

The Crime Victims' Rights Act: Its Impact on Plea Negotiations with the Antitrust Division

John M. Majoras and Eric P. Enson

According to the Ninth Circuit, “The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims’ Rights Act sought to change this by making victims independent participants in the criminal justice process.”¹ The Crime Victims’ Rights Act,² or CVRA, signed into law in 2004, attempts to accomplish this goal by affording crime victims with notice of, access to, and a role in public criminal proceedings.

Not surprisingly, the CVRA has been invoked in the prosecution of violent crimes and crimes perpetrated by swindlers like Bernard Madoff to allow victims to present victim-impact testimony prior to sentencing or merely to vent frustrations with the criminal justice system. The CVRA has also been invoked in criminal antitrust matters as a justification for providing victims with notice of, and an opportunity to appear at, public hearings. But with increasing frequency, some civil antitrust plaintiffs have attempted to use the CVRA to push their participation beyond public proceedings and into private plea negotiations between the Antitrust Division of the Department of Justice and targets of the Division’s investigations. There are obvious questions regarding whether such efforts are a permissible—or advisable—use of the CVRA. There are also questions about whether this is a legitimate exercise of the CVRA or a mere litigation tactic geared towards obtaining an advantage in related civil litigation.

What rights does the CVRA confer on crime victims?

The CVRA provides crime victims with eight enumerated rights: (1) the right to be reasonably protected from the accused; (2) the right to notice of public court proceedings; (3) the right not to be excluded from any public court proceeding; (4) the right to be reasonably heard at any public court proceeding involving release, plea, sentencing, or parole; (5) the reasonable right to confer with government attorneys prosecuting the case; (6) the right to restitution as provided by law; (7) the right to proceedings free from unreasonable delay; and (8) the right to be treated with fairness and with respect.³ Crime victims most frequently assert the rights to notice of, to be reasonably heard at and not to be excluded from public hearings, as well as the right to confer with government attorneys.

Who is responsible for enforcing the CVRA?

The CVRA is clear: courts “shall ensure that the crime victim is afforded the rights” set forth in the statute.⁴ The CVRA also requires DOJ attorneys to employ their “best efforts to see that crime

■ **John M. Majoras and Eric P. Enson** are attorneys with the law firm of Jones Day. Both focus on the defense of criminal and civil antitrust matters. The views expressed herein do not necessarily reflect the views of Jones Day, its attorneys or its clients.

¹ Kenna v. U.S. Dist. Ct., 435 F.3d 1011, 1013 (9th Cir. 2006).

² 18 U.S.C. § 3771.

³ *Id.* § 3771(a).

⁴ *Id.* § 3771(b) (1).

victims are notified of, and accorded” the rights provided for in the statute.⁵ For this reason, the Antitrust Division’s Web site has a “Victims’ Rights” page with links describing the CVRA and listing upcoming public hearings in pending matters.⁶ The Division does note, however, that the manner in which victims are afforded their rights “will depend on the facts of the case, the need of the Government effectively to investigate and prosecute the crime, and the legal rights of the defendants.”⁷

Who is an antitrust “crime victim”?

Unlike robbery, assault, embezzlement, and many other crimes, identifying the “victims” of antitrust offenses is probably the most daunting procedural task in applying the CVRA to antitrust matters. The CVRA defines a “crime victim” as “a person directly and proximately harmed” by a federal offense or an offense in the District of Columbia.⁸ Thus, indirect purchasers of the goods or services affected by the antitrust violation are not crime victims under the terms of the CVRA. This interpretation squares nicely with the Supreme Court’s ruling in *Illinois Brick*, which prohibits indirect purchasers from recovering damages under the Sherman Act.⁹ But as of yet, no court has had occasion to rule on the specific issue of whether indirect purchasers are CVRA “crime victims.”¹⁰

Nor has a court ruled on whether alleged victims must show an actual injury from the antitrust violation before being afforded the rights provided in the CVRA. While the CVRA’s definition of a “crime victim” as someone “harmed” by a crime seems to require such a showing, the evidence and testimony necessary to prove such harm—as antitrust practitioners well know—would undoubtedly “complicate or prolong the proceedings,” a situation that the CVRA directs courts to avoid in applying the statute.¹¹ Another problem with requiring alleged victims to establish harm from the antitrust violation is that a ruling by a criminal court on issues such as harm and causation may have unintended collateral effects in related civil litigation.

How do courts and the Antitrust Division comply with the CVRA in antitrust cases that may involve large numbers of alleged victims?

The CVRA provides that where the number of crime victims makes it impracticable to accord all of them their rights under the Act, “the court shall fashion a reasonable procedure to give effect to [the CVRA] that does not unduly complicate or prolong the proceedings.”¹² With more and more frequency, the Division has sought court approval of a procedure for crime victim notification at the outset of the proceedings. For example, in connection with the hydrogen peroxide prosecutions, the Division submitted a motion to the court arguing “that the number of ‘crime victims’ directly and proximately harmed by the hydrogen peroxide conspiracy would make it impracticable for the government to provide to each victim individual notices about every public court pro-

⁵ *Id.* § 3771(c) (1).

⁶ U.S. Dep’t of Justice, Antitrust Div., Victims’ Rights Web page, <http://www.justice.gov/atr/victim/index.html>.

⁷ U.S. Dep’t of Justice, Antitrust Div., Victims’ Rights—Overview, <http://www.justice.gov/atr/victim/vroverview.htm>.

⁸ 18 U.S.C. § 3771(e).

⁹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁰ The court in *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1051 (N.D. Cal. 2005), came close to taking a position on this issue, stating that the victim of the alleged antitrust offense was the “public at large.” But the court noted that the civil plaintiffs suing the defendant were those members of the public at large “directly and proximately harmed as a result of the commission of the antitrust violation.”

¹¹ 18 U.S.C. § 3771(d) (2).

¹² *Id.*

[I]dentifying the “victims” of antitrust offenses is probably the most daunting procedural task in applying the CVRA to antitrust matters.

ceeding.”¹³ As such, the Division proposed providing “reasonable notice of the proceeding on the internet, at the publicly accessible web site for the Antitrust Division.”¹⁴ This approach has been adopted by courts and the Division on a number of occasions.

What does it mean for a crime victim to be “reasonably heard” at public proceedings?

The leading case on the CVRA right to be reasonably heard is the Ninth Circuit’s decision in *Kenna*. The *Kenna* court ruled that “[v]ictims now have an indefeasible right to speak, similar to that of the defendant.”¹⁵ In so holding, the court found that the district court violated the CVRA by limiting a victim to written submissions regarding the impact of the defendant’s conduct.¹⁶ To remedy this deficiency, the Ninth Circuit ordered the district court to consider a motion to reopen sentencing being “cognizant that the only way to give effect to [the alleged victim’s] right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing.”¹⁷ Given this ruling, it behooves defendants and prosecutors interested in sentencing finality and certainty to ensure that the court and government give alleged crime victims an opportunity to speak during sentencing proceedings, even if it prolongs the sentencing phase.

What is the “right not to be excluded” from public proceedings?

Although the right not to be excluded from public proceedings seems rather straightforward, it has been interpreted to also require the public disclosure of information in a criminal antitrust case. In *United States v. Crompton Corp.*, which related to the Antitrust Division’s investigation of the rubber chemicals industry, the defendant sought to redact the name of one of its employees “carved out” of the company’s plea agreement with the government.¹⁸ The defendant argued that if the employee’s name were made public, he would be exposed to liability in the pending civil matters against the company and the disclosure would negatively impact the company’s share price. Despite these concerns, the court ruled that redacting the employee’s name would violate the CVRA and abrogate crime victims’ “‘right not to be excluded’ from any public court proceedings.”¹⁹ In doing so, the court noted that, under the CVRA, it must be “particularly sensitive” to ensuring that crime victims “are given full access to the proceedings and the Plea Agreement.”²⁰

Does the “reasonable right to confer” with government attorneys give crime victims a seat at the table during plea negotiations?

No, but as a practical matter, the “reasonable right to confer” with prosecuting attorneys has given crime victims and their attorneys more access than they previously had. Based in part on the CVRA’s statement that it shall not be construed to impair “prosecutorial discretion,”²¹ several

¹³ Motion to Establish Procedure for Crime Victim Notification Pursuant to 18 U.S.C. § 3771, *United States v. Solvay S.A.*, No. CR 06-0159 MMC (N.D. Cal. Mar. 22, 2006), available at <http://www.justice.gov/atr/cases/f215400/215471.htm>.

¹⁴ *Id.*

¹⁵ *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1016 (9th Cir. 2006).

¹⁶ *Id.* at 1014–16.

¹⁷ *Id.* at 1017.

¹⁸ *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1048 (N.D. Cal. 2005). In corporate plea agreements, the Antitrust Division has consistently identified “carve outs,” those employees not covered by the non-prosecution protections contained in the plea agreement.

¹⁹ *Id.* at 1051.

²⁰ *Id.*

²¹ 18 U.S.C. § 3771(d) (6).

courts have ruled that the CVRA does not create a right for crime victims to participate in plea negotiations. For example, one district court found that the CVRA “does not give the victims of crime veto power over any prosecutorial decision, strategy or tactic regarding bail, release, sentencing or parole.”²² The Second Circuit has taken a similar view: “Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”²³ Likewise, courts have found that the CVRA does not give crime victims a right to access non-public documents, such as presentence reports.²⁴ These decisions are buttressed by the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, both of which demand that grand jury proceedings and plea negotiations remain confidential.²⁵

Despite this, attorneys representing civil antitrust plaintiffs have used the CVRA’s “reasonable right to confer” with prosecuting attorneys as a basis for requesting meetings with the Antitrust Division to discuss the Division’s investigation and potential plea agreements. In what appears to be an abundance of caution, as well as a nod to the CVRA’s intent, the Antitrust Division has entertained many of these requests.²⁶

Going even further, some civil antitrust plaintiffs—self-declared as crime victims—have attempted to disrupt ongoing plea negotiations or block acceptance of plea agreements based on the Division’s alleged failure to abide by the CVRA, similar to the victims’ efforts in *Kenna*.²⁷

[T]he CVRA does not give crime victims “veto power” over sentencing decisions nor does it impair prosecutorial discretion.

Why would civil plaintiffs seek to disrupt a plea agreement between the Antitrust Division and a defendant?

Typically, a plea deal between the Division and one of its targets is quite welcome to antitrust plaintiffs because a guilty plea can be used as evidence of liability in related civil litigation. But some civil antitrust plaintiffs have taken the position that certain plea agreements are too limited with respect to the admitted conduct or the volume of affected commerce. If the scope of the prosecution is not to their liking, these plaintiffs move under the auspices of the CVRA to prevent the entry of the plea, asserting that the Division failed to take victims’ views into account in negotiating the language of the plea agreement and the recommended sentence.

Is this a permissible use of the CVRA?

No, for at least two reasons. First, the CVRA does not confer a right to interfere with plea negotiations or to block the acceptance of a guilty plea. As discussed above, the CVRA does not give crime victims “veto power” over sentencing decisions nor does it impair prosecutorial discretion. Second, in most cases, trying to block a plea agreement because it is not broad enough may be an obvious attempt to gain a tactical advantage in related civil litigation, rather than an exercise of legitimate rights under the CVRA. The fact that these efforts are orchestrated by lawyers who have filed civil claims regarding the same conduct makes the purpose of these efforts seeming-

²² *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008).

²³ *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 564 (2d Cir. 2005). *But see In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (finding that the district court’s sealing of an *ex parte* order violated an identifiable victim group’s right to notice under the CVRA).

²⁴ *In re Siler*, 571 F.3d 604, 610 (6th Cir. 2009); *United States v. Coxton*, 598 F. Supp. 2d 739, 741 (W.D.N.C. 2009).

²⁵ FED. R. CRIM. PROC. 6(e), 11(f); FED. R. EVID. 410.

²⁶ Indeed, the Division Web site encourages alleged victims to contact the Division regarding ongoing investigations. U.S. Dep’t of Justice, Antitrust Division, Victims’ Rights—Contacts, <http://www.justice.gov/atr/victim/vrcontacts.htm>.

²⁷ *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1013 (9th Cir. 2006) (seeking an order vacating the district court’s sentence pursuant to a plea agreement).

ly clear. Generally speaking, scenarios where civil antitrust plaintiffs attempt to block negotiated plea agreements do not involve people and families injured by violent crimes or bankrupted by scam artists. Instead, they involve, for the most part, entities or individuals hand-selected by plaintiffs' counsel and who have a modest (if not miniscule) financial stake—and no personal stake—in the outcome of the criminal or civil proceedings.

Given these realities, it is difficult to see how these civil plaintiffs have a “right” to be a part of the criminal process, much less to disrupt or interfere with the scope or acceptance of a defendant's criminal plea. The pending civil litigation is specifically intended to be the means by which these plaintiffs' alleged injuries and rights can be fully redressed. As such, it is reasonable for courts to recognize the pendency of civil actions when determining whether and how to afford CVRA rights to civil plaintiffs.

Can district court decisions regarding the CVRA be appealed?

Yes. In fact, the CVRA provides for an expedited appeals process. If a district court in a criminal proceeding denies relief sought under the CVRA, “the movant may petition the court of appeals for a writ of mandamus.”²⁸ From there, the court of appeals “shall take up and decide such application forthwith within 72 hours after the petition has been filed.”²⁹

Can we expect to see more CVRA litigation involving antitrust violations?

The Ninth Circuit believes so: “As victim participation in the criminal justice system becomes more common, we expect CVRA claims to become more frequent.”³⁰ It remains to be seen whether this expectation will pan out with antitrust violations given the issues identified above. But it is clear that the Antitrust Division and antitrust defendants see the CVRA as a significant consideration in resolving criminal antitrust investigations. It is also clear that as long as plaintiffs' counsel view the CVRA as a tool for nudging criminal antitrust investigations in a direction that provides benefits in related civil litigation, these efforts will continue. ●

²⁸ 18 U.S.C. § 3771(d) (3).

²⁹ *Id.*

³⁰ *Kenna*, 435 F.3d at 1018.