[84] Change has been advocated to "prevent the august United States Government from again being cast in the role of a pitiful, helpless giant,"[85] as happened in *United States v. Grinnell Corp.*[86] While it is generally acknowledged that the Department of Justice has done an adequate job in enforcement actions, the *Grinnell* case bears witness to the obstacles of a section 4A damage suit. Congress intended section 4A to provide the statutory authorization for recovery of governmental damages that the Court in *Cooper* said was lacking in the original section 4 of the Clayton Act.[87] The indications have been that section 4A needs legislative revitalization.

It remains a mystery why the False Claims Act is not used to fill the void. Since the elements of proof in the two acts are so similar[88] and the False Claims Act affords a time and damage advantage, it is surprising that the lead of *Ward Baking Co.* and *Rutherford* has not been followed.[89] The significance of *Beatrice Foods* lies in the rebirth of an antitrust conspiracy sword. The Government, to prevent a repeat performance as the helpless giant, will likely turn to the breadth and utility of the False Claims Act. In this event, Congress will be faced with a repeal or a reconstruction of one of the statutes. With the overlapping

is no tolling of the statute during an enforcement action. The Government is also denied the one-year extension period following an enforcement action. *See* note 45 *supra*, and accompanying text. For a case in which the Government was denied damages to which it would otherwise have been entitled, due to the above limitations, see United States v. Grinnell Corp., 307 F. Supp. 1097 (S.D.N.Y. 1969). *See also* Langsdorf, *supra* note 40, at 191. Also, it should be noted that in *In re* Antibiotic Drugs, 309 F. Supp. 155 (D.D.C. 1970), the Government managed to circumvent partially the four-year limitation for a section 4A action by asserting a common-law deceit action.

[83] *See generally* J. BURNS, ANTITRUST DILEMMAS: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS (1969).

[84] A recent (June 1971) and comprehensive analysis has been prepared by the Nader Study Group on Antitrust Enforcement, entitled THE CLOSED ENTERPRISE SYSTEM (M.J. Green ed. 1971). " 'The government can't hit everyone,' says a San Francisco executive, 'so a business goes ahead and does what it wants, if it isn't obviously crooked, and gambles that it won't get caught. There is no moral dimension to it. The odds are in your favor.' " *Id.* at 218 (quoting *Newsweek*). "Even if the Antitrust Division and the Federal Trade Commission enjoyed appropriations five times as large as they now have, they could not conceivably bring a tenth of the cases it would be possible to bring." *Id.* (quoting Edward S. Mason, 1949).

[85] Langsdorf, *supra* note 40, at 212. *See* notes 75, 78 *supra*.

[86] 307 F. Supp. 1097 (S.D.N.Y. 1969).

[87] "While the Government could enjoin the perpetration of this conspiracy in the future—and even punish those guilty of scheming to eliminate competition for Government business by a criminal proceeding—the injury to the coffers of the Treasury resulting from violations of the law would still remain unrecompensed." H.R. REP. NO. 422, 84th Cong., 1st Sess. 3 (1955).

This statement, which was meant to illustrate the need for section 4A, is inaccurate because the False Claims Act was in existence long before *Cooper Corp.* or section 4A. Under that Act the Government could indeed be recompensed twofold. In fact, had the False Claims Act been used in *Cooper Corp.*, there is no reason to believe the outcome would not have been different because the case involved an alleged conspiracy to fix collusive prices.

[88] United States v. Rutherford, 365 F.2d 353 (9th Cir.), *cert. denied*, 385 U.S. 987 (1966).

[89] The first authority to allow the bringing of a section 4A and False Claims action in the same suit came in United States v. Carnation Co., 1963 Trade Cas. ¶ 70,695 (E.D. Wash. 1963). Judge Christensen's decision shores up *Carnation*, which was in a somewhat different context and based on the single nondispositive authority of United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1942).