"Cartel Prosecution: Stopping Price Fixers and Protecting Consumers"
Hollis Salzman's Responses to Senator Klobuchar's QFRs

Q1. Why is private cartel enforcement an important component in the fight against cartels?

A1. Private enforcement provides virtually the only way to compensate consumers and businesses that are victims of anticompetitive cartel conduct. The importance of private cartel enforcement is underscored by the very language of the United States' antitrust statutes. Congress created a financial incentive to encourage individuals and businesses to act as private attorneys general to bring enforcement actions by allowing them to recover treble damages and attorneys' fees under the Sherman and Clayton acts.[1] Courts have also long considered private enforcement of the antitrust laws, including through class actions,[2] an important complement to public enforcement.[3] The Antitrust Division of the Department of Justice's ("DOJ") Workload Statistics underscore this symbiotic relationship, noting "frequently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims."[4]

[1] *See* Section 4 of the Clayton Act, 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

[2] In particular, the class action mechanism has facilitated the prosecution of meritorious antitrust claims where otherwise there might not have been private enforcement. *See, e.g.*, HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 18.08, at 18-3 (3d ed. 1992) ("'It may be that a class action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers. Sometimes a class-action lawsuit is the only way in which consumers would know of their rights at all, let alone have a forum for their vindication.'") (quoting *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 520 (M.D. Ala. 1992).

[3] *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purpose of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.").

[4] U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2003-2012, 11 n.15, http://www.justice.gov/atr/public/workload-statistics.html.

Given the limited resources available to federal and state enforcement authorities, private antitrust litigation has helped to promote compliance with the antitrust laws as well as to provide compensation to victims. Antitrust scholars Professors Joshua P. Davis and Robert H. Lande recently published an article reinforcing the results of their earlier qualitative study finding private enforcement may even deter more anticompetitive conduct than the DOJ's extremely successful anti-cartel program.[5] For example, from 1990 to 2011, Davis and Lande calculated approximately $11.7 billion in total deterrence from the DOJ's anti-cartel cases, in comparison to $34-$36 billion recovered from sixty private cases for the same period.[6] Their research also indicated that the premise that private actions always follow and depend on government actions is false. Of the sixty cases studied, twenty-four were not preceded by government action, and another twelve involved a substantially different action than the one pursued by the government.[7]

Q2. What barriers exist to victims bringing private enforcement cases?

A2. Where a cartel has injured businesses or individuals, class actions or class arbitrations can be an efficient and effective means of ensuring adequate compensation. This is especially true where the violation resulted in harm to many victims with negative value claims – individual claims involving damages that are much smaller than it would cost to litigate the claim. In the most recent of a string of decisions imposing greater barriers on victims pursuing class action claims, the Supreme Court blocked the ability of some victims with low or negative value antitrust claims to bring suit in *American Express Co. v. Italian Colors Restaurant* ("*Italian*

[5] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case For Private Antitrust Enforcement*, 48 GA. L. REV. 1, 26 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051&download=yes.

[6] The authors do note, however, that since some of the private cases followed DOJ actions, a portion of the deterrence from these private actions should be ascribed to the initial DOJ investigation. Davis & Lande, *supra* note 5 at 26 n. 110.

[7] *Id.* at 30.

Colors"). Here, the Court held that a contractual waiver of class arbitration is enforceable even where a plaintiff's costs to individually arbitrate its claim exceed the potential recovery.[8]

In *Italian Colors*, a class of merchants subject to American Express's Card Acceptance Agreement, which contains provisions mandating arbitration, but precluding class-wide arbitration, brought antitrust claims against American Express. The plaintiff merchants argued that the provision preventing class arbitration was unenforceable because it rendered arbitration prohibitively expensive; it would cost more for individual merchants to arbitrate their claims than they could recover if they succeeded in arbitration. Plaintiffs' expert economist, Dr. Gary L. French, found that total expert fees, even in an individual action, would cost between several hundred thousand dollars to over one million dollars, while the largest volume named plaintiff merchant might expect damages of $12,850, or $38,549 when trebled.[9]

On *certiorari*, the Supreme Court reversed the Second Circuit's holding that enforcement of the class arbitration waiver would bar "effective vindication" of statutory rights under the federal antitrust laws. The Supreme Court noted that, while a merchant might well conclude that it was "not worth the expense involved in *proving* [its] statutory remedy[,]" this practical reality did not constitute "the elimination of the *right to pursue* that remedy."[10] In other words, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[11] Thus the fact that a class arbitration waiver renders arbitration prohibitively expensive did not make an arbitration provision unenforceable.

[8] No. 12-133, 133 S. Ct. 2304 (June 20, 2013).

[9] *See In re Am. Express Merchants' Litig.*, 554 F.3d 300, 316 (2d Cir. 2009).

[10] 133 S. Ct. at 2311.

[11] *Id.* at 2309.

The Supreme Court's opinion in *Italian Colors* blocks many consumer and small business plaintiffs from effectively vindicating their rights under the federal antitrust laws. A mandatory arbitration clause prevents antitrust victims from pursuing their claims in federal court and an enforceable class arbitration waiver prevents such victims from aggregating their claims in arbitration which is necessary to make it economically feasible for victims to pursue low or negative value claims. To date, there is, however, at least one regulatory reform meant to curb the impact of the Supreme Court's decision, at least in the context of mortgage transactions. The Consumer Financial Protection Bureau has enacted new Truth in Lending Act rules that ban mandatory arbitration provisions. The new rules ban "terms that require arbitration or any other non-judicial procedures to resolve any controversy or settle any claims arising out of" consumer mortgage and home equity loan transactions.[12]

There are also various proposals before Congress that are intended to reverse or restrict the effect of the Supreme Court's holding in *Italian Colors*. For example, we urge the Senate to enact the Arbitration Fairness Act, introduced by Senator Franken, which would prohibit the enforcement of binding, mandatory pre-dispute arbitration clauses in certain cases, including antitrust class actions. In addition, narrowly crafted legislation aimed at specific industries in which there is heightened concern for consumer protection may lessen the inequity that occurs when large corporations unilaterally impose sweeping arbitration provisions on unwitting consumers who are then prevented from bringing aggregated actions for antitrust violations.

Q3. Is there anything the DOJ can do to facilitate private enforcement?

A3. Private enforcement provides virtually the only way to compensate consumers and small businesses that are victims of anticompetitive cartel conduct. Given the importance of obtaining restitution for consumers and small businesses harmed by cartels, effective coordination between

[12] 12 C.F.R. § 1026.36(h) (2013).

the DOJ and private litigants can greatly benefit consumers. One suggested area in which coordination may be improved is in the DOJ's participation in follow-on private civil antitrust litigation involving an Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") applicant.

In my written testimony dated November 14, 2013, I explained that ACPERA allows an amnesty applicant to limit its liability in follow-on civil actions to actual damages if the applicant provides "satisfactory cooperation" [13] to civil plaintiffs, but that even with the 2010 amendments, ACPERA's guidance on the timeliness of satisfactory cooperation remains vague. Amnesty applicants have at times taken advantage of this uncertainty to their advantage in follow-on civil litigation.[14] While I urge Congress to amend the statute to require satisfactory cooperation at the earliest possible opportunity, the DOJ can also greatly assist plaintiffs in private civil litigation by filing amicus briefs supporting the position that satisfactory cooperation means cooperation at the earliest possible opportunity in order to make such cooperation meaningful and effective.

Of course, where discovery is stayed in a follow-on civil proceeding in deference to the DOJ's criminal investigation, there may be competing considerations which require the amnesty applicant to suspend or limit its cooperation until the stay is lifted. The 2010 amendments to ACPERA account for such a situation, and in fact require the amnesty applicant, once the stay (or protective order) is lifted, to provide "without unreasonable delay" any cooperation previously prohibited by the stay.[15] Again, DOJ amicus briefs supporting the position that

[13] ACPERA, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

[14] *See, e.g.*, *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWx), 2013 U.S. Dist. LEXIS 125287 (C.D. Cal. Aug. 26, 2013) (finding defendants not entitled to the damages-limiting benefits of ACPERA because they did not disclose all relevant information to civil class action plaintiffs in a timely fashion).

[15] Pub. L. No. 111-190, § 3, 124 Stat. 1275, 1276.

"without unreasonable delay," means at the earliest possible opportunity would greatly assist private litigants, who need this information to successfully prosecute their claims.