IT AIN'T OVER 'TIL IT'S OVER: CAN MAKING ACPERA RESTITUTION CONDITIONAL HELP FILL A GAP IN THE LAW?

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The Ambivalent Effect of Antitrust Damages on Deterrence
By Miriam C. Buiten

The Difference-in-Differences Approach in the Estimation of Cartel Damage
By Frank P. Maier-Rigaud & Slobodan Sudaric

Private Antitrust Enforcement in Italy
By Mario Siragusa & Alessandro Comino

Comment on Cartel Enforcement in the Trump Administration
By John M. Connor

Antitrust Damages, Fines, and Deterrence: Collusion in the Nurse Labor Market
By Roger D. Blair & Anita Walsh

It Ain't Over 'Til It's Over: Can Making Acpera Restitution Conditional Help Fill a Gap in the Law?
By Meegan Hollywood & Dave Rochelson

Penn State Hershey: A Cautionary Tale for Antitrust Litigators
By Margaux Poueymirou

I. INTRODUCTION

In the past two years, the Department of Justice Antitrust Division's (the "Division's") criminal enforcement activity has fallen off a cliff. From 2009 to 2016, the Division charged an average of 20.5 corporations per year; from 2017 to 2018, that average dropped to 6.5 per year, a decline of 68 percent. Similarly, the average number of individuals charged per year fell 53 percent; the average number of criminal cases filed per year fell 66 percent; and, significantly, the average figures for criminal fines & penalties levied fell by 90 percent, from $1.18 billion to $119 million per year.[2]

Yet, there is one aspect of the Division's criminal enforcement that has held steady: restitution. Indeed, the annual figures for restitution to victims has been, and has stayed, low. Over the period from 2008 to 2016, the Division imposed orders of restitution in connection with criminal cases of, on average, just $8.6 million per year.[3] Although the 2017 figure of $2.2 million reflects a significant drop from that average,[4] it is still higher than the figures for 2014 and 2015. In fact, in only two years since 2008 has the Division imposed restitution of more than $10 million.

These low figures for criminal restitution serve as an important reminder that, as the Division's criminal enforcement waxes and wanes, private enforcement remains virtually the only way that victims of anticompetitive conduct by cartels and dominant firms can receive compensation. In the five years from 2013 to 2018, private antitrust suits recovered over $19 billion for victims in antitrust class actions, or about $3 billion per year.[5] Settlements of less than $10 million or of $10-99 million grew at an average annual rate of over 30 percent, and settlements between $100-499 million grew at an average annual rate of almost 120 percent.[6]

These recoveries help explain the Division's statement that, "[f]requently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims."[7] This approach is one manifestation of a larger assumption underlying much of our antitrust law and policy: that public enforcement (by regulators) and private enforcement (via civil action) are essential and complementary elements of a comprehensive scheme. As Justice Brett Kavanaugh wrote earlier this month in the much-anticipated *Apple v. Pepper* decision, the law reflects a "longstanding goal of effective private enforcement and consumer protection in antitrust cases."[8] Division Policy reflects that goal, too.

2 U.S. Dep't of Justice, Criminal Enforcement Trend Charts, available at https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

3 U.S. Dep't of Justice, Antitrust Division Workload Statistics, FY 2008–2017, available at https://www.justice.gov/atr/file/788426/download, at 12.

4 The Division has not yet published restitution figures for 2018.

5 American Antitrust Institute ("AAI"), *The Vital Role of Private Antitrust Enforcement in the U.S.* (May 10, 2019), at 2.

6 *Id.* at 4.

7 2008–2017 Workload Statistics, at 12 n. 19.

8 *Apple Inc. v. Pepper*, No. 17-204, 2019 U.S. LEXIS 3397, at *21 (May 13, 2019).

But what happens when private litigation is unable or unlikely to provide relief to victims?

In many cases, the Division determines antitrust liability, imposes fines, secures guilty pleas and sentences executives to jail, but declines to impose restitution. By design, private actions secure compensation for victims. Every once in a while, however, the civil action encounters a quirk of the law or other unique circumstance that precludes victims from receiving compensation, despite the fact that the criminal action established liability. Cases like that fall into a gap in the law, which allows companies who knowingly violate antitrust laws to remain free from the obligation to compensate their victims.

One way to partially fill this gap, at least where one of the subjects of the criminal action has applied for leniency under the Division's Corporate Leniency Program, is to make sure the Division retains the power to provide restitution to victims in the event that the civil action can't. Under Division policy and the Antitrust Criminal Penalty Enhancement & Reform Act of 2004 ("ACPERA"), an applicant for leniency who informs the Division about criminal cartel activity can be absolved of criminal liability and have their civil liability limited to "actual damages," provided they make information and witnesses available to private plaintiffs and provide restitution to victims. The fact that the Division requires restitution as a condition of ACPERA leniency is not well-known and rarely discussed, perhaps because it is honored more in the breach than in the observance. But it reflects the praiseworthy policy goal of guaranteeing compensation to victims. Allowing the DOJ to retain restitution power pending the outcome of civil litigation could ensure that goal is realized.

II. THE COMPLIMENTARY RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

While restitution is available to the Division, the Division almost never seeks it, whether the defendants are leniency applicants or not. As noted above, Division orders of restitution in criminal cases average less than $10 million per year — a small fraction of what it secures in criminal fines.[9] The disclaimer that "[f]requently restitution is not sought in criminal antitrust cases, as damages are obtained through treble damage actions filed by the victims" appears in the Division's annual Workload Statistics every year.[10] This division of labor (so to speak) makes sense. The Division's criminal arm, with its subpoena, warrant, leniency, and other powers, is best positioned to use its limited resources to uncover, build, develop, and prosecute cases against conspiracies that otherwise might never come to light. Private Plaintiffs, while doing many of these things as well, are particularly adept at securing compensation for victims.

The Division is careful in pursuing remedies that do not limit compensation due to victims in several ways. For instance, Division policy provides that criminal fines "should not interfere with the [defendant's] ability to make restitution."[11] The model plea agreements that the Division uses as templates provide that a sentence "does not include a restitution order" because civil causes of action "potentially provide for a recovery of a multiple of actual damages."[12] Sure enough, this language routinely appears in Division plea agreements and sentencing memoranda for both corporate and individual defendants, citing the availability of both treble damages and joint and several liability.[13] Courts have tended to agree with this approach. In a sentencing hearing for a guilty-pleading corporate defendant in one of the *Auto Parts* cases, the court explained

9 2008–2017 Workload Statistics, at 12. Note that criminal fines, which a defendant typically pays to the government, should not be confused with restitution, which a defendant pays to victims.

10 *Id.* at 12 n. 19; see also, e.g. U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2003-2012, available at http://www.justice.gov/atr/public/workload-statistics.html, at 11 n.15 (same); see also 5 Antitrust Laws and Trade Regulation, 2nd Edition § 97.01 (2019).

11 Antitrust Division Manual (5th Ed.), available at https://www.justice.gov/atr/file/761166/download, at IV-80 (citing 18 U.S.C. § 3572).

12 See Antitrust Guidelines and Policy Statements § 40, Model Annotated Corporate Plea Agreement ("(c) In light of the [availability of civil causes of action] OR [civil cases filed against the defendant, including [CASE NAME, CASE NUMBER], in the United States District Court, [X] District of [X]], *which potentially provide for a recovery of a multiple of actual damages*, the recommended sentence does not include a restitution order for the offense charged in the Information.]") (emphasis added); Antitrust Guidelines and Policy Statements § 41, Model Annotated Individual Plea Agreement (same).

13 See, e.g. Sent'g Mem., *United States v. LG Chem, Ltd.*, 13-cr-473 (N.D. Cal. Sept. 3, 2013), ECF No. 13 at 7 (stating that "[t]he civil process provides potential victims with a variety of options to expand their recovery well beyond that which would be available as part of restitution in the criminal case," including treble damages and joint and several liability); Joint Sent'g Mem., *United States v. Polo Hsu*, No. 11-cr-0061 (N.D. Cal. March 15, 2011), at 3 (explaining that civil suits "potentially provide for a recovery of a multiple of actual damages" and "the courts in the related civil cases . . . are best suited to compensate those parties who may be aggrieved and would otherwise receive restitution"); Joint Sent'g Mem., *United States v. Japan Airlines Int'l, Co., Ltd.*, No. 08-cr-00106 (D.D.C. April 30, 2008), ECF No. 5 at 3 ¶ 4 ("The United States will not seek restitution in this case in light of . . . the many civil class action cases filed . . . which each potentially provide for a recovery of a multiple of actual damages."); Sent'g Mem., *United States v. Gonzalez*, No. 10-cr-20790 (S.D. Fl. Feb. 29, 2012), ECF No. 403 at 6 ¶ III(C) ("In light of civil cases filed which potentially provide for a recovery of a multiple of actual damages, the United States agreed not to seek a restitution order for the offense charged in the Indictment."). But see *In re Morning Star Packing Co.*, LP, 711 F.3d 1142, 1144 (9th Cir. 2013) (concluding that "the district court committed legal error in denying restitution because of . . . the potential availability of civil remedies").

the decision not to impose restitution:

> [T]he Court has considered the parties[’] joint request that I do not impose . . . an order of restitution in the case, recognizing . . . the likelihood of restitution accomplished by virtue of private lawsuits brought by the various levels of victims in this case, and it does strike the Court that it is much more efficient and properly more accurate for the restitution to be obtained by civil litigation where the details and the scope of the violation can be better presented and understood, and ultimately more efficiently and probably more accurately arrive at an appropriate level of payment than would be the case in the context of this Court attempting to identify the appropriate restitution amount as part of its sentencing process.[14]

Another reason the Division often declines to seek restitution, according to its sentencing memoranda and plea agreements, is the risk of prolonging the sentencing process[15] — a justification rooted in the U.S. Sentencing Guidelines.[16] Here, too, courts have tended to agree.[17] The Division has also explained a decision not to seek restitution by citing the fact that civil plaintiffs may allege a broader conspiracy than is at issue in the criminal action.[18] Ordering restitution might require the Division to determine who is or is not a victim of the criminal conspiracy, which “could adversely affect arguments certain parties might advance on the civil side when seeking recovery.”[19]

One final consideration is that, given “the per se nature of antitrust criminal violations,” which “relieves the prosecution from having to introduce evidence of harm resulting from the violation to secure a conviction,” the Division may not always undertake a damages analysis that could inform a restitution award.[20] Private plaintiffs, on the other hand, must build their cases from the outset with damages in mind, particularly in the wake of the Supreme Court’s decision in *Comcast Corp. v. Behrend*.[21] Thus, they routinely handle such issues while preparing expert damages testimony or administering claims following a settlement.

Despite these myriad reasons not to seek restitution, the Division’s employee manual provides that “attorneys *should* consider seeking orders for restitution in cases in which victims are *unable or unlikely* to seek treble damages.”[22] In other words, the Division should seek restitution if, for example, there are not enough damages at stake to provide incentives for a private civil action. In recent cases relating to public real

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14 Guilty Plea and Sentencing Hr’g Tr., *United States v. Corning Int’l Kabushiki Kaisha*, No. 16-20357 (E.D. Mich. May 16, 2016), ECF No. 15 at 22. Robins Kaplan LLP serves as co-lead counsel for end payor plaintiffs in *In re Auto Parts Antitrust Litig*. See also Hr’g Tr., *United States v. LG Chem, Ltd.*, 13-cr-473 (N.D. Cal. Oct. 10, 2013), ECF No. 35 at 30:25-31:3 (“Restitution is waived in light of . . . all of the civil actions which are pending. Court finds it would be more appropriate to resolve issues of restitution in that forum.”).

15 See, e.g. *LG Chem* Sent’g Mem. at 7 (“The government believes that the complexity of this case and the resulting difficulty of making any accurate estimation of damages as part of a sentencing proceeding make restitution inappropriate in this instance.”); Sent’g Mem., *US v. UCAR Int’l Inc.*, No. 98-cr-177 (E.D. Pa April 21, 1998), at 5–6 (“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.”).

16 See U.S.S.G. §§ 5E1.1(b)(2) (“Restitution”) (providing that restitution is not mandatory where “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”), 8B1.1(b)(2) (“Restitution – Organizations”) (same), available at https://www.ussc.gov/guidelines/2018-guidelines-manual. See also Antitrust Division Manual (5th Ed.) at IV-83 (citing 18 U.S.C. §3663A(c)(3)); U.S. Dep’t of Justice, Overview of Victims’ Rights, available at https://www.justice.gov/atr/overview-rights-federal-crime-victims (providing that “victims of Federal offenses such as antitrust violations are entitled to certain rights,” including “[t]he right to restitution as provided in law,” but noting that “Division attorneys represent the United States and not the victims of antitrust violations” and “[c]rime victims are encouraged to seek the advice of their own attorneys . . .”).

17 *In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010); *accord United States v. Rahal*, No. 2:08-cr-0566 TLN, 2016 U.S. Dist. LEXIS 44262 (E.D. Cal. Mar. 30, 2016), at *5–6.

18 See, e.g. *LG Chem* Sent’g Mem. at 7-8. One reason it is common for civil plaintiffs to allege a broader conspiracy is that civil plaintiffs face a lower burden of proof than the Division would face in a criminal case. See Taladay, John, “Why ACPERA Isn’t Working and How to Fix It,” CPI Chronicle (January 2019) at 4 n. 15.

19 *LG Chem* Sent’g Mem. at 7-8.

20 Antitrust Division Manual at IV-84.

21 569 U.S. 27 (2013).

22 Antitrust Division Manual at IV-84 (emphasis added). *See also* 8 Antitrust Laws and Trade Regulation, 2nd Edition § 174.05 (2019) (“Restitution has been imposed in connection with criminal cases where treble damage actions have not been filed by the victims of the criminal antitrust conspiracy.”).

estate foreclosure auctions, for instance, the Division secured over a dozen guilty pleas and approximately $2 million in restitution.[23] Because an antitrust case can be among the most complex and expensive to litigate, routinely requiring millions of dollars in fees and costs, the scope of the damages there may have been insufficient to incentivize private plaintiffs to bring suit.

In the typical case, however, private civil suits provide appropriate incentives for victims to seek redress, and private plaintiffs are well-equipped to do so.

III. ANTITRUST CLASS ACTIONS CONTINUE TO SECURE SUBSTANTIAL RECOVERIES FOR VICTIMS OF ANTICOMPETITIVE CONDUCT

Case law and Division policy assume that consumers will enforce their rights against cartels and monopolists. To quote Justice Kavanaugh again, where "plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers," the courts should allow the case to proceed because "[t]hat is why we have antitrust law."[24]

Private plaintiffs have delivered on that promise. In the past five years alone, the private antitrust bar has secured over $19 billion in settlements and awards. In many of those cases, the Division obtained guilty pleas or convictions, but did not impose restitution. To cite just a few recent examples:

- In *In re Automotive Parts Antitrust Litig.*, the Division obtained numerous guilty pleas from dozens of defendants and collected fines in excess of $2.9 billion, but did not order restitution to victims. To date, private plaintiffs secured over $1.9 billion to compensate automobile dealership plaintiffs, direct purchasers and end payor purchasers, and that number continues to grow.[25]

- In *In re Foreign Exchange Antitrust Litig.*, the Division obtained felony guilty pleas from the parent corporations of five major financial institutions and secured criminal fines of more than $2.5 billion, but did not order restitution to victims.[26] Private plaintiffs secured $2.3 billion to compensate purchasers.[27]

- In *In re Capacitors Antitrust Litig.*, the Division obtained guilty pleas from eight corporate defendants and convictions of two individuals, but did not order restitution to victims.[28] Private plaintiffs secured over $250 million to compensate purchasers.[29]

23 Gibson Dunn, 2016 Year-End Criminal Antitrust and Competition Law Update (Jan. 10, 2017), available at https://www.gibsondunn.com/2016-year-end-criminal-anti-trust-and-competition-law-update/#_ftn74 ("In total, 15 defendants in both California and Georgia were ordered to pay approximately $2.3 million in restitution to victims."). Some commentators have also noted that the Division has imposed orders of restitution when it is recovering on behalf of the government itself as a purchaser. See R. Lande & J. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U.L. Rev. 315, 326. For instance, the Division secured over $600 million in restitution, penalties and disgorgement from large financial institutions in relation to the conspiracy to rig bids in the municipal bond derivatives market. See U.S. Dep't of Justice, Municipal Bonds Investigation 2014, available at https://www.justice.gov/atr/division-update/2014/municipal-bonds-investigation. It is not clear why these figures are not included in the Division Workload Statistics for the years in which the Division announced the penalties, 2010 and 2011, which reflect restitution of only $24.3 million and $6.4 million, respectively. It may be because defendants paid restitution to federal and state agencies rather than individuals or businesses. Notably, a related private action secured $225 million in settlements for the injured parties. See $100M In Settlements End Class Action in Muni Bond MDL, Law360 (July 8, 2016), available at https://www.law360.com/articles/815462.

24 *Apple*, 2019 U.S. LEXIS 3397, at *24.

25 AAI Report at 10. Robins Kaplan LLP is co-lead counsel for the end payor class.

26 U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

27 AAI Report at 11.

28 *Id.* at 12.

29 *Id.*

- In *In re Air Cargo Shipping Services Antitrust Litig.*, the Division obtained guilty pleas from 21 companies and individuals and criminal fines of more than $1.8 billion, but did not order restitution to victims.[30] Private plaintiffs secured over $1.2 billion to compensate purchasers.[31]

Antitrust class actions as they exist in the popular imagination often involve a payout of maybe a few dollars per claim. Perhaps that is why claimants sometimes ignore settlement notices based on the mistaken belief that the amount of time and effort needed to file a claim exceeds the amount of any potential recovery. While it is true that some consumer cases may involve claims worth less than $100 (take the *eBooks* case, for example), that scenario only describes a subset of antitrust class actions. In some instances, class members can recover tens of thousands of dollars or more. In *Air Cargo*, for example, most class members were "freight forwarder" companies that purchased freight services from large airlines.[32] Some class members collected hundreds of thousands of dollars and several recovered amounts north of $1 million.[33] Certain class members in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.* and *In re Graphite Electrodes Antitrust Litig.* also recovered more than $1 million.[34] In *In re TFT-LCD (Flat Panel) Antitrust Litig.*, eight claimants recovered over $10 million.[35] And, even in those cases involving small claims figures for individual class members, the case for private enforcement is all the more pronounced because a single claim would not justify the costs of litigation. Therefore, aggregating those claims in a class action suit is critical if victims of the conspiracy expect to ever see recovery.

It is therefore not surprising that Division policy assumes that private plaintiffs will pursue and obtain compensation for victims of antitrust violations, and they do. Until they don't…

In the criminal action in *In re Vehicle Carrier Services*, for example, the Division secured multiple convictions and guilty pleas, as well as hundreds of millions of dollars in fines.[36] The guilty pleas did not seek restitution and the court agreed that restitution was not appropriate in light of the pending civil actions.[37] Under similar circumstances, the victims of the conspiracy — in this case, purchasers of shipping services for the transportation of cars and trucks, including automobile dealerships and others — are typically able to recover compensation through private civil action. But in 2017, the Third Circuit ruled that federal maritime law precluded direct and indirect purchasers' antitrust claims.[38] Instead, the court required plaintiffs to seek redress before the Federal Maritime Commission. In 2018, an Administrative Law Judge issued an initial decision dismissing plaintiffs' claims, and an appeal before the full Commission is still pending.[39] Thus, *Vehicle Carrier Services* is an example of a case where there is a wrong without a remedy. Despite evidence of liability in the criminal action, including criminal fines paid to the Division and indictments of corporate executives, the actual victims of the conspiracy have not been able to demonstrate the harm they suffered or receive compensation for that harm.

What then?

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30 Doroshow, Joanne, First Class Relief: How Class Actions Benefit Those Who are Injured, Defrauded and Violated (October 2014), at 31. Robins Kaplan LLP is co-lead counsel for Direct Purchaser Plaintiffs in *Air Cargo*.

31 *Id.* at 32.

32 *Id.* at 32.

33 *Id.*

34 *Id.*

35 *Id.*

36 See, e.g. Buyers Tell 3rd Circ. Car Shipping Antitrust Ruling Misfired, Law360 (June 21, 2016), available at https://www.law360.com/articles/809134/buyers-tell-3rd-circ-car-shipping-antitrust-ruling-misfired.

37 See, e.g. Transcript of Guilty Plea and Sent'g, *United States v. Wallenius Wilhelmsen Logistics AS*, No. 16-cr-362 (D. Md. Sep. 12, 2016), ECF No. 21 at 26:24-27:1 ("Restitution . . . is not going to be imposed based upon the pending civil litigation that is being pursued in this matter."); Transcript, *United States v. Compania Sud Americana de Vapores S.A.*, No. 14-cr100 (D. Md. May 1, 2014), ECF No. 23 at 30:2-7 ("[A]lthough restitution is not being ordered directly . . . there are numerous civil cases related to the same conduct, and . . . the disposition of those civil cases is being handled appropriately, without the necessity for a specific order of restitution."); see also Plea Ag't, *Wallenius*, No. 16-cr-362, ECF No. 17 at 7 ¶ 9(b); Plea Ag't, *Compania Sud Americana*, ECF No. 12 at 7 ¶ 9(b); Plea Ag't, *United States v. Nippon Yusen Kabushiki Kaisha*, No. 14-cr-612 (D. Md. Mar. 11, 2015), ECF No. 20 at 7 ¶ 9(b); Plea Ag't, *United States v. Kawasaki Kisen Kaisha, Ltd.*, No. 14-cr-449 (D. Md. Nov. 5, 2014), ECF No. 19 at 7 ¶ 9(b); Plea Ag't, *United States v. Otoda*, No. 15-cr-34 (D. Md. Mar. 26, 2015), ECF No. 18 at 9; Plea Ag't, *United States v. Tanaka*, No. 15-cr-22 (D. Md. Mar. 10, 2015), ECF No. 15 at 9; Plea Ag't, *United States v. Yamaguchi*, No. 14-cr-613 (D. Md. Feb. 6, 2015), ECF No. 12 at 9; Plea Ag't, *United States v. Tanioka*, No. 14-cr-610 (D. Md. Feb. 2, 2015), ECF No. 14 at 9.

38 *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71 (3d Cir. 2017). Robins Kaplan LLP serves as co-lead counsel for the end payor class.

39 See *In re Vehicle Carrier Services*, Fed. Mar. Comm. Do. Nos. 16-01, 16-07, 16-10, 16-11.

IV. CASES THAT FALL THROUGH THE CRACKS: IS CONDITIONAL RESTITUTION THE ANSWER?

With ACPERA due for renewal next year,[40] practitioners and commentators have begun debating whether there is a way to revise the statute to encourage more leniency applications and, perhaps, an uptick in criminal enforcement.

In the 1970s, the Division began what would become its Corporate Leniency Program, often considered "the single most effective tool in the detection and prosecution of cartels ever devised by enforcers."[41] Pursuant to that program, the Division declines to seek criminal charges against a cartel participant who approaches authorities to report the illegal conduct.[42] However, the so-called "leniency applicants" could still face treble damages and joint and several liability in a subsequent civil action. Thus, in 2004 Congress passed ACPERA to improve the program and address those perceived deficiencies.[43] In addition to avoiding criminal penalties such as prison time or criminal fines, the statute provides that the amnesty applicant can be liable only for "actual damages . . . attributable to . . . the applicant" in any subsequent civil action arising from the same facts or based on the same violation.[44] In exchange, the applicant must provide "satisfactory cooperation to the claimant with respect to the civil action."[45]

But "[t]he initial grant of leniency is conditional," and moving from "conditional" leniency to "final" leniency requires a showing that cooperation is in fact "satisfactory."[46] Although ACPERA itself defines "satisfactory cooperation" to require the provision of documents and testimony, Division guidance provides that a "final grant of leniency" also requires "payment of restitution to victims."[47] Indeed, "[t]here is a strong presumption in favor of requiring restitution in leniency situations."[48] The Division's Model Corporate Conditional Leniency Letter requires the applicant 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."[49] Division guidance also provides that "[r]estitution is excused only where, as a practical matter, it is not possible."[50] As noted above, however, the Division often declines to seek restitution for various reasons and courts routinely find that it is "more efficient" and "more accurate" to address compensation for victims in private civil actions.[51]

Treatment of restitution under ACPERA is one of the issues that has come up as the statute approaches renewal next year. The defense bar has tended to focus on ways to reassure leniency applicants that they will receive final leniency, including by clarifying that applicants will enjoy a rebuttable presumption of "satisfactory cooperation" well before the civil action goes to trial.[52] But at least one proposal suggests "[e]liminating ACPERA altogether and instead requiring a leniency recipient to pay restitution into a fund that would be administered by the Antitrust

40 DOJ Antitrust Head Says Leniency Program 'Alive And Well', Law360 (April 11, 2019), available at https://www.law360.com/articles/1149183.

41 Klawiter, Donald, "The U.S. Corporate Leniency Policy: It Is Time for a Renaissance," CPI Chronicle (January 2019), at 2.

42 *Id.* at 3.

43 150 Cong. Rec. S3610, S3613 (Apr. 2, 2004) (statement of Sen. Kohl) ("Our bill will give the Justice Department the ability to offer those applying for leniency the additional reward of only facing actual damages in antitrust civil suits, rather than treble damage liability. This will result in more antitrust wrongdoers coming forward to reveal antitrust conspiracies, and thus the detection and ending of more illegal cartels.").

44 Antitrust Criminal Penalty and Reform Act of 2004, Pub. L. No. 108-237, Tit. II, 118 Stat. 661 (June 22, 2004), § 213 ("Limitation on Recovery").

45 *Id.* § 213(b).

46 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, at 24.

47 *Id.*

48 *Id.* at 18.

49 Model Conditional Leniency Letter ¶ 2(g), available at https://www.justice.gov/atr/leniency-program.

50 Division FAQ at 18.

51 See *Corning* Sent'g Hr'g Tr., No. 16-20357 (E.D. Mich.), ECF No. 15 at 22.

52 Taladay at 5.

Division, so that the leniency recipient is not subjected to civil liability in private follow-on litigation."[53] This proposal, though extreme on its face, gets one thing right: victims are entitled to compensation. But instead of absolving the leniency applicant of all civil liability, the Division should retain the power to impose restitution until the civil case is fully resolved. If private plaintiffs secure a recovery, the Division can relinquish this power. If not, the Division could require the applicant to at least partially compensate the injured parties. Indeed, this approach could help to address a gap in current law: civil actions like *Vehicle Carrier Services* that, despite evidence of guilt in the criminal action, encounter procedural obstacles that bar compensation to victims.

That's not to say payouts should proceed where private enforcement fails by its own merits, but rather contemplates a narrow scenario: one in which the Division obtains guilty pleas or convictions, declines to impose restitution, but the civil action encounters a quirk of the law or other unique circumstance that precludes victims from receiving compensation. As it is, a leniency applicant may not receive final assurance of its immunity until trial or other ultimate resolution of the civil case. Under our proposal, restitution would be a conditional obligation, just as the applicant's other cooperation obligations are conditional. After all, Division policy already provides that its attorneys "should consider seeking orders for restitution in cases in which victims are *unable or unlikely* to seek treble damages."[54] But in practice, while the Division applies the "unlikely" portion of this statement, it will typically relieve a leniency applicant of its restitution obligations in the plea agreement — long before anyone knows if victims will be "unable" to seek recourse via civil action. The approach we propose would still provide defendants with some relief from the risk of treble damages, while giving victims of the conspiracy a failsafe — single damages via restitution — in the event that private enforcement falls through. At the end of the day, where the defendants' guilt is not in question, victims should be compensated.

V. CONCLUSION

In the vast majority of cases, the system works. The Division's approach of pursuing guilty pleas, convictions, and fines while declining to impose restitution is sensible in light of the billions of dollars private plaintiffs have succeeded in obtaining for victims. Still, there will sometimes be a case where, despite evidence of criminal guilt, plaintiffs are unable to achieve compensation because of a unique circumstance or procedural issue. In those rare instances where a case does fall through the cracks, a modest adjustment to the Division's treatment of restitution will help ensure that antitrust law continues to achieve the "longstanding goal" of compensation for victims.

53 Latham & Watkins Client Alert, US DOJ Weighs Reform Options for Antitrust Leniency Law Set to Expire (April 16, 2019), available at https://www.lw.com/thoughtLeadership/US-DOJ-Weighs-Reform-Options-for-Antitrust-Leniency-Law-Set-to-Expire.

54 Antitrust Division Manual at IV-84 (emphasis added).

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