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**CRIMINAL CARTEL PROSECUTION:  
Considerations on Motivating Self-Disclosure  
and Attempts to Compensate Victims**

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# **CRIMINAL CARTEL PROSECUTION: Considerations on Motivating Self-Disclosure and Attempts to Compensate Victims**

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The United States has a long history of following criminal cartel prosecutions with civil, treble damage class actions that have serious repercussions on the ability of leniency to spur self-disclosure of cartel activity. Leniency has lost its luster in recent years, and few, if any, see the U.S. system as the paragon of efficient redress. The provisions of the Antitrust Criminal Penalties Enhancement and Reform Act (ACPERA)<sup>1</sup> that de-treble damages and remove joint and several liability for leniency applicants appear to add little to tip the scales for a company as it assesses the balance of benefits and harms voluntarily to report a cartel to the government. This paper notes some of the concerns that flow from the current system in the United States and looks at potential alternatives to today's civil claims in cases where the government has already devoted resources to prosecute. In this context, the time has come to consider a revised approach to victim claims, including using restitution as part of the U.S. criminal process and partial or complete blocking of civil litigation purporting to accomplish victim redress on violations that are the subject of public enforcement efforts. Suggested herein are some alternatives to the current system to better motivate self-disclosure while eliminating substantial wasted expense and burden that do not contribute to greater social welfare.

## **U.S. ANTITRUST CIVIL TREBLE DAMAGE CLASS ACTIONS**

Criminal enforcement of antitrust laws creates a flood of corollary litigation, most importantly, civil treble damage actions. A criminal conviction is *prima facie* evidence of liability in these cases.<sup>2</sup> The situation involved in this follow-on cartel litigation is very different from typical litigation involving dispute resolution between parties or when a party seeks the protection of legal rights.<sup>3</sup> The government does the work to establish liability, and the class action plaintiff lawyers build on that to create a fund from which they can to recover a huge bounty. All the follow-on plaintiffs rely heavily on the government investigation to try to avoid dismissal and rely on the pressure of the government action to induce settlements. Follow-on class action cases often commence merely upon the basis of the report of a government investigation as that begins the squabble by plaintiffs' class action lawyers to take control over the litigation to garner the lucrative reward.<sup>4</sup> The class lawyers, not the alleged victims, control the litigation process. Follow-on cases

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<sup>1</sup> Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004), as amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), codified as amended at 15 U.S.C. § 1 note (the "amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant [that has provided "satisfactory cooperation" to civil plaintiffs] . . . shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation").

<sup>2</sup> 15 U.S.C. § 16(a) (2018).

<sup>3</sup> This paper is limited to the antitrust context and does not extend to class litigation apart from criminal cartel prosecutions, like civil rights or employment where government enforcement operates under an entirely different regime. Moreover, it does not address the circumstances of litigation, even in the cartel area, that are not based upon government proceedings. Other considerations apply to both of these circumstances.

<sup>4</sup> *See, e.g.*, Ryan Kriger, "Clash of the Class Action Law Firms," LAW 360 (Oct. 3, 2011), *available at* <http://www.law360.com/articles/275328/clash-of-the-class-action-law-firms>; Edvard Pettersson, "Judges in California are cracking down on cozy class-action settlements," LOS ANGELES TIMES (Mar. 25, 2019), *available at*

almost never go to trial, and the purported victims typically have no emotional, pecuniary, or other investment in the class litigation. As an inducement to be the named plaintiffs in the representative action, the plaintiffs' lawyers typically ask the court for a bonus payment to the named plaintiffs. Not infrequently, named individual plaintiffs are related to the lawyers either through a familial or work connection.

The court process takes a long time, and cases may drag on for years until settled. The extraordinary burden and expense of antitrust discovery have been recognized repeatedly, including by the United States Supreme Court.<sup>5</sup> It is well known that in antitrust litigation typically high-priced experts digest and disgorge massive amounts of data to support class certification and to calculate damages. The defense's experts then offer their own massive amounts of data to rebut the findings of the expert or experts hired by the plaintiffs. The similarly expensive experts will undergo rigorous cross-examination at depositions and often at hearings. And, judges must review whether the experts are basing their conclusions on accepted scientific principles applied according to accepted scientific methods.<sup>6</sup> Scores of lawyers consume massive amounts of private and judicial resources to orchestrate this process, especially to address class certification issues.

Many months, if not years, and many millions of dollars are spent in the civil litigation process. Yet, none of that money goes to the victims. The money instead goes to lawyers, experts, and supporting services, such as electronic database support that alone can cost well over a million dollars for a modest case.<sup>7</sup> These costs do not encompass judicial resources, nor the time and burden on business executives that distracts from a focus on business. Similarly, there are real foregone business impairment and opportunity costs incurred when a business is known to be facing the type of unquantified substantial potential liability that weighs on any defendant in the midst of treble damage antitrust class action litigation. These soft costs should not be underestimated and, because of the difficulty of quantification, are largely ignored.

## **VOLUNTARY DISCLOSURE – THE BALANCE THAT DRIVES THE DECISION**

### **Leniency**

The Antitrust Division's Leniency Policy<sup>8</sup> has driven its criminal enforcement for well over a decade, and thus also is the engine behind the follow-on litigation. The current policy, which was first implemented in 1993, provides that the first to apply will receive total amnesty from criminal prosecution if certain conditions are met. There are two types of Leniency available, one for previously unknown cartel conduct and a second for circumstances in which the Division may have

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<https://www.latimes.com/business/la-fi-class-action-settlement-guidelines-20190325-story.html>.

<sup>5</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007).

<sup>6</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

<sup>7</sup> In May 2016, the ABA Journal reported that the market for e-discovery services is forecasted to reach \$14.7 billion by 2019. "Opening Statements," ABA JOURNAL at 14 (May 2016) (citing International Data Corp. (Jan. 4, 2016)) [hereinafter Opening Statements].

<sup>8</sup> See U.S. Dep't of Justice, "Corporate Leniency Policy," (Aug. 10, 1993), available at <https://www.justice.gov/atr/file/810281/download>. The Policy lays out the basic requirements and clarification is available in FAQs. See U.S. Dep't of Justice, "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters," (Jan. 26, 2017), available at <https://www.justice.gov/atr/page/file/926521/download>.

reason to investigate, but insufficient evidence to prosecute. The principle condition, aside from “first-in”, is that the Applicant fully cooperate and accept responsibility for criminal behavior. The Policy also requires that the Applicant make restitution. The amnesty applies to all current corporate individuals for disclosing a previously unknown cartel, and generally also when the Division has already started an investigation. This application to the corporate individuals is critical for the company to have the means to enlist those individuals to help provide the necessary cooperation.

### **ACPERA**

Today, the Leniency Policy and ACPERA are the principal devices to foster disclosure. ACPERA works as a corollary to the Division’s Leniency Policy. Congress designed ACPERA to add weight to the Leniency Policy’s incentives for disclosure by adding to the amnesty reward.<sup>9</sup> Even with amnesty from criminal charges, a company that discloses cartel conduct is highly likely to face civil damage claims, including class action claims. With the cooperation of an amnesty candidate, the Division generally is able to convince other conspirators to plead guilty. Those pleas will trigger civil claims, and even reports of an investigation will often be sufficient to trigger civil complaints. Direct purchasers seek damages for overcharges pursuant to Section 4 of the Clayton Act, which provides for joint and several liability and treble damage recovery plus attorneys’ fees.<sup>10</sup> Inevitably, some claims will be asserted as class actions, but some purchasers from an alleged conspirator may choose to proceed individually or in groups (known as “direct action purchasers”). Indirect purchasers, which are further down the distribution chain and include consumers, seek damages under the laws of various states. Some states may pursue damages as *parens patriae*.

ACPERA provides the amnesty winner with additional benefits in these “follow-on” civil cases. For the amnesty winner alone, ACPERA limits its liability to only single damages and damages caused by that company’s own conduct (rather than joint and several liability). This benefit, however, comes with various costs. The amnesty winner must not only fulfill the qualifications under the Leniency Policy, but provide timely cooperation to the civil plaintiffs.

### **The Decision-Making Balance**

The decision of whether to seek leniency rests on an assessment of what is gained and lost. The highest price that consumers could pay for the purported benefits of follow-on litigation is when fewer cartels are disclosed and prosecuted. This potential to kill the goose laying the golden eggs is real, as the vast majority of all cartel damage claims arise only as a result of criminal prosecutions. That civil litigation affects the willingness of defendants to cooperate with governments is well-recognized.

Congress passed ACPERA with an aim to alter the decisional balance for a company deciding whether to self-report and take advantage of leniency by adding more to the scale in

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<sup>9</sup> ACPERA also may add greater power to the penalty side of the equation by requiring cooperation with the civil claimants or make the civil redress process move faster as cooperation is required to be made on a timely basis, but there does not appear to be any indication of these benefits having materialized, especially given the strength of the U.S. discovery system and the forces that push even the amnesty candidate to defend itself.

<sup>10</sup> 15 U.S.C. § 15.

favor of self-disclosure and cooperation. The Leniency Policy's requirement of cooperation enlists a company to work with the Antitrust Division to prosecute other conspirators, while ACPERA seeks to give the civil plaintiffs a similar cooperation benefit. This, of course, presents another burden for the Leniency applicant.

But the reward of single damages for one's purchases is not the same carrot as amnesty. The civil litigation will involve major additional time, burden and expense. Moreover, as civil claims are typically settled on the basis of single damages on the defendant's own sales, ACPERA may add little, if anything, to tip in favor of self-reporting, especially given that the civil claims typically expand well beyond the conduct involved in criminal cases or for which the Applicant has sought leniency. Companies are loathe to try to have a jury sort through the additional claims when the core allegation involves a criminal conviction. The resulting settlement often leaves the Leniency Applicant no better off in the civil litigation that has vastly expanded potential exposure far beyond what was disclosed, and some claim the Leniency applicant sits in a worse position than other alleged conspirators.

The efficacy of both ACPERA and the Leniency Policy to motivate self-reporting has become the subject of industry scrutiny in light of recent trends evidencing a decline in leniency enforcement. The Antitrust Division under the Trump administration has filed the lowest number of enforcement actions since the 1970s.<sup>11</sup> The number of cases that the Antitrust Division filed in fiscal years 2018 and 2017 are fractions of the total cases filed during the first years of both the Obama and George W. Bush administrations.<sup>12</sup> Consequently, the amount of penalties and fines have dwindled to numbers not seen since the early 2000s.<sup>13</sup> The influx of civil litigation that follows after a government investigation is made public unquestionably has unfavorably altered the balancing in the context of a decision whether to seek leniency.<sup>14</sup>

## **SOCIAL WELFARE ISSUES**

### **Deterrence**

Antitrust laws arise from the belief in the social benefits of a well-functioning free market. Competitive markets will allocate resources to their highest and best use. Consumers will choose to buy what they perceive as the best value, and the most efficient producers providing the most value will reap the rewards of those purchases. Thus, the fundamental goal of the Sherman Act's prohibition of price fixing or market allocations among competitors is to avoid interference with the competitive process and maintain a competitive marketplace.

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<sup>11</sup> See Kadhim Shubber, "US antitrust enforcement falls to slowest rate since 1970s," FINANCIAL TIMES (Nov. 28, 2018), available at <https://www.ft.com/content/27a0a34e-f2a0-11e8-9623-d7f9881e729f>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See Bryan Koenig, "DOJ Antitrust Head Says Leniency Program 'Alive And Well,'" LAW360 (Apr. 11, 2019), available at <https://www.law360.com/articles/1149183>. Other factors also have affected the perceived balance, but the civil litigation liability unquestionably has put a heavy load in the scale against self-disclosure. For a broader description of problems, see Tom Madge-Wyld, "US DOJ has shaken confidence in its own leniency programme, former official says," GCR (Mar. 27, 2019), available at <https://globalcompetitionreview.com/article/1189310/us-doj-has-shaken-confidence-in-its-own-leniency-programme-former-official-says>.

Enforcement promotes this goal primarily by deterrence, as cartel recidivism is rare to non-existent.<sup>15</sup>

Deterrence is best measured by looking at the likelihood of disclosure and the amount of the penalty.<sup>16</sup> The Division has been successful with high penalties, and more recently is promoting corporate antitrust compliance programs.<sup>17</sup> High penalties are useless as a deterrent if those violating the law feel comfortable that prosecutors will not learn of the wrongful activity. Self-reporting thus becomes the most critical component of the deterrence equation, as no one can doubt the substantial nature of the fines for antitrust violations.<sup>18</sup>

While deterrence is often cited as a reason to promote civil damage actions, measuring the appropriate pecuniary amount to provide deterrence has never been a goal of private litigation, nor a by-product. Moreover, the notion of a need for private attorneys general simply does not apply in the context of today's follow-on cartel litigation. Years ago when this structure and concept were conceived, criminal fines were minimal, as the offense was only a misdemeanor. In that circumstance, an argument could be made that supplemental civil damages would further deterrence. Now, the government does the work to expose a violation, imposes huge fines, and sends culpable individuals to jail (on average for 2+ years). Moreover, when a civil action is brought merely on the basis of the report of a government investigation, that litigation may well fall into the category of extortionate litigation that parties settle simply to avoid litigation costs.

### **Consumer Harm**

A number of factors lead to questions regarding whether the process and damages assessed through cartel follow-on litigation result in a decrease or increase in social welfare. Are these

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<sup>15</sup> Belinda A. Barnett, Scott D. Hammond & Gregory J. Werden, U.S. Dep't of Justice, "Recidivism Eliminated: Cartel Enforcement in the United States Since 1999," Before the Georgetown Global Antitrust Enforcement Symposium, Washington, D.C., at 6-7 (Sept. 22, 2011), *available at* <https://www.justice.gov/atr/file/518331/download>. And if specific deterrence is necessary, the government may also insist upon the institution of compliance programs in addition to fines. In the distant past, it was common for the U.S. government to enter into consent decrees along with plea agreements, which decrees required the company for a period of years to maintain a robust compliance program. More recently, the Antitrust Division has incorporated directly into the sentencing process compulsion for companies to adopt and maintain compliance programs. For example, in sentencing Hitachi Chemical Co. and AU Optronics Corp., the courts, at the request of the Antitrust Division, imposed three to five years' probation and required each company to hire a compliance monitor to develop and implement an effective compliance program. *See* United States' Sentencing Memorandum, *United States v. AU Optronics Corp., et al.*, 3:09-cr-00110-SI at 43-44 (N.D. Cal. Sept. 20, 2012), ECF No. 948; *see also* *United States v. Hitachi Chemical Co., Ltd.*, 4:16-cr-00180-JD at 7 (N.D. Cal. Jun. 10, 2016).

<sup>16</sup> One facet of the ACPERA legislation was to increase the amount of the criminal maximum penalty under the Sherman Act. Pub. L. No. 108-237, § 215 (increasing the maximum fines from \$10 million to \$100 million for corporations and from \$350,000 to \$1 million for individuals, and increasing the maximum jail term for individuals from 3 years to 10 years). This facet of ACPERA cannot be ignored in the overall equation of the decision-making balance regarding self-disclosure.

<sup>17</sup> For a reflection of the high fines, *see* U.S. Dep't of Justice, Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More (Jan. 23, 2018), <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>. With regard to compliance programs,

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actions helping or harming consumers? A strong case can be made that private cartel follow-on litigation merely penalizes the consumer once again.

In the United States, the rules in federal court provide that only direct purchasers can recover damages. These corporate direct purchasers calculate their injury without regard to whether they passed through any overcharge to subsequent purchasers. Numerous states reject the federal rule and allow indirect purchasers to sue for damages. Some indirect purchasers are corporations in the supply chain, but as the claimants go further down the supply chain consumer class-action litigation has become frequent as well. Thus, parties seeking damages are typically corporations in a supply chain and an amorphous indirect consumer class.

There simply is no basis to argue that antitrust class actions are the best way to provide consumer level redress. This point has been recognized repeatedly.<sup>19</sup> In fact, the difficulties involved in the prosecution of indirect purchaser claims, especially problems with ascertaining damages, are a reason for the federal rule that restricts claims to direct purchasers.<sup>20</sup> As consumers generally do not retain receipts or other proof of purchase, determining which consumers should receive how much is virtually impossible, wholly aside from other difficulties such as the size of the claim or whether any particular consumer actually paid the inflated price.<sup>21</sup> Indeed, class members often fail to make claims against settlement funds that have been established, and *cy pres* remedies may be employed specifically because of the implausibility of compensating victims.<sup>22</sup> A study reported that class members make claims against the fund less than 10%, and more often less than 1%, of the time.<sup>23</sup>

With regard to corporate plaintiffs and corporate defendants, there are numerous reasons why these damage actions are neutral at best for social welfare and, more typically, affirmatively adverse. Judge Douglas Ginsburg has cogently explained that the punishment of shareholders, who likely are innocent of any conceivable wrongdoing and who may well have suffered as its victims themselves, does not further social welfare.<sup>24</sup> Similarly, and equally important, the author knows of no empirical research to support the idea that corporate recipients of these windfall damages use such monies in furtherance of consumer benefits. The settlement amounts from the treble damage follow-on cases appear as windfalls to the corporate balance sheet.

The temporal disparity between the wrongful activity and the costs and distribution of damages settlements creates fundamental impediments to any deterrent value flowing from the imposition of these corporate expenses. This is especially true for cartels that operated over a

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<sup>19</sup> See e.g., Albert A. Foer, *Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices*, 24 ANTITRUST 86 (2010) [hereinafter Foer].

<sup>20</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>21</sup> Foer at 86.

<sup>22</sup> See *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21 (9th Cir. 2011).

<sup>23</sup> See Elizabeth Cabraser & Andrew Pincus, *Claims-Made Class-Action Settlements*, 99 JUDICATURE 81, 82 (Winter 2015), available at [https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature-vol99-no3\\_point-counter.pdf](https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature-vol99-no3_point-counter.pdf).

<sup>24</sup> See Douglas Ginsburg & Joshua Wright, *Antitrust Sanctions*, 8 COMPETITION POLICY INT'L 46, 53, 65-66, 74 (Spring 2012), available at <https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/cpispring2012ginsburg-wrightreprint.pdf>.

lengthy period of time. The injured direct purchasers likely long ago passed on overcharges, and the shareholders on either side may not be the same as, respectively, the ones who benefited or were harmed. The wealth transfer goes from one hapless group of shareholders to a different, much happier group who suddenly find themselves enriched.

Moreover, if most industry participants are finding themselves caught up in a cartel investigation, who truly bears the litigation and settlement costs? What happens when the cost of doing business in an industry goes up? Ultimately, it is hard to imagine that the consumers do not pay the price or at least bear a major part of the cost. This then leads back to the dependency upon government enforcement, not only for finding the violation, but also for determining the appropriate penalty that calibrates deterrence against additional consumer cost.

### **Tensions Between Parallel Criminal And Civil Actions**

The government, plaintiffs, and defendants can lose important rights and protections when criminal and civil actions proceed in parallel. Similarly, some parties can seek to procure advantages from the dual proceedings to which they otherwise would not be entitled.

One source where this tension has long been recognized is that the broad discovery rules in civil litigation can interfere with the criminal investigation. Thus, it has not been uncommon for prosecutors to request a stay of some or all discovery in parallel civil proceedings. Sometimes plaintiffs do not object, as they would like the government to secure convictions that create a prima facie case in the civil litigation. But sometimes the plaintiffs, especially after some convictions, would prefer the pressure of a faster time schedule to push along settlement negotiations. In general, courts grant government requests for a stay. But sometimes the government seems compelled to limit its request perhaps more narrowly than might be optimal, and stay requests have been denied.<sup>25</sup>

Rarer, but highly intrusive to the governmental investigative process, is when private plaintiffs seek to force the government to share investigative results. In one matter, a judge in pretrial civil redress litigation proceedings involving allegations of price fixing by three principal players in the packaged ice industry granted the direct purchaser class plaintiffs' motion to compel the Antitrust Division to produce certain tape recordings made by the government during its investigation.<sup>26</sup> The government had enlisted certain individuals to cooperate and agreed to tape record conversations with persons of interest, and the government had sole possession of the recordings. The government objected to the plaintiffs' subpoena to the government to procure the recordings. It argued sovereign immunity and various privileges, including the federal law enforcement privilege. The court rejected these arguments and forced the government to disclose the recordings.

While in this instance the government lost, this case highlights a perplexing dilemma from the perspective of the defendants. Discoverability of government submissions in the context of

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<sup>25</sup> See e.g., *In re Optical Disk Drive Prods. Antitrust Litig.*, 3:10-MD-02143-RS (N.D. Cal. June 24, 2010) (denying the government's motion to stay discovery but indicating a willingness to reconsider the issue on a case-by-case basis.).

<sup>26</sup> *In re Packaged Ice Antitrust Litigation*, 2011 U.S. Dist. LEXIS 51116, Case No. 08-MD-01952 (E.D. Mich. May 10, 2011), ECF No. 363.

government cooperation presents a huge risk. In balancing those risks and rewards, the detrimental use of the submissions in the U.S. civil litigation weighs heavily against the most fulsome cooperation with government and presents an additional concern with civil enforcement operating against social welfare and maximum deterrence of antitrust violations. As stated by some commentators, "[t]oday, targets of multijurisdictional investigations appear to face a dilemma: cooperate with governmental authorities or protect rights and defenses in U.S. civil litigation."<sup>27</sup>

### **Criminal Restitution**

Various alternatives that would resolve many concerns and rebalance decision-making in favor of self-reporting would invoke the use of restitution as a bar to civil litigation. In some instances, the court would impose restitution as a sentencing condition. In other alternatives, the Antitrust Division would handle restitution. The Division may have done sufficient work to understand the gain or loss from the offense or, as in the case of most offenses related to government contracting, will otherwise have the means to understand the relevant issues to determine the gains, losses, and appropriate distribution of restitution. In other instances, the use of experts or a monitor, paid for by the conspirator making restitution, would assist with recommendations.

The concept of handling victim recompense as part of the criminal sentencing process is not new. Today, the practice of combining redress and criminal punishment is frequently employed in the context of cartels affecting public procurement, albeit more typically through use of a supplemental settlement agreement than through court-ordered restitution. Most importantly, the concept is embedded into statutory sentencing requirements for federal crimes. Courts are required to impose a sentence mandating restitution unless the case falls into a specific statutory exception.<sup>28</sup>

Most criminal antitrust cases invoke the exception. Plea agreements with the Antitrust Division generally contain language similar to the following: "In light of the civil class action cases filed against the defendant, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense charged in the Information."<sup>29</sup>

Handling victim claims as restitution has come to the forefront in a few criminal cases. In the first case described below the prospect of restitution was simply raised by the court as a possibility. In the second, however, restitution was included in the settlement agreement between

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<sup>27</sup> Joy Fuyuno & Jason K. Sonoda, "The Hidden Cost of Cooperation: Discoverability of U.S. and Foreign Governmental Submissions in Private Litigation" at 2-3 (Jan. 30-Feb. 1, 2008).

<sup>28</sup> 18 U.S.C. § 3663A(c) provides for mandatory restitution to victims for certain crimes; for example, "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." *Id.* § 3663A(c)(1)(B). There is a statutory exception to mandatory restitution for Title 18 property offenses where "(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." *Id.* § 3663A(c)(3).

<sup>29</sup> Plea Agreement, *United States v. Akzo Nobel Chemicals International B.V.*, No. CR 06-0160 MMC (N.D. Cal. May 17, 2006), available at <http://www.justice.gov/atr/cases/f216300/216369.pdf>.

the defendants and various government authorities, throwing a wrench squarely into civil plaintiffs' pursuit of a follow-on class action and lighting a path to avoid the extra costs of those proceedings.

In the first case, Samsung SDI ("Samsung") agreed to plead guilty with regard to a price-fixing conspiracy related to color display tubes ("CDTs").<sup>30</sup> The charging information alleged that Samsung participated in a conspiracy from at least January 1997 until at least March 2006 "to suppress and eliminate competition by fixing prices, reducing output and allocating market shares of [CDTs] to be sold in the United States and elsewhere."<sup>31</sup> Pursuant to the agreement, Samsung agreed to pay a fine of \$32 million.

Not surprisingly, various private civil plaintiffs had also named Samsung SDI as a defendant in the follow-on case seeking trebled compensatory damages for the price fixing of CDTs. At the initial hearing on the criminal case, when the government and Samsung requested the court to impose the sentence in accord with the plea agreement, the judge balked and raised the question whether he should impose a restitution requirement. Ultimately, restitution was not required.<sup>32</sup>

The second matter pertains to the U.S. government's investigation into anti-competitive conduct in the municipal bond market. In 2006, the government began an investigation into the competitive practices of providers and brokers of municipal bonds.<sup>33</sup> Soon thereafter, multiple cities, states, and other entities filed suits alleging price-fixing and bid-rigging in the municipal derivatives industry, seeking treble damages under the Clayton Act. The cases were consolidated into a single multidistrict litigation ("MDL") lawsuit.<sup>34</sup>

In December 2010, the government entered into an agreement with Bank of America, the amnesty applicant, under the terms of which Bank of America agreed to pay "restitution to federal and state agencies for its participation in a conspiracy to rig bids in the municipal bond derivatives market."<sup>35</sup> The government has since entered into similar settlement agreements with UBS AG, JP Morgan, Wachovia, and GE Funding, requiring, among other conditions, the parties to pay

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<sup>30</sup> See Press Release, U.S. Dep't of Justice, "Samsung SDI Agrees to Plead Guilty in Color Display to Price-Fixing Conspiracy," (Mar. 18, 2011), *available at* <http://www.justice.gov/opa/pr/2011/March/11-at-350.html>. See also Indictment, *United States v. Samsung SDI Co., Ltd.*, No. 11-cr-00162-WHA-1 (N.D. Cal. Mar. 18, 2011), ECF No. 1 [hereinafter Samsung Indictment].

<sup>31</sup> Samsung Indictment ¶ 2.

<sup>21</sup> The court imposed its sentence on August 17, 2011, accepting the \$32 million plea agreement with no restitution apparently based on in camera materials related to the defendant's substantial cooperation. See Pamela MacLean and Karen Gullo, "Samsung SDI's Plea Deal in Price Fixing Case Blocked," BLOOMBERG (Apr. 20, 2011), *available at* <http://www.bloomberg.com/news/2011-04-20/samsung-sdi-s-32-million-plea-deal-with-u-s-in-price-fixing-blocked.html>. For the judgment, see *U.S. v. Samsung SDI Company, LTD*, 3:11-cr-00162-WHA (N.D. Cal. Aug. 19, 2011).

<sup>33</sup> See William Selway and Martin Z. Braun, "U.S. Subpoenas Muni Firms, Seizes Papers in Probe," BLOOMBERG (Nov. 16, 2006), *available at* [http://www.bloomberg.com/apps/news?pid=email\\_en&refer=home&sid=aDrqOJHmHQLQ](http://www.bloomberg.com/apps/news?pid=email_en&refer=home&sid=aDrqOJHmHQLQ).

<sup>34</sup> *In re: Municipal Derivatives Antitrust Litigation*, MDL No. 1950, Master Docket No. 08-2516 (VM) (GWG) (S.D.N.Y.).

<sup>35</sup> See U.S. Dep't of Justice, "Bank of America Agrees to Pay \$137.3 Million in Restitution to Federal and State Agencies as a Condition of the Justice Department's Antitrust Corporate Leniency Program" (Dec. 7, 2010), *available at* <http://www.justice.gov/opa/pr/2010/December/10-at-1400.html>.

restitution to persons or entities injured by their anticompetitive conduct in return for the government's agreement not to prosecute.<sup>36</sup> Concurrently with these agreements, the banks entered into agreements with a number of governmental agencies and representatives, including a coalition of state attorneys general. The agreement with the latter specifically set aside funds for restitution to municipalities harmed by the anticompetitive conduct.<sup>37</sup> Under the terms of the agreement, persons and entities who seek compensation through the restitution fund cannot participate in the civil class action.

Immediately after the government and Bank of America signed the agreement, plaintiffs' counsel in the civil class action complained to the court that the restitution agreement with the government, which awards compensation directly to the purported victims, effectively circumvents the class action.<sup>38</sup> Unmentioned was the fact that the agreement also cuts plaintiffs' lawyers—and their compensation—out of the settlement.<sup>39</sup>

Following the filing of various motions, the court ordered that before any notice of settlement was issued by the state attorneys general, the court would have to review and approve the notice, and that such notice must let claimants know that they may have rights under the class action.<sup>40</sup> Subsequent settlements have drawn similar criticism from plaintiffs' counsel and similar court orders.<sup>41</sup> The content of the notice was contentious, with state attorneys general indicating

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<sup>36</sup> U.S. Dep't of Justice, "UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$160 Million to Federal and State Agencies" (May 4, 2011), *available at* <http://www.justice.gov/opa/pr/2011/May/11-at-567.html>; U.S. Dep't of Justice, "JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$228 Million to Federal and State Agencies" (July 7, 2011), *available at* <http://www.justice.gov/opa/pr/2011/July/11-at-890.html>; U.S. Dep't of Justice, "Wachovia Bank N.A. Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay \$148 Million to Federal and State Agencies" (Dec. 4, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-at-1597.html>; U.S. Dep't of Justice, "GE Funding Capital Market Services Inc. Admits to Anticompetitive Conduct by Former Traders in the Municipal Bond Investments Market and Agrees to Pay \$70 Million to Federal and State Agencies" (Dec. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-at-1706.html>.

<sup>37</sup> Agreement Among the Attorneys General of the States and Commonwealths of Alabama, California, Connecticut, Florida, Illinois, Kansas, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina and Texas and Bank of America Corporation (Dec. 7, 2010), *available at* <http://www.stateagmunisettlement.com/docs/BOA%20Settlement%20Agreement%20with%20scanned%20signatures.pdf>.

<sup>38</sup> Letter from Interim Co-Lead Class Counsel Michael D. Hausfeld of Hausfeld LLP to the Honorable Victor Marrero, *In re: Municipal Derivatives Antitrust Litigation*, MDL No. 1950, Master Docket No. 08-2516 (VM) (GWG) (S.D.N.Y. Dec. 14, 2010), ECF No. 1192.

<sup>39</sup> If the Antitrust Division reaches settlements with companies that include restitution, it erodes the class action plaintiffs' lawyers' ability to recover large fees in these lawsuits.

<sup>40</sup> Order, *In re: Municipal Derivatives Antitrust Litigation*, MDL No. 1950, Master Docket No. 08-2516 (VM) (GWG) (S.D.N.Y. Mar. 1, 2011), ECF No. 1253.

<sup>41</sup> Letter from Seth Ard of Susman Godfrey LLP to the Honorable Victor Marrero, *In re: Municipal Derivatives Antitrust Litigation*, MDL No. 1950, Master Docket No. 08-2516 (VM) (GWG) (S.D.N.Y. May 9, 2011), ECF No. 1329 (complaining regarding the UBS AG settlement); Letter from Elinor R. Hoffman, Assistant Attorney General, State of New York, to the Honorable Victor Marrero, *In re: Municipal Derivatives Antitrust Litigation*, MDL No. 1950, Master Docket No. 08-2516 (VM) (GWG) (S.D.N.Y. July 12, 2011), ECF No. 1553 (responding to Interim Class Counsel's complaint regarding the JP Morgan settlement).

that class counsels' proposed language discouraged potential claimants from participating in the state attorneys general settlement, while class counsel argued that the proposed notice of the state attorneys general did not sufficiently advise potential claimants of alternatives. After months of court filings and arguments, the final notice letter for the Bank of America settlement was issued in mid-November 2011.

## **SUGGESTED ALTERNATIVES TO INCENTIVIZE SELF-REPORTING**

Only a dramatic realignment of the civil and criminal costs will create the necessary incentives to increase self-reporting in view of the many other considerations that now affect the scale. In the context of criminal sentencing, the government has a range of options that enable it to review all relevant circumstances and create an appropriate monetary penalty to meet the goals of deterrence, both individual and social. And with leniency available only to the first applicant, no conspirator would think of engaging in a conspiracy under the theory that it would be protected from future prosecution by taking advantage of the leniency policy. Also, as noted above, the minimal or negative social gain from civil follow-on actions indicates that—in rebalancing civil and criminal considerations—removing costs from the civil side of the scale makes the most sense. Such a realignment promotes the greatest deterrence with the least negative impact.

The proposals below would apply only (1) when there is a government criminal antitrust investigation, and (2) there is an attempt in civil litigation to make antitrust claims related, in whole or in part, to the government investigation.

**Alternative A**—Eliminate civil follow-on litigation, apply sentencing restitution to those convicted, and absolve the Leniency Applicant from civil liability:

If a government investigation led to a criminal conviction, the civil litigation would be dismissed in its entirety.<sup>42</sup> The sentencing court would handle any appropriate victim compensation through restitution imposed at sentencing for non-leniency applicants, and those convicted would bear the burden of any appropriate restitution claims relating to sales by the Leniency Applicant. The Division would not require the Leniency Applicant to make restitution. If there are no criminal convictions, the civil cases, which would be stayed pending the government investigation, would be allowed to proceed except as to the Leniency Applicant.<sup>43</sup> The legislation would need to specify that it preempts state claims. The Division would calibrate fine levels to maximize deterrence without adversely affecting consumers.

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<sup>42</sup> The relationship of civil treble damage litigation and restitution has not been examined fully to understand the interaction of the two. Arguably, under current law if the court provided for restitution to victims as part of the criminal process, having no longer sustained injury to their business or property as a result of the violation, it is unclear whether the victims could continue to seek treble damages. As a matter of standing rules, it could be strongly argued that the victims no longer had standing to seek treble damages. In this manner, treble damage class actions could be cut off in cases of follow-on cartel litigation without affecting other types of civil antitrust litigation. While this procedure would avoid the need for statutory intervention, legislation to implement changes likely would be preferable.

<sup>43</sup> If the Antitrust Division determines that there was no criminal conduct, it will not grant Leniency, and thus there is no Leniency Applicant as defined herein. If the Division fails to succeed with a conviction but grants Leniency, the Leniency Applicant should still be able to receive the benefit of self-reporting.

**Alternative B**—Dereble civil follow-on litigation, apply discretionary sentencing restitution to those convicted, and absolve the Leniency Applicant from civil liability:

Along with derebling and preemption, the legislation would contemplate that the courts in sentencing antitrust defendants would block civil claims for those claimants who took the streamlined method of accepting restitution as part of the sentencing process. The Leniency Applicant would not be subject to suit and the Division would not require restitution.

**Alternative C**—Eliminate class actions for follow-on litigation, apply discretionary sentencing restitution to those convicted, and absolve the Leniency Applicant from restitution requirement:

This too would require preemption and leave open the option for individual claimants to take advantage of a streamlined method to resolve claims.

The obvious alternatives that absolve the Leniency Applicant from all civil claims for redress without affecting the overall exposure for others is not among the proposals above because of the need to avoid too dramatically distorting industry competition. As noted above, the antitrust laws set the framework to enable consumers to reward with success those industry participants that most efficiently meet customer needs and desires. Self-reporting through leniency has proven itself the most useful tool to uncover violations, and, in turn, to promote compliance through deterrence, but one price extracted for the use of this tool is some distortion of the competitive system within the affected industry. The extent of that distortion can be severe, and the means to promote self-disclosure need to limit the distortion when possible. Leaving in place the current system costs for all but the Leniency Applicant so significantly affects costs for the remaining industry participants and likely results in the imposition of an industry champion not based on any efficiency rationale or the meeting of consumer demand. That is an unnecessary reward to motivate disclosure of violations and can be avoided in the alternatives suggested.

## **CONCLUSION**

Reversing the trend of diminished cartel enforcement will require companies to decide to self-report violations. Recalibrating the balance of criminal and civil consequences is imperative to motivate greater self-disclosure of cartels and requires a dramatic change from the current system of handling compensation for purported victims in the context of follow-on litigation. By utilizing restitution as part of the criminal sentencing process, and reducing overall civil exposure with a particular focus on criminal fines and corporate compliance programs, alternatives are readily available to increase social welfare, avoid unnecessary costs, streamline and shorten the time involved for resolution of the consequences of a violation, eliminate tensions between public and private enforcement, and provide effective deterrence.