Comment

Does De-Trebling Sacrifice Recoverability of Antitrust Awards?

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The Antitrust Reform Act altered the Justice Department's treatment of antitrust conspirators who come forward to cooperate in the prosecution of conspiracies. Under the prior Leniency Policy, the first cooperating conspirator was immune from criminal prosecution but remained jointly and severally liable for treble damages. Under the new Act, the amnesty applicant avoids criminal penalties and limits its civil liability to actual damages. Though the theory of the Act was to increase incentives to abandon and reveal antitrust conspiracies, this Comment suggests that the Act will have a consequence Congress did not intend: depriving antitrust plaintiffs of full recovery of treble damage awards. Because joint and several liability for treble damages disproportionately hurts deep-pocketed conspirators, the incentives under the new policy may cause deep pockets to take advantage of the Leniency Policy. This may result in more conspiracies coming to light, but it leaves plaintiffs to collect from conspirators who are more likely to be insolvent. This detrimental effect on plaintiffs' recovery could jeopardize the effectiveness of private antitrust enforcement. In a complex remedial scheme, Congress must consider the effects of changes to one element of the scheme on all the others.

Introduction

Proponents of the Antitrust Criminal Penalty Enhancement and Reform Act (Antitrust Reform Act) of 2004[1] tout the statute's increased incentives for

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conspirators to cooperate with the Department of Justice and its enhanced measures for deterring antitrust conspiracies.[2] In particular, the Act de-trebles civil damages for antitrust conspirators who cooperate with the Justice Department through its Corporate Leniency Program. Discussions of the efficacy of the Act's reforms, however, ignore the potential harm to antitrust victims of the Act's de-trebling provision.[3] This Comment argues that a collateral consequence of the new scheme may be to harm the potential for antitrust victims to recover the entirety of their treble damage awards. It concludes that the de-trebling provision provides incentives for conspirators with the deepest pockets to cooperate, leaving victims to claim recovery from the less solvent conspirators. While Congress purportedly considered the interests of antitrust victims in enacting the de-trebling provision, it overlooked the ways that de-trebling may sacrifice the interests of individual victims—in terms of recoverability of damage awards—in exchange for a general increase in the detection of conspiracies. Antitrust victims continue to be legally entitled to treble damages, but analysis of the new incentives demonstrates how the Act may hamper recoverability in practice.

The Justice Department's Corporate Leniency Policy ("Leniency Policy") grants amnesty from criminal prosecution to the first conspirator to come forward and cooperate ("amnesty applicant") in the prosecution of its co-conspirators. Prior to the Antitrust Reform Act, amnesty applicants continued to be jointly and severally liable for treble damages in the resulting civil suits brought by antitrust victims.[4] However, as a result of the success of the earlier amendments to the Leniency Policy,[5] Congress revisited the incentives for

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1 Pub. L. No. 108-237, 118 Stat. 665 (2004) (codified in scattered sections of 15 U.S.C. and accompanying notes).

2 In a speech given shortly after the passage of the amendments, Acting Deputy Assistant Attorney General Scott Hammond emphasized the benefits of the amendments, which simultaneously increased criminal penalties for conspirators and de-trebled damages for amnesty applicants:

> [T]he amendment likely will (1) increase the number of criminal antitrust conspiracies that are exposed and prosecuted; (2) increase compensation to victims of criminal antitrust conspiracies through the required cooperation provided to the victims by the amnesty applicant; (3) further de-stabilize, and deter the formation of, criminal antitrust conspiracies by creating an additional major incentive to self-report the violation; (4) reduce the costs of investigating and prosecuting criminal antitrust conspiracies; and (5) reduce the cost for victims to recover the damages they suffer from criminal antitrust conspiracies.

Scott Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Speech to the American Bar Association Midwinter Leadership Meeting: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program (Jan. 10, 2005) (transcript available at http://www.usdoj.gov/atr/public/speeches/207226.pdf).

3 Senator Hatch, one of the bill's sponsors, "expect[ed] that the total compensation to victims of antitrust conspiracies [would] be increased because of the requirement that amnesty applicants cooperate [with civil plaintiffs.]" 150 CONG. REC. S3610, S3614 (daily ed. Apr. 2, 2004) (statement of Sen. Hatch) [hereinafter Hatch Statements].

4 The policy prior to the Antitrust Reform Act is available at Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993).

5 The 1993 Amendments resulted in an increase in leniency applicants from one per year before the reforms to an average of two per month by 1999. *See* Kylie Cooper & Adrienne C. Dejinou, *Twentieth Survey of White Collar Crime: Antitrust Violations*, 42 AM. CRIM. L. REV. 179, 207 & n.181

antitrust conspirators to self-report and cooperate with investigators. The Antitrust Reform Act creates an enhanced set of incentives for antitrust conspirators to cooperate. Under the new regime, the Leniency Policy not only affords immunity from criminal prosecution to the first conspirator to cooperate with the Justice Department's criminal investigation but also limits the amnesty applicant's civil liability to actual damages.[6] Prior to this de-trebling provision, a conspirator had to weigh the likelihood of a successful civil suit against the benefits of criminal immunity before coming forward to cooperate with the Justice Department. In removing the threat of large civil damages awards as a disincentive to cooperate, Congress may have hurt the interests of antitrust victims in recovering the full amount of the treble damages owed by the conspirators.

I. The Dual Track Enforcement Regime

In permitting parallel criminal and civil enforcement of antitrust laws, Congress deputized citizens as private attorneys general and entitled them to treble damages in return for their role in enforcing antitrust laws. Since the 1960s, private enforcement has become the "bulwark of anti-trust enforcement."[7] Enforcement by victims qua private attorneys general has not infrequently preceded criminal indictment by the Justice Department,[8] suggesting that civil suits serve a function in detecting and exposing conspiracies as well as enforcing antitrust laws. To encourage civil plaintiffs to bring these suits, section 7 of the Sherman Act first permitted automatic awards of treble damages in antitrust civil suits.[9] The purpose of granting treble damages to private parties is two-fold:[10] compensating antitrust victims and

(2005); *see also* Gary R. Spratling, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust: Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update (Feb. 16, 1999) (transcript available at http://www.usdoj.gov/atr/public/speeches/2247.pdf). At the same time, the criminal prosecutions have resulted in higher fines. *See* James M. Griffin, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address at ABA Antitrust Section 49th Annual Spring Meeting: Status Report: Criminal Fines (Mar. 28, 2001) (transcript available at http://www.usdoj.gov/atr/public/speeches/8063.pdf).

6 *See* Pub. L. No. 108-237, § 213(a), 118 Stat. 665, 666 (2004).

7 Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968).

8 *See, e.g.*, *In re* NASDAQ Market Makers Antitrust Litig., 169 F.R.D. 493 (S.D.N.Y. 1996); *In re* Brand Name Prescription Drugs Antitrust Litig., 1996-1 Trade Cas. (CCH) ¶ 71,350 (N.D. Ill. Apr. 4, 1996). In fact, the civil suit in *NASDAQ* appears to have sparked both the Justice Department's investigation and the SEC's investigation. *NASDAQ*, 169 F.R.D. at 498-501.

9 This provision was later re-enacted as section 4 of the Clayton Act. 15 U.S.C. § 15 (1982).

10 The Supreme Court has acknowledged the twin goals of private enforcement action. *See, e.g.*, Atl. Richfield Co. v. USA Petroleum, 495 U.S. 328, 360 (1990); California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Am. Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982); Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); *id.* at 748, 749 (Brennan, J., dissenting); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969); *see also* Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 805 (D.C. Cir. 2001).

encouraging enforcement of the antitrust laws by private parties.[11] This enforcement goal necessarily also has deterrence effects.[12] Impairing victims' ability to recover treble damages awards may impair the effectiveness of the private enforcement system.

The related doctrine of joint and several liability, a judge-made requirement, has often meant that one defendant with the deepest pockets, or highest net worth, is liable for the entirety of the civil award.[13] In declaring that there is no common law right of contribution in antitrust cases, the Supreme Court invited Congress to create such a right,[14] but none of the congressional proposals have proven successful.[15] Antitrust plaintiffs have the extra assurance that the defendant with the deepest pockets will be forced to pay for the entire award; consequently, less wealthy conspirators avoid paying their portion of the bill.

The Antitrust Reform Act introduced a package of incentives to encourage cooperation with the Justice Department along with increased penalties to the

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11 *See* Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); United States v. Borden Co., 347 U.S. 514, 519-20 (1954) (discussing the dual track enforcement mechanism of criminal prosecution and civil suit with treble damages); *see also* City of Atlanta v. Chattanooga Foundry & Pipe Works, 127 F. 23, 29 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906) ("It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action . . . .").

12 Some scholars have suggested that even two-thirds of the treble damages are compensatory rather than punitive. *See, e.g.*, Robert H. Landes, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 123 (1993); Lawrence Vold, *Are Threefold Damages Under the Antitrust Act Penal or Compensatory?*, 28 KY. L.J. 117, 157-58 (1940). From the perspective of deterrence, others have described the treble damages as a multiplier necessary to counteract the possibility of escaping detection. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 7.2, at 223-30 (4th ed. 1992). Other scholars have criticized the deterrence aspect of private enforcement. *See, e.g.*, Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 444-45 (1997) ("With government penalties increased so substantially, antitrust class actions can no longer be justified reflexively as essential for deterrence. When a firm has paid hundreds of millions of dollars in fines and seen its executives dragged off to prison, it is not self-evident that additional punishment is needed to achieve the correct level of deterrence.").

13 *See* W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 47-48 (5th ed. 1984). *See generally* Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277, 1283 (1987) (describing as one of the standard criticisms of joint and several liability that "it is possible that a deep-pocket defendant, who had only peripheral involvement in the conspiracy or reaped only minor benefits, [can] be held liable for all of a treble damages judgment").

14 In 1981, the Supreme Court held that there was no common law right of contribution in antitrust cases, concluding that Congress must provide for such rights explicitly. Tex. Indus. v. Radcliff Materials, 451 U.S. 630 (1981).

15 Congress has considered several proposals to create a right of contribution among antitrust defendants but has never passed one. *See, e.g.*, STAFF OF SUBCOMM. ON MONOPOLIES AND COMMERCIAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON THE PROPOSED LEGISLATION TO ALLOCATE DAMAGES AMONG DEFENDANTS IN PRIVATE ANTITRUST LITIGATION 1-2, *reprinted in* 44 Antitrust & Trade Reg. Rep. (BNA) 280 (Feb. 10, 1983).

Sherman Act enforcement regime. The Act provides a potent new incentive for self-reporting: In return for cooperation with the Justice Department's prosecuting of antitrust co-conspirators, an amnesty applicant limits its civil liability to actual damages.[16] The Act also requires amnesty applicants to cooperate with victims in civil suits.[17] The remaining conspirators continue to be jointly and severally liable for the remainder of the treble damages owed to victims less the actual damages attributable to the amnesty applicant. In addition, the Act significantly increased criminal penalties for conspirators.[18] While the new regime is still too new to evaluate conclusively, some commentators believe that it will produce more cooperation with the Justice Department and ultimately result in an increased number of both successful criminal prosecutions and civil awards for victims.[19]

II. Congressional Concern with Civil Recovery

The Act's legislative history indicates that Congress considered the interests of civil plaintiffs and concluded that they would not be harmed by the new proposals. According to its sponsors, the aim of the reforms was to "enhance the Justice Department's existing leniency program to encourage more antitrust criminal wrongdoers to come forward and thereby significantly assist the Department in detecting and preventing antitrust conspiracies."[20] The Antitrust Reform Act received very little discussion in floor debates of both chambers and was signed into law by President Bush in June 2004.

While most of Congress's discussion concerned the promise of increased detection and deterrence, the bill's sponsors emphasized that victims' interests would not be harmed. One of the bill's supporters explained: "[B]ecause all other conspirator firms would remain jointly and severably liable for three times the total damages caused by the conspiracy, the victims' potential total recovery would not be reduced by [the Act's de-trebling provision]."[21] Congress intended for antitrust plaintiffs to incur no negative effects from the changes in liability. On the day of its passage, Representative Scott stressed that "the victims' potential recovery [will] not [be] reduced by leniency in this situation."[22] Instead, the bill's sponsors believed that the likely increase in detection of conspiracies combined with the cooperation of the amnesty applicant would cause "total compensation to victims of antitrust conspiracies

16 Pub. L. No. 108-237, § 213(a), 118 Stat. 665, 666 (2004).

17 *Id.* § 213(b) (requiring an applicant to be available for "interviews, depositions, or testimony in connection with the civil action as [plaintiffs] may reasonably require").

18 The Antitrust Reform Act raised the maximum Sherman Act corporate fine to $100 million, the maximum individual fine to $1 million, and the maximum Sherman Act jail term to ten years. *Id.* § 215.

19 *See, e.g.*, Hatch Statements, *supra* note 3.

20 149 CONG. REC. S13,517, S13,520 (daily ed. Oct. 29, 2003) (statement of Sen. Kohl).

21 Hatch Statements, *supra* note 3.

22 150 CONG. REC. H3654, H3659 (daily ed. June 2, 2004).

[to] be increased."[23] However, these assertions are flawed. As explained in the following section, the recoverability of antitrust damage awards may suffer under the new regime. Additionally, the cooperation of an amnesty applicant in a civil case is likely to help the plaintiff only in proving liability and damages but not in recovering the damages awarded from the remaining defendants if they are judgment-proof.[24]

III. The Effects of the De-Trebling Provision

While Congress considered the prospect of increased self-reporting, it did not appear to analyze *which* conspirators would be the most likely to cooperate under the new regime. A brief comparison of the incentives before and after the de-trebling provision suggests that Congress ignored the likely effect of the relative solvency and net worths of individual conspirators on their incentives to cooperate.[25] The following analysis assumes a basic price-fixing conspiracy among a small number of competitors and likely Justice Department criminal enforcement with subsequent civil antitrust suits.[26]

The Leniency Policy creates incentives for conspirators to defect from the conspiracy and cooperate with the Justice Department.[27] Each conspirator in a price-fixing conspiracy is faced with two options: cooperate with the Justice Department by becoming the amnesty applicant or do not cooperate with the Justice Department and continue in the conspiracy (but risk being caught by a Justice Department investigation). While it is economically advantageous for all of the conspirators to continue the conspiracy, the ever-present risk of

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23 *See* Hatch Statements, *supra* note 3.

24 Section 1 of the Sherman Act requires a civil plaintiff to prove three elements: (i) an agreement to concerted action, such as a combination or conspiracy formed by two or more entities; (ii) the agreement unreasonably restrained trade or commerce; and (iii) the restrained trade or commerce is interstate or international. 15 U.S.C. §§ 1-7 (2000). However, civil antitrust plaintiffs have a light burden in proving the amount of damages once they have established liability, *see* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946), and section 5 of the Sherman Act permits a favorable verdict in a government antitrust prosecution to serve as prima facie evidence in a subsequent private antitrust action. 15 U.S.C. § 16(a) (2000).

25 Similar analyses have revealed how treble damages and joint liability affect the game dynamics in the settlement process of antitrust civil suits. *See* Cavanagh, *supra* note 13, at 1289 n.68; John Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits*, 55 ST. JOHN'S L. REV. 42 (1980).

26 In order to isolate the effects of the de-trebling provision, the analysis presented here involves several simplifying assumptions. It ignores settlement dynamics in both the civil and criminal actions, the potential for other international and state enforcement actions, and the FTC's enforcement activities. *See generally* Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207 (2003). As noted previously, some antitrust conspiracies are increasingly brought to light first by civil suits. *See supra* note 8 and accompanying text. Because the Leniency Policy does not grant immunity retroactively, the analysis presented here applies only to those cases in which the criminal investigation precedes the civil action.

27 The terms of the Leniency Policy permit only the first conspirator to receive amnesty. Therefore, multiple conspirators cannot cooperate and receive the benefits of immunity. *See* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/0091.pdf [hereinafter LENIENCY POLICY].

detection means that there is always a temptation for one conspirator to inform on the others. If a conspirator comes forward to report the conspiracy to the Justice Department and cooperates with the investigation, it will avoid criminal liability. Detection of the conspiracy, including through the revelations of an amnesty applicant, also potentially produces civil suits against the conspirators with awards of treble damages. At the outset, none of the conspirators knows how the treble damage award will be allocated—to one or all of them—so they must assume the probability-adjusted risk of bearing the entire amount of treble damages.[28]

Under the old regime, each of the conspirators was jointly and severally liable for the entire award of treble damages. Thus, the risk of one defendant's insolvency was borne by the other conspirators and sometimes entirely by the conspirator with the deepest pockets. Any individual conspirator would cooperate with the Justice Department only where the immunity from criminal penalties outweighed the likelihood of paying civil damages. Thus, a conspirator would have to assess two variables: (1) the likelihood that one of its co-conspirators comes forward first, thus exposing the conspirator to criminal prosecution and civil suit (or the same consequences occurring through the Justice Department's independent discovery of the conspiracy), and (2) the probability of bearing the entire treble damage award. The amendments to the Corporate Leniency Program rely on calculations of this second factor to induce individual conspirators to come forward.

The rational conspirator would cooperate with the Justice Department only when the probability weighted penalties from cooperation exceed those from not cooperating. Under the previous regime, conspirators faced criminal fines of up to $10 million as well as joint and several liability for treble damages. Since the gain of avoiding criminal penalties comes only through increasing the risk of exposure to treble civil damages, those companies most likely to bear the treble damages risk the most from cooperation. Under this regime, those conspirators with the lowest probability of having to pay the treble damages awards would be more likely to cooperate; for them, the exposure to civil liability is smaller than the criminal penalties incurred if the conspiracy is detected.

The firms with low probabilities of bearing the entire treble damage awards are those with low net worths relative to their co-conspirators, or even insolvent conspirators. For this reason, a conspirator with a relatively low net worth is likely to be the amnesty applicant. On the opposite end of the spectrum, for conspirators with deep pockets, the likelihood that they will bear the entire burden of treble damages in a civil action—even when they are the amnesty applicant—overwhelms the modest benefit from the immunity from

28 As discussed later, this analysis uses net worth as a proxy for the probability of bearing the entire amount of treble damages, as antitrust victims usually sue the conspirator(s) with the deepest pockets.

criminal sanctions. Each conspirator, depending on its net worth, faces a different disincentive to cooperate. Thus, the previous regime provided incentives for low net worth conspirators to cooperate.[29]

While the Justice Department does not disclose the identities of amnesty applicants, available information suggests that amnesty applicants were among the lower net worth conspirators. The Justice Department's prosecution of an international vitamin industry cartel is illustrative. In that case, the Justice Department secured the cooperation of Rhone-Poulenc SA in 1999 as an amnesty applicant.[30] Twelve other conspirators pled guilty to price-fixing and paid criminal fines of up to $500 million each.[31] The criminal prosecution spawned a number of civil suits.[32] While Rhone-Poulenc escaped paying a criminal fine, the company did face liability in a subsequent civil trial, which was settled by some of the defendants for an amount exceeding $2 billion.[33] Rhone-Poulenc, the amnesty applicant, was the smallest company of the three major conspirators.[34] In other Justice Department prosecutions prior to the Antitrust Reform Act, the effect was similar.[35] Under that regime, higher net worth conspirators were still liable for both criminal fines and civil awards. Civil plaintiffs could recover from any of the conspirators, thus increasing the likelihood that they would recover the entire treble damages award.

The new regime under the Antitrust Reform Act alters these incentives dramatically. The Act both increases criminal penalties from a maximum fine of $10 million to $100 million for corporate defendants[36] and reduces the civil burden on the amnesty applicant to the actual damages caused by that conspirator. The non-cooperating conspirators are responsible for the remainder of the treble damages; as before, those non-cooperating conspirators with the

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29 The Leniency Policy prohibits the "leader" of the price-fixing cartel from receiving the benefits of amnesty. LENIENCY POLICY, *supra* note 27. In some cases, but not all, the leader of the cartel may be the company with the highest net worth. In those cases, the analysis presented here would explain behavior among the remaining conspirators according to net worth.

30 *See* Brief for United States as Amicus Curiae, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

31 *See* Press Release, U.S. Dep't of Justice, F. Hoffmann-La Roche and BASF Agree To Pay Record Criminal Fines for Participating in International Vitamin Cartel (May 20, 1999), http://www.usdoj.gov/opa/pr/1999/May/196at.htm.

32 These cases were eventually consolidated into a single class action in the District of Columbia. *See In re* Vitamins Antitrust Litig., 209 F.R.D. 251 (D.D.C. 2002).

33 *See In re* Vitamins Antitrust Litig., No. 99-197 TFH, 2000 WL 1737867 (D.D.C. Mar. 31, 2000) (describing settlement agreement); *see also* Waller, *supra* note 26, at 222 ("Three of the defendants—BASF, Hoffman-La Roche, and Rhone-Poulenc—were responsible for paying $900 million of the total figure.").

34 *See* Richard Wolffe, *Conspiracy Worthy of a Textbook*, FIN. TIMES (London), May 22, 1999, at 5.

35 *See* Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address at the ABA's Criminal Justice Section's Fifteenth Annual National Institute on White Collar Crime: When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on Individual Freedom? (Mar. 8, 2001) (transcript available at http://www.usdoj.gov/atr/public/speeches/7647.pdf) (discussing graphite electrodes, marine construction, and fine art auctions prosecutions).

36 *See* Pub. L. No. 108-237, § 215, 118 Stat. 665, 666 (2004).

largest net worths are most likely to shoulder most, if not all, of the burden of treble damages awarded in the resulting civil suit.[37] When analyzed in terms of incentives to cooperate, it becomes clear that the de-trebling provision of the Act provides relatively stronger incentives for the company with the most at risk in the civil case to come forward first in order to limit its civil liability. As noted above, the decision for any firm turns on the benefit of immunity from criminal penalties in comparison to the cost of increased civil exposure. In comparison to the pre-2004 amendment regime, the criminal penalties have increased ten-fold, while the civil exposure has shrunk due to the de-trebling of damages. Aside from the impact of the change in magnitude of criminal penalties, the change in civil liability should differentially impact the incentives of higher net worth firms. Those are the firms that would have—due to their relatively higher net worth compared to the other co-conspirators—had to pick up the bill for the treble damages in the old regime. Now these firms can escape that burden through cooperation. The lower net worth conspirators do not face as large a gain from the reduced civil liability, because their chances of bearing the entirety of the treble damages were always unlikely. As a result, for higher net worth companies, the incentive to cooperate has increased. Under the new regime, then, the highest net worth conspirators—those with the highest probability of bearing the entirety of the treble damages—will be the most likely amnesty applicants. Conversely, those conspirators with low net worths or those that are judgment-proof have relatively lesser incentives to cooperate because they are unlikely to shoulder the burden of the treble damages.[38]

The conspirator with the deepest pockets will limit its liability to actual damages, and the remainder of the treble damages award will be paid by the resulting pool of civil defendants—likely to be less solvent and have a lower average net worth. If that is the case, this change would affect the victims' abilities to recover the total amount of treble damages awarded. Thus, in a very real sense individual victims' recovery may suffer under the new regime. Increased detection, therefore, comes at a price paid by plaintiffs in terms of the probability of recovery.

IV. Conclusion

The trade-off between detection and private enforcement is inevitable in the dual track system that the antitrust laws contemplate. Tinkering with one aspect of this complicated mechanism necessarily implicates the others.

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37 Again, because Congress has not provided for a right of contribution for conspirators in the case of treble damages, the deepest pockets are likely to be burdened with the largest share of the damages award. *See supra* note 13.

38 Of course, were there to be perfect information, even those with lesser incentives would realize the inclination of their higher net worth co-conspirators to contact the Justice Department, and may (depending on the possible payoffs) respond by racing to call the Department first.

Congress should more explicitly consider the ramifications for civil enforcement in amending the system: The possibility of reduced civil awards must be weighed against the increased detection of conspiracies. The incentives to self-report under the previous regime were dampened by the prospect of civil liability and treble damages awards. These weakened incentives may have produced under-detection of conspiracies, and, therefore, some antitrust victims were never compensated in civil actions. The unintended costs of the increased antitrust conspiracy detection and prosecution under the new amendments to the Corporate Leniency Program may be that antitrust victims suffer not from lack of detection or enforcement, but in recovering treble damage awards. Since the Antitrust Reform Act includes a sunset provision and must be reenacted in five years,[39] Congress should re-evaluate whether victims' interests have in fact suffered and whether the trade-off between detection and recoverability was the correct one.

39 *See* Pub. L. No. 108-237, § 211(a), 118 Stat. 665, 666 (2004).