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No Rest(itution) for the Weary: Crime Victims and Treble Damages in Antitrust Cases

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Victims of criminal conduct, including those injured by unlawful anticompetitive conduct, can receive restitution under various federal statutes enacted during the last 30 years. Despite this authority, the Department of Justice has rarely sought restitution in criminal antitrust cases. Recent antitrust cases suggest, however, that interest may be developing in the role of restitution statutes to help promote recovery for antitrust victims. For example, based in part on restitution concerns, Judge William Alsup recently rejected, at least temporarily, a plea agreement in a case charging a conspiracy to fix prices for cathode ray tubes (''CRTs'') used in computer monitors.[2] And in a case stemming from a global conspiracy to fix prices on airfreight shipping services, the private civil plaintiffs introduced restitution in a criminal proceeding, although the DOJ itself has not sought restitution despite recovering over $1 billion in fines from cartel members.[3]

Whether these cases foreshadow increased interest in the role that restitution can play in criminal antitrust cases, or are merely outliers instead, courts and litigants have made it clear that restitution cannot replace the traditional role that private enforcement plays in the antitrust enforcement regime. Because the restitution statutes do not provide for treble damages, which are available to victims of anticompetitive harm in cases brought under the Sherman and Clayton Acts, restitution in and of itself is insufficient to both assure victim redress and adequately deter potential price-fixers from breaking the law. The integral role of private antitrust enforcement counsels in favor of using restitution statutes to complement private antitrust enforcement, not to supplant it.

This article explores some of these underlying policy issues. In Section I, we provide background on the federal restitution statutes that could be applied in the antitrust context. In Section II, we discuss four recent antitrust cases where restitution has come into play. Then, in Section III, we offer ideas to promote the policy of restitution in the criminal antitrust setting while still preserving civil antitrust enforcement.

I. Overview of the Federal Restitution Statutes

As part of the ''victim's rights'' movement of the late 1970s and early 1980s, Congress passed the Victim and Witness Protection Act of 1982 (''VWPA'').[4] Enacted to protect crime victims and witnesses, the VWPA defined the term ''victim'' as ''a[ny] person directly and proxi-

[2] Minute Entry, United States v. Samsung SDI Co., Ltd., No. 11-cr-00162-WHA (N.D. Cal. April 19, 2011) (Dkt. No. 19).

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[3] *See generally* Section II(c), *infra*.

[4] Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. § 3663).

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mately harmed as a result of the commission of an offense . . . including . . . any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.'' Despite the law's facial breadth, the Supreme Court later limited those who could be considered ''victims'' under the VWPA to persons harmed by conduct underlying the conviction offense.[5]

The same year that the VWPA passed, a task force on victims recommended amending the Sixth Amendment to guarantee enhanced rights to victims as part of ''every criminal prosecution.''[6] Although the amendment never had traction at the federal level, more than half of the states have since amended their own constitutions to include language similar to the proposed Victims' Rights Amendment.[7]

Twelve years after passing the VWPA, Congress passed the Violent Crime and Law Enforcement Act of 1994 (''VCLEA''). The VCLEA made restitution mandatory in specific cases involving violent conduct and telemarketing fraud. It also amended the bankruptcy code to ensure that a defendant's restitution obligation was not discharged in bankruptcy.[8]

The scope of mandatory restitution expanded again in 1996, with the passage of the Mandatory Victims' Restitution Act of 1996 (''MVRA''). In keeping with the thematic interests underlying the VCLEA, the MVRA affords victims of violent crimes generally a right to receive restitution. In addition, however, the MVRA also mandated restitution for victims who suffered an offense against their property, or who suffered physical or pecuniary loss.[9] Restitution must be calculated using actual damages or a reasonable estimate.[10] If restitution has not been made, courts are required to order it as a condition of probation or supervised release.[11] Further, defaulting on restitution payments can result in a revocation or modification of probation, re-sentencing, or an order directing the defendant to sell property to make the payment or to ''take any other action necessary to obtain compliance'' with the restitution order.[12] The MVRA also bars double recovery by requiring that any civil damage award be applied to reduce a restitutionary award.[13]

The ability of crime victims to receive restitution was expanded once again in 2004, with the passage of the Crime Victims' Rights Act of 2004 (''CVRA''). Under the CVRA, victims of ''all crimes,'' not just ''violent crimes,'' are entitled to assert their rights to ''full and timely restitution.''[14] A ''crime victim'' under the statute is any person ''directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.''[15] Moreover, the government must use its ''best efforts'' to provide notice to vindicate victim rights.[16] Victims also have a right to be heard, including through the submission of impact statements at sentencing, as well as a right to confer with prosecutors at critical stages of the case.[17] Under the CVRA, a probation officer creates a report detailing ''to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant.''[18] The court then has discretion to either apportion liability among multiple defendants or to hold each defendant liable in full.[19] A final determination of the victims' losses must occur within 90 days after sentencing.[20] However, where the number of victims makes it impracticable to ensure proper restitution under the Act,[21] or where complex issues of fact related to the cause or amount of the victims' damages would complicate or prolong the sen-

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[5] *See* Hughey v. United States, 495 U.S. 411 (1990).

[6] Final Report of the President's Task Force on Victims of Crime, *Final Report* (1982), p. 114, available at http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf. *See generally* National Victims' Constitutional Amendment Passage, Legislative Action at http://www.nvcap.org/congress.htm; *see also* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 849 (2005); Charles Doyle, *Victims' Rights Amendment: A Proposal to Amend the United States Constitution in the 108th Congress* (2004), available at http://royce.house.gov/UploadedFiles/RL31750.pdf.

[7] National Victims' Constitutional Amendment Passage, State Victim Rights Amendments, http://www.nvcap.org.

[8] Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). *See also* Victims' Assistance Legal Organization, *A Compendium of Promising Practices for Restitution* (Draft Version), ch. 1, p. 10, http://www.valor-national.org/restitution/b-chapter1.pdf.

[9] The MVRA is a subtitle of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at various sections of Title 18).

[10] *See* United States v. Havens, 424 F.3d 535 (7th Cir. 2005) (holding that a civil judgment award by itself is insufficient to support an order of restitution because some damages and costs recoverable in a civil action, such as treble damages, consequential damages, and attorney's fees do not qualify as ''losses'' under the MVRA); United States v. Futrell, 209 F.3d 1286, 1290 (11th Cir. 2000) (''[T]he loss need not be [precise]. The court need only make a reasonable estimate of the loss.'') (citing United States v. Dabbs, 134 F.3d 1071, 1081-82 (11th Cir. 1998)).

[11] 18 U.S.C. §§ 3663, 3664 (2006); U.S.S.G. §§ 5E1.1(b)(2), 8B1.1(b)(2) (2008). *See, e.g.*, United States v. Kyles, 601 F.3d 78, 83 (2nd Cir. 2010) (sentencing court may direct and modify a restitution schedule); Judgment, United States v. Sacane, No. 3:05-cr-325 (D. Conn. Jan. 30, 2007) (Dkt. No. 62) (''The [restitution] schedule can be adjusted based on the defendant's ability to pay.'').

[12] 18 U.S.C § 3613A(a)(1) (2006).

[13] 18 U.S.C. § 3664(j)(2) (2006). *See also* United States v. Stanley, 309 F.3d 611 (9th Cir. 2002).

[14] 18 U.S.C. § 3771(a)(4), (a)(6), (c)(1), (c)(3) (2006).

[15] 18 U.S.C. § 3771(e).

[16] Id.

[17] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[18] 18 U.S.C. § 3664(a) (2006); *see also* 18 U.S.C. § 3664(f)(1)(A) (2006).

[19] 18 U.S.C. § 3664(h) (2006).

[20] 18 U.S.C. § 3664(d)(5) (2006).

[21] 18 U.S.C. §§ 3663A, 3771(d)(2) (2006); Fed. R. Crim. P. 60(d)(3); Statement of Sen. Kyl, 150 CONG. REC. S10912 (Daily ed. Oct. 9, 2004) (''[A] court may find that the sheer number of victims is so large that it is impracticable to accord each victim the rights in this bill. . . . [T]he court must then fashion a procedure that still gives effect to the bill and yet takes into account the impracticability.''). *See, e.g.*, United States v. Saltsman, No. 07-cr-641, 2007 WL 4232985 (E.D.N.Y. Nov. 27, 2007) (finding that ''tens of thousands'' of potential victims made identification, location, and notice impracticable).

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tencing process, courts have discretion to administer alternative procedures to give effect to the CVRA.[22]

DOJ statistics report that $2.84 billion in criminal fines, felony assessments, and restitution was collected in 2010 alone.[23] Since 2000, courts have used restitution statutes to order convicted criminals to pay $25 million or more 258 times, for a total of approximately $30 billion.[24] Of course, criminals often cannot pay, and, as a result, only about $660 million of the $30 billion has actually been collected.[25] In 2009, for example, top executives at a failed healthcare finance company were ordered to provide $2.4 billion restitution, of which only $3.2 million was repaid as of March 2011.[26] Not surprisingly, prosecutors have, from time to time, used other means to secure compensation for victims. The use of a court-appointed bankruptcy trustee in the Madoff matter is the prime example.[27]

With the passage of the CVRA and the MVRA, there appears to be a gateway for victims of Sherman Act felonies to receive restitution. The gates themselves, however, have rarely opened for persons or businesses injured by federal antitrust violations.

II. Restitution in Criminal Antitrust Cases

None of the statutory provisions discussed above explicitly provides for restitution in the antitrust context. But Sherman Act § 1 violations such as price-fixing are felonies, and, therefore, restitution is available to victims of criminal anticompetitive conduct. However, the Antitrust Division has itself stated that cases ''rarely'' exist ''in which restitution is truly mandated.''[28] The likely pendency of a private civil suit at the time of sentencing, and the ability of such civil suits to provide treble damages, can make restitution unnecessary – particularly given the complexity inherent in antitrust cases and the difficulty in determining the amount of damages.[29] Further, the *per se* nature of most criminal antitrust cases relieves federal prosecutors from having to prove victim injury-in-fact in order to prevail at trial. In consequence, federal antitrust enforces are not accustomed to working with the data and experts typically used to prove the amount of the price-fixing overcharge at the victim's level. The Antitrust Division's position appears regularly in criminal antitrust case filings.[30]

Hence, the Antitrust Division tends not to seek restitution in its criminal Section 1 cases, either directly or as a condition of probation.[31] From 1990 through 2007, the DOJ obtained criminal antitrust fines of more than $4.1 billion.[32] By comparison, during the same period, the DOJ secured only $118 million in restitution in criminal antitrust cases, mostly for price-fixing overcharges that the federal government paid.[33] Companies convicted of federal crimes generally are, in the aggregate, ordered to pay restitution about three times as often as are companies convicted of antitrust violations.[34]

Interestingly, the Antitrust Division's corporate leniency program calls out restitution as an express condition of amnesty by requiring the amnesty recipient to ''mak[e] all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which Applicant was a participant.''[35] However, regardless of the Antitrust Division's express position, amnesty recipient resistance in civil treble-damage litigation is commonplace. The Division has never revoked a grant of conditional amnesty for the recipient's failure to meet the restitution condition.

The Antitrust Division's institutional reluctance to enter restitution-land, despite over-arching federal policy, is understandable nonetheless. There is an active and effective private antitrust bar, which is tasked with ensuring that victims of anticompetitive conduct receive compensation up to three times the amount of the damages suffered.[36] Recent cases thus reflect defer-

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[22] 18 U.S.C. §§ 3663(a)(1)(B), 3663A (2006). *See* U.S.S.G. § § 5E1.1(b)(2); 8B1.1(b)2) (2008); S. Rep. 104-179 at 18–19 (1995) (''It is the committee's intent that courts order full restitution to all identifiable victims of covered offenses, while guaranteeing that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings.'').

[23] Press Release, *U.S. Dep't of Justice, U.S. Attorney's Office Collects More Than $15 Million In Victim Restitution, Fines, Civil Actions* (Dec. 16, 2010) available at http://www.justice.gov/usao/mow/news2010/fiscal.html.

[24] Brad Heath, *Swindlers rarely pay huge, court-ordered fines*, USA Today (Mar. 7, 2011), available at http://www.usatoday.com/news/washington/2011-03-07-1Afines07_ST_N.htm.

[25] Id.

[26] Id. *See also* United States v. Ageloff, No. 98-cr-1129 (JRD), 2011 WL 3665146 (E.D.N.Y. Aug. 19, 2011) (directing restitution of more than $190,000,000 against an imprisoned securities fraud violator who victimized thousands of investors).

[27] *See* Brad Heath, *Swindlers rarely pay huge, court-ordered fines*, *supra* n. 24. Of an estimated $17.3 billion in lost principal, that resulted from Madoff's Ponzi scheme, the Madoff trustee reportedly has recovered about $11 billion. Chad Bray & Michael Rothfeld, *Judge Tosses $20 Billion in Claims*, Wall Street Journal (Nov. 2, 2011), available at http://online.wsj.com/article/SB10001424052970203707504577012462332212818.html.

[28] UNITED STATES DEPARTMENT OF JUSTICE ANTITRUST DIV. MANUAL, at IV-91(''Division Manual''), available at http://www.justice.gov/atr/public/divisionmanual/chapter4.pdf.

[29] Id.

[30] *See, e.g.*, United States' and Defendant Polo Shu-Sheng Hsu's Joint Sentencing Memorandum at 3,United States v. Polo Hsu, No. 11-cr-0061, (N.D. Cal. Mar. 15, 2011) (Dkt. No. 8) (explaining that restitution was not sought because the private case ''potentially provide[s] for a recovery of a multiple of actual damages.''); United States' Sentencing Memo., United States v. UCAR Int'l Inc., No. 98-177, at 5-6 (E.D. Pa. Apr. 21, 1998) (Dkt. No. 4) (''Given the remedies afforded [antitrust victims] and the active involvement of private antitrust counsel . . . the need to fashion a restitution order is outweighed by the difficulty [in determining losses] and the undue complication and prolongation of the sentencing process.'').

[31] Division Manual, *supra* n. 28, at IV-90-91.

[32] Robert H. Lande & Joshua P. Davis, *Comparative Deterrence From Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. Rev. 315, 352 & Table 3 (2011).

[33] Id. & Table 1.

[34] Beryl A. Howell, *Sentencing Of Antitrust Offenders: What Does The Data Show?*, at 10, 15 (Nov. 2009), available at http://www.ussc.gov/About_the_Commission/About_the_Commissioners/Selected_Articles/Howell_Review_of_Antitrust_Sentencing_Data.pdf.

[35] Model Corporate Conditional Leniency Letter (Nov. 18, 2008), available at http://www.justice.gov/atr/public/criminal/239524.pdf.

[36] I ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 792 (5th ed. 2002).

ral to private civil antitrust litigation as the preferable alternative to grappling with the difficulties inherent in trying to provide restitution to victims in criminal antitrust cases.

a. CRTs

Price-fixing in the manufacture and sale of cathode display tubes used in computer monitors has been the subject of an extensive Antitrust Division investigation. The case against one manufacturer, Samsung, initially proceeded like many others that the Division has brought for Sherman Act violations. Having investigated, the Division filed a price-fixing information and negotiated a plea agreement with Samsung SDI Co. Ltd. under which the company agreed to pay a $32 million fine. The agreement hit a roadblock, however. Unlike a typical antitrust plea where the judge readily accepts the DOJ's refusal to request restitution, District Judge William Alsup initially rejected the plea deal in part because of concerns about restitution:

> Preceding sentencing in this matter, the parties and the probation officer shall please do an analysis of the two alternative measures of fines, namely the gain to defendant and the injury to victims. The probation officer shall also please do a full analysis of potential restitution and where the civil case stands. The probation officer should interview counsel in the civil litigation on the restitution issue. This should all be included in the presentence report.[37]

Thus, under Judge Alsup's order, the potential for recovery from the related civil suit may be evaluated before the Court determines whether to accept a plea agreement without restitution.

Following additional submissions from both Samsung[38] and the United States,[39] Judge Alsup approved the plea and fine without ordering that restitution be paid. According to the Judgment, the Court declined to order restitution because ''over 40 separate civil cases filed on behalf of direct and/or indirect purchasers have been coordinated and [are] pending.''[40] Given the complexities in determining damages, civil litigation rather than government restitution was seen as the more plausible means of compensating victims.

b. Packaged Ice

Judge Alsup's reluctance to accept the Samsung plea stands in contrast to another recent ruling, this one in a case stemming from antitrust violations in the packaged ice industry. There, the court readily denied requests for restitution because, the court held, related civil litigation rendered restitution redundant.

Based on information from an informant, Martin McNulty, the government investigated whether a conspiracy existed to allocate customers and fix prices in the packaged ice industry.[41] As result of the investigation, McNulty's former employer, Arctic Glacier International, pleaded guilty to conspiring to allocate customers of packaged ice sold in certain regions of Michigan from 2001 and through at least 2007. As part of the plea, Arctic Glacier agreed to pay a $9 million fine. The government also agreed not to seek a restitution order ''[i]n light of the availability of civil causes of action.''[42] The Court accepted the plea.

Both the indirect purchasers and McNulty — who asserted that he was blackballed for whistleblowing — sought restitution by applications in the criminal case itself. Neither was successful. When the indirect purchasers sought mandamus relief, the Sixth Circuit held that, even assuming the indirect purchasers were ''victims'' under the CVRA, restitution was inappropriate. The ''difficulty of determining the losses claimed,'' the Court wrote, ''would so prolong and complicate the proceedings that any need for restitution would be outweighed by the burden on the sentencing process.''[43] Similarly, on McNulty's petition for a writ of mandamus from the district court's decision denying him $6.3 million in restitution, the Sixth Circuit again agreed with the district court, finding that neither the CVRA or the MVRA afforded restitution to an informant. Because the ''harms'' McNulty may very well have suffered were civil in nature, rather than criminal, and they were not ''normally associated with the crime of antitrust conspiracy,'' he was precluded from receiving restitution.[44] Instead, ''the victims of the offense in this case were customers.''[45]

c. Air Cargo

''Air Cargo'' is a case stemming from a global conspiracy to fix prices for airfreight shipping services throughout the world, including prices on routes to, from and within the United States. Numerous airlines have pleaded guilty to Sherman Act violations and have agreed to pay fines aggregating over $1 billion. The DOJ has not sought restitution in any of the plea agreements. The conspiracy has also resulted in civil litigation by direct purchasers of cargo shipping services, who have sued various airlines for the damages that the wide-ranging conspiracy caused.[46] The circumstances associated with one of the pleading carriers, Polar Air Cargo, LLC, resulted in the plaintiffs in the civil suit making a filing relating to restitution in the criminal case. The background is this:

Several years before its criminal plea, Polar went through reorganization in bankruptcy. The class period in the civil action covers time both before and after Polar's bankruptcy discharge, and there are, accordingly, issues regarding Polar's civil damage exposure. By contrast, the bankruptcy discharge does not affect the

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[37] Order Requesting Sentencing Information, United States v. Samsung SDI Co., Ltd., No. 11-cr-00162, (N.D. Cal. May 18, 2011) (Dkt. No. 31). Judge Alsup also required the parties to report on the extent of Samsung's purported cooperation in the ongoing criminal probe into the conspiracy.

[38] Samsung SDI Co., Ltd.'s Sentencing Memorandum, United States v. Samsung SDI Co., Ltd., No. 11-cr-00162 (N.D. Cal., Aug. 8, 2011) (Dkt. No. 39) (arguing that restitution is unnecessary because of the existence of ''closely court-supervised civil litigation and potentially damaging inferences in these cases'').

[39] United States' Sentencing Memorandum, United States v. Samsung SDI Co., Ltd., No. 11-cr-00162 (N.D. Cal., Aug. 8, 2011) (Dkt. No. 40).

[40] Judgment, United States v. Samsung SDI Co., Ltd., No. 11-cr-00162, (N.D. Cal. Aug. 19, 2011) (Dkt. No. 56).

[41] United States v. Arctic Glacier Int'l Inc., No. 1:09-cr-00149 (S.D. Ohio).

[42] Transcript of Sentencing Hearing Proceedings at 15, United States v. Arctic Glacier Int'l Inc., No. 1:09-cr-00149 (S.D. Ohio Feb. 18, 2010) (Dkt. No. 46).

[43] In re Acker, 596 F.3d 370, 372 (6th Cir. 2010).

[44] In re McNulty, 597 F.3d 344, 348 (6th Cir. 2010).

[45] Id. at 352.

[46] In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-md-1775 (E.D.N.Y.).

  ATRR ISSN 0003-6021

criminal court's authority to direct Polar to pay restitution to the victims of its price-fixing.[47] The plaintiffs in the Air Cargo civil action thus asked the criminal court to defer deciding, in connection with Polar's plea and sentencing, whether to dispense with restitution, pending developments in the civil case.[48] In effect, the plaintiffs sought to avoid a decision on restitution while the impact of Polar's bankruptcy discharge remained unresolved and the civil action remained unsettled. Both Polar and the Department of Justice opposed the request, with the government arguing, among other things, that the Polar plea ''does not affect the potential for Plaintiffs' recovery of damages in their civil suit.''[49]

There was some appeal to the plaintiffs' attempt to enable the criminal court to have more information before making its restitution decision. But there also are considerations associated with having finality in criminal pleas. Thus, the court denied the plaintiffs' deferral request in a bench ruling, noting as relevant considerations the complexity inherent in determining both the amount of restitution and identity of victims, as well as the time needed to do so.[50] More generally, just as in CRT, the criminal court accepting the airlines' guilty pleas in Air Cargo has regularly declined to impose restitution in view of the pending civil class actions.[51]

d. Municipal Securities Derivatives

One other recent federal criminal investigation touching on restitution is worthy of mention. Unlike the three earlier cases, this particular situation does not implicate restitution in the federal criminal setting so much as it illustrates the controversy that can arise when a government-produced settlement that offers victim recovery is insensitive to, and indeed seeks to trump, parallel private civil antitrust enforcement activity.

There has been a lengthy on-going investigation into possible financial institution misconduct in the issuance of municipal securities derivatives. The DOJ has obtained criminal pleas to bid-rigging antitrust violations, and has unresolved cases pending, with IRS and SEC investigations also proceeding.[52] Bank of America received antitrust amnesty under the Antitrust Division's corporate leniency program several years ago. More recently, Bank of America agreed to a $137 million settlement, part of which is earmarked as restitution to municipal governments and not-for-profit entities who were victims of the bid-rigging scheme.[53] Lacking eligibility for amnesty, UBS and JPMorgan Chase & Co. have entered into non-prosecution agreements with the DOJ and similarly agreed to settlements of $160 million and $228 million, respectively, part of which represents compensation to certain of the victims of the scheme.[54]

The three banks' settlements involve not only the DOJ, but also the IRS, SEC and OCC, as well as various State Attorneys General who conducted a parallel investigation. The State AGs are responsible for distributing what the AGs have described as ''restitution'' to municipalities and the non-for-profits under an opt-in process. In exchange for receiving some form of restitution, these victims are expected to release the settling banks from further liability.[55] There are, however, private civil antitrust class actions pending, consolidated as an MDL proceeding, which assert claims broader than those referred to in the banks' settlements.[56] Nevertheless, those entities choosing to opt-in and to accept the settlement amounts offered would give up the opportunity for additional civil recovery from the settling banks in the pending MDL class action litigation.

From the perspective of civil plaintiffs who are actively litigating against the settling banks and their many co-conspirators, these settlements are sweetheart deals, which allow the banks to avoid treble-damage exposure for the injury that they have caused — and to do so without any judicial review of the settlements' adequacy or reasonableness. Thus, the class action plaintiffs have objected to the disclosure contained in the proposed notice, designed to encourage opt-ins. In response to their concerns, Judge Victor Marrero, who is presiding over the MDL proceeding, barred Bank of America, UBS and JPMorgan from disseminating notice of the settlement without court approval. Judge Marrero also ordered the banks to negotiate a new notice with private plaintiffs' counsel to ensure that poten-

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[47] *See* Kelly v. Robinson, 479 U.S. 36 (1986) (holding that restitution obligations imposed as a condition of probation by a state court are nondischargeable within § 523(a)(7)); In re Amigoni, 109 B.R. 341, 345 (Bankr. N.D. Ill. 1989) (''Section 1141(d) excludes debts enumerated under § 523(a) from discharge. Debtors concede that their restitution obligations are such debts. The authority cited above recognizes that parties to whom such debts are owed cannot have their rights under nonbankruptcy law restricted by a plan of reorganization.'').

[48] Crime Victims' Sentencing Memorandum, United States v. Polar Air Cargo, Inc., No. 10-cr-00242-JBD (D.D.C. Nov. 5, 2010) (Dkt. No. 14).

[49] United States' Supplemental Brief on the Issue of Restitution, at 1, United States v. Polar Air Cargo, Inc., No. 10-cr-00242-JBD (D.D.C. Nov. 5, 2010) (Dkt. No. 16).

[50] *See* Transcript at 16-23, United States v. Polar Air Cargo, Inc., No. 10-cr-00242-JBD, (D.D.C. Nov. 15, 2010) (Dkt. No. 21).

[51] *See, e.g.*, Transcript at 40-41, United States. v. Asiana Airlines, No. 09-cr-0099 (D.D.C. May 5, 2009) (Dkt. No. 17); Transcript at 35, United States v. SAS Cargo Group A/S, No. 08-cr-00182 (D.D.C. July 21, 2008) (Dkt. No. 10).

[52] *See generally* Press Release, *JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investment Market and Agrees to Pay $228 million to Federal and State Agencies*, Department of Justice (July 7, 2011), available at http://www.justice.gov/opa/pr/2011/July/11-at-890.html.

[53] *See 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*, Financial Fraud Enforcement Task Force (Dec. 7, 2010), available at http://www.stopfraud.gov/news/news-12072010.html.

[54] *See* Footnote 52, *supra*; Letter from Christine A. Varney, Assistant Attorney General, to Thomas Mueller (July 6, 2011) (outlining agreement not to prosecute JPMorgan Chase & Co.), available at http://www.justice.gov/atr/public/press_releases/2011/272815a.pdf; Letter from Christine A. Varney, Assistant Attorney General, to Kenneth A. Gallo (May 4, 2011) (outlining agreement not to prosecute UBS AG), available at http://www.justice.gov/atr/public/press_releases/2011/270720a.pdf.

[55] Samuel Howard, *Court Muzzles Plaintiffs in $137M BofA Muni Bond Pact*, CompLaw360 (May 17, 2011), available at http://www.law360.com/articles/245680/court-muzzles-plaintiffs-in-137m-bofa-muni-bond-pact (subscription required).

[56] *See* id.; In re Municipal Securities Antitrust Litig., 08-md-1950 (E.D.N.Y.).

tial claimants are aware of their rights under the class action proceedings.[57]

Private litigation has been an integral feature of federal antitrust enforcement since Congress enacted the treble-damage remedy as part of the original Sherman Act.[58] Tensions between public and private antitrust enforcement are, therefore, inevitable from time to time — perhaps particularly in the area of restitution or compensation for claims involving municipal governments where representation by the private bar is common. The municipal derivatives situation is an example.

III. Creativity Needed to Promote Victim Restitution

What conclusions can be drawn from these recent antitrust examples in which restitution has come into play? Despite the strong federal policy favoring restitution for crime victims, the Antitrust Division seems to maintain its institutional pre-disposition against seeking restitution in antitrust cases. The Division's position is not surprising, however. The role of private litigation in the antitrust enforcement regime is long-standing and well-developed. And however well-intentioned the federal restitution provisions may be, it is unrealistic to suggest that the Antitrust Division could replicate the private bar's ability to redress the economic injury to the victims of antitrust violations.

That said, the policy of the federal restitution statutes is dis-served if an antitrust felon is able to enlist the DOJ's assistance to effectively exempt itself from restitution in the criminal case, while that same felon throws a thousand tacks in the victim recovery road that the private civil action provides. Judge Alsup's order in CRTs requiring the probation office to address restitution in greater depth is a step in the right direction. However, more can, and should, be done to accommodate the goals of the restitution statutes, while still preserving the role of private antitrust enforcement and, at the same time, accommodating the needs of the criminal sentencing system.

For example, the criminal court could promote restitution merely by adducing more detailed corporate testimony prior to accepting a guilty plea. Typically, at a plea hearing, the Antitrust Division proffers what it contends the evidence at trial would prove, and the pleading company, under the court's questioning, admits to the Sherman Act violation – all of which takes place at a relatively high level of generality. The following example from Nippon Cargo's plea hearing in Air Cargo is illustrative:[59]

> [Counsel for the United States]: Had this case gone the trial, . . . the United States would have proved beyond a reasonable doubt that during the time period covered by the information, that the defendant and its coconspirators were air cargo carriers and their employees; that the defendant and its coconspirators engaged in meetings and communications that resulted in agreements regarding one or more components of the cargo rates that the conspirators would charged [sic] to their customers for international air shipments; that after reaching those agreements, the coconspirators made the charges that had been agreed upon to their customers; and finally that Nippon Cargo air shipments that were affected by the conspiracy traveled on certain trans-Pacific routes to and from the United States.
>
> * * *
>
> THE COURT [to the Defendant's representative]: . . . Are there any corrections or changes that you would make on behalf of Nippon to the summary of what the government says that it can prove?
>
> THE DEFENDANT: No, I do not.
>
> THE COURT: Is that factual summary true and correct?
>
> THE DEFENDANT: Yes, it is.
>
> THE COURT: Did Nippon in fact do what the government has stated that it can prove at trial?
>
> THE DEFENDANT: Yes, it did.

So far, so good. But what happens when the civil plaintiffs seek to elicit the more detailed factual basis for the corporation's admission — the specifics of the conspiracy participants, and of the meetings and other communications that resulted in the agreements'' that the company admittedly ''engaged in''? In Air Cargo, the civil plaintiffs noticed Nippon Cargo's deposition, as well as that of Korean Airlines, another pleading defendant, under Rule 30(b)(6), designating the two airlines' in-court guilty plea admissions as topics for examination. As the plaintiffs probed for details during the depositions, however, they were met with attorney-client and work product privilege objections, which produced motions to compel in the civil case.[60] Both the Magistrate Judge and thereafter the District Court denied discovery, rejecting the plaintiffs' attempt to probe the facts underlying the two companies' guilty pleas through witness examination.[61] Thus, despite having admitted the Sherman felony in open court, neither civil

[57] Zach Winnick, *Judge Halts $92M JPMorgan Deal in Muni Bond MDL*, Complaw360 (July 18, 2011) available at http://www.law360.com/articles/258825 (subscription required).

[58] *See* Sherman Act of July 2,1890, Sec. 7, 26 Stat. 209, 51st Cong., 1st Sess.; Act of July 7, 1955, ch. 283, 69 Stat. 283; Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (''Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.'') (emphasis in original); Walter Hamilton & Irene Till, TEMPORARY NATIONAL ECONOMIC COMMITTEE, 76TH CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER 10 (Comm. Print 1941) (''In the thought of the nineties the law should be as nearly self-enforcing as possible. The main reliance seems to have been placed upon the private suit.''); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 229 (1955) (''Congress put great faith in the act's capacity for self-enforcement taken over from the common law.'').

[59] Transcript of Plea/Sentencing Hearing, at 14-15, United States v. Nippon Cargo Airlines Co., Ltd., 09-cr-0098 (JDB), (D.D.C. May 8, 2009) (Dkt. No. 10).

[60] *See* Air Cargo (06-md-01775), Plaintiffs' Redacted Discovery Motion Letter to Magistrate Judge (Aug. 5, 2011) (Dkt. No. 1535); Korean Air Lines Co., Ltd. Redacted Letter Response (Aug. 19, 2011) (Dkt. No. 1549); Plaintiffs' Redacted Letter Motion for Discovery (Aug. 23, 2011) (Dkt. No. 1552); Nippon Airways Redacted Opposition (Sept. 9, 2011) (Dkt. No. 1576).

[61] Air Cargo, Orders (Sep. 9, 2011) (Dkt. No. 1574) and (Sep. 29, 2011) (Dkt. No. 1582); Order (Oct. 24, 2011). *See generally* In re Zypera Prods. Liab. Litig., 1:06-cv-05826-JBW-RLH (E.D.N.Y. Feb. 18, 2009), *objections denied sub nom.* West Virginia ex rel. McGraw v. Eli Lilly & Co., 2009 WL 959536 (E.D.N.Y. Apr. 6, 2009).

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defendant was required to testify to the facts on which its criminal plea was based.

But now consider an alternative scenario. Imagine the criminal sentencing court at the plea hearing, about to decide whether to accept the company's plea, whether to impose the negotiated fine proposed by the Antitrust Division, and whether to dispense with victim restitution? Does it seem likely that the pleading company would refuse to answer questions by the sentencing court similar to those objected to at the civil action deposition? A few more minutes of drilling down into the facts of the conspiracy being admitted could spare the civil plaintiffs considerable effort and help promote the goal of restitution via recovery in the private civil litigation. Moreover, once it became clear that district courts required more detail at plea hearings, the Antitrust Division and pleading company would likely prepare accordingly, perhaps leading to a more meaningful plea hearing explication of the facts constituting the price-fixing violation.[62]

Other criminal sentencing changes could similarly promote victim restitution. For example, the antitrust plea negotiations typically cover not only the Antitrust Division's recommended fine level, but also a Division recommendation to dispense with probation.[63] The criminal court, however, need not simply adopt the Antitrust Division's recommended fine or decline to impose probation on corporate antitrust felons. A company's professing its remorse and announcing a new, improved antitrust compliance program, as corporate antitrust violators regularly do, does nothing for those previously injured by the price-fixing. The criminal court may fairly expect more at sentencing, and it has broad supervisory authority that it can exercise to help secure victim recovery.[64]

The criminal court could enhance the proposed fine level by a multiplier, and direct a payment schedule that would, in effect, allow for dispensing with the payment installment if victim restitution were forthcoming before the fine installment came due. The amounts of the individual payment installments could themselves be tailored to encourage earlier resolution of the civil litigation by making later installments more costly than earlier ones.

Significantly, the fine installments would ***not*** be calibrated to approximate victim recovery in the civil litigation, thus obviating any need for the criminal court to make inquiry comparable to that required to prove victim damages in a civil case. Rather, the fine installments would represent an amount, payable to the United States, that the pleading company would be exposed to if recovery in the civil litigation was not reached. So long as the aggregate fine imposed comports with criminal sentencing guidelines, dividing its amount into installment components, which the sentencing court could adjust or dispense with entirely, should not be objectionable. A criminal court's authority to impose and modify a fine installment schedule is well-recognized.[65]

The criminal court also could put the company on probation and require periodic reporting, the length and conditions of which take into account the company's obligation to afford victim restitution. Indeed, the criminal court could appoint an independent corporate monitor to provide oversight.[66] Means could be fashioned to give the civil plaintiffs input into periodic review of the company's performance under the probation and oversight conditions imposed. The financial and reputational consequences of such a state of affairs on the company might not incent antitrust felons to discharge their restitution obligation by affording more timely recovery for victims in the civil case. But, surely, measures such as this would not hurt.

Unlike an individual, a corporation that violates the criminal law cannot be incarcerated, and as a result ''unique and creative terms of probation'' can be justified.[67] There is opportunity here for creative counseling directed to achieving the overarching objective of affording antitrust victims economic recovery for their injury sooner, rather than later — and without impairing either the criminal sentencing process or the role of private antitrust enforcement. Thus far, however, those opportunities have gone largely unexplored.

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[62] *Cf.* United States v. Danilow, 563 F.Supp. 1159, 1162 (S.D.N.Y. 1983) (before accepting *nolo contendere* pleas from antitrust defendants, the court required each defendant to submit ''a narrative statement of his (or its) role in the conspiracy,'' which the Antitrust Division had to approve, which ''became a part of the public record of the case'').

[63] *See, e.g.*, Transcript, at 25, United States v. Polar Air Cargo LLC, No. 1:10-cr-00242 (D.D.C. Nov. 15, 2009) (Dkt. No. 21) (noting that Polar ''has made some changes'' by putting in place ''stronger internal compliance and training mechanisms,'' and ''has accepted responsibility''); Transcript at 37-38, United States v. Nippon Cargo Airlines Co., Ltd., No. 09-cr-0098 (D.D.C. May 8, 2009) (Dkt. No. 10) (noting that Nippon had ''accepted responsibility'' and taken steps to avoid future violations by ''creation and application of a corporate compliance program''). For illustrative plea agreement provisions, *see also* Plea Agreement ¶¶ 6(a), 8(d), United States v. China Airlines Ltd., No. 10-cr-00263 (D.D.C. Sept. 27, 2010) (Dkt. No.6); Plea Agreement ¶¶ 6(a), 8(g), United States v. British Airways PLC, No. 07-cr-00183 (D.D.C. July 31, 2007) (Dkt. No. 7).

[64] United States v. A-Abras, Inc., 185 F.3d 26, 30 (2nd Cir. 1999) (''trial courts traditionally have enjoyed broad discretion to tailor the conditions of probation to the particular circumstances of each case, provided that such conditions are reasonably related to the dual goals of rehabilitating the offender and protecting the public''); United States v. Davis, 151 F.3d 1304, 1306-07 (10th Cir. 1998) (the court has ''has supervisory power over the defendant's term of supervised release'').

[65] *See Sentencing of Organizations*, 2011 FEDERAL SENTENCING GUIDELINES MANUAL, Chapter 8. at 509-10.

[66] In 2010, the United States' Sentencing Commission proposed including a corporate monitor to its recommended conditions of probation for an organization. *See* Proposed Amendments to Sentencing Guidelines, United States Sentencing Commission (Jan. 21, 2010). Independent of any USSC guidelines, the courts have authority to appoint compliance monitors in antitrust and non-antitrust cases. *See, e.g.*, United States v. Microsoft Corp., 231 F.Supp.2d 141, 196 (D.D.C. 2002), *aff'd sub nom.* Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004); Government's Memorandum in Support of the Proposed Plea Agreements and Deferred Prosecution Agreement, United States v. Alcatel-Lucent France, S.A., No. 10-cr-20906 (S.D. Fla. May 5, 2011) (Dkt. No. 44).

[67] United States v. Mitsubishi Int'l Corp., 677 F.2d 785, 788 (9th Cir. 1982).