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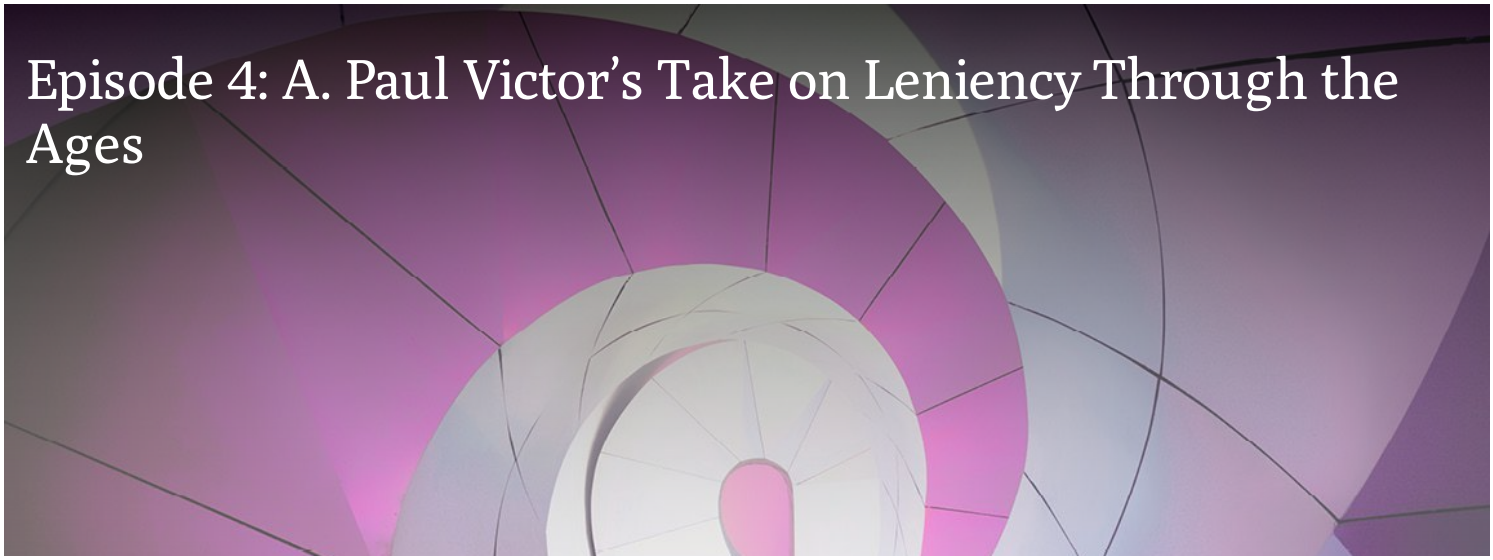
Episode 4: A. Paul Victor's Take on Leniency Through the Ages



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Audio Transcript
Today's episode is really special. My guest is A. Paul Victor, who as many of you know is the "Godfather" of the cartel space. Paul's first cartel matter was the famous lysine case, and he has been involved in the area ever since, including as a former partner here at Winston & Strawn.

I thought it would be very interesting to many of our listeners to interview Paul about the changes he has seen over time in terms of price-fixing investigations as well as changes in terms of the DOJ's and other leniency programs. For those who don't know, a leniency program typically offers amnesty or other benefits in exchange for a company or individual admitting to antitrust violations and then cooperating throughout the course of a government enforcer's investigation. Today there are leniency programs for antitrust that are alive and well throughout the world. Paul, welcome to the podcast and thank you for joining us.

Paul Victor: Thank you for having me.

Well, why don't you tell us a little bit about your background before the lysine situation came to pass. What type of work were you doing?

Paul Victor: Sure. After graduating from Michigan, I went to the Antitrust Division at the Justice Department in Washington and spent two and a half years there. I was assigned work in the transportation / regulated industries area, and I got involved with competition issues before the various agencies like the Interstate Commerce Commission and the Civil Aeronautics Board. I had a great deal of experience investigating matters and appearing before the agencies and even the courts with respect to matters that found their way before court. I also worked on the government's positions on legislative proposals before Congress, including the testimony of Division executives.

In addition, I spent six months in the Appellate Section writing briefs for the government to the Supreme Court and Courts of Appeal. After the Division, I spent two and a half years in private practice in Washington doing all kinds of antitrust work, including under Section Seven, the Robinson-Patman Act, and, of course, the Sherman Act. I then moved back to New York where I spent 38 years doing all kinds of international trade and antitrust matters, including the famous Matsushita case that lasted 17 years from beginning to end. Then I joined my former partner Jeffrey Kessler at another firm and eventually we all came over here to Winston.

And when in that timeline did the lysine situation come up?

Paul Victor: I got involved in the lysine case in 1995, and I've been heavily focusing on international cartel government investigations and follow on private treble damage class actions ever since.

What happened factually in the lysine case, and how was it that you got involved?

Paul Victor: That was one heck of an experience. The government had irrefutable evidence of collusion, including multiple video and audio tapes and there was no way of doing anything but to figure out how to try to get the best deal for our client. I represented Kyowa Hakko, one of the Japanese lysine producers. How did I get involved? One of our former Japanese foreign legal trainees represented Kyowa and clearly understood the company's need for U.S. counsel. Fortunately, he thought of me to help his client.

If you can tell us, did your client take advantage of the DOJ's leniency program at all in lysine? What was the leniency program like at that time?

Paul Victor: While there was a leniency—or amnesty—program at the DOJ at that time, it was in its infancy, and many defense counsel were skeptical, didn't really try to make use of it. In any event, the government's investigation in that case did not start because of an amnesty application. It started because the chairman of Archer Daniels Midland knew top-level government officials and was under the impression that someone was involved in some wrongdoing and was going to, or was already, engaged in extortion of his company. So he went and he asked the government to start an investigation. I'm not 100% sure, but the investigation that was started wasn't solely an antitrust investigation. This all came about because of the famous Mark Whittaker. I think you may have heard of him. He's the ADM employee that played the spy for the DOJ in connection with all the taping, but ended up in jail because he was in fact the extortionist.

I know it's a great story. I have read the book and I know you're in it Paul, but let me ask you one thing about what you just said that the DOJ's leniency program was very young at this time. Well when did the program first get taken seriously? And also I want to ask whether the U.S. was the only jurisdiction with the leniency program at the time of lysine.

Paul Victor: Well, shortly after the jail terms and the first hundred-million-dollar antitrust fines in the lysine case, the DOJ's program began to be taken seriously. I don't think the U.S. was the only one with such a program back then. I think the EC and Canada had programs as well, maybe even some other countries. But not long thereafter, the U.S. was extremely successful in persuading a multitude of other jurisdictions to join in with a leniency program. And today there's well over a hundred countries that have such programs. Once a company has decided to self-report, then it's wise for the company to self-report at the same time to all, or at least the most important, other jurisdictions. Because, as you know Molly, getting leniency in one jurisdiction does not protect you in other jurisdictions, and someone else may rush in for leniency elsewhere, leaving you exposed to fines and or penalties in those other jurisdictions.

Right. So when would you say you first started having to take a hard look at leniency programs outside the U.S.?

Paul Victor: Pretty much around the turn of the century. The whole business of self-reporting and cooperation became much, much more complicated. As you know, we've been involved in some cases where we've gone to seven or eight jurisdictions seeking first-in protection for our clients. That's a really difficult decision for a company to make. And often that decision has to be made with less than a full deck of information.

I know, really a tough situation for a lot of clients. Well, was there an investigation that you think contributed most to the development of leniency programs worldwide? Would you say it was lysine?

Paul Victor: I'm not sure I'm right, but I do think it was the lysine investigation. Certainly the auto parts investigation really opened up the floodgates for leniency around the world, but that started in 2010, by which time amnesty programs were widespread.

Okay. Well, aside from the sheer number of leniency programs, what is the biggest change you've seen when it comes to representing a client involved in a cartel investigation?

Paul Victor: Well, if a company has the opportunity to obtain first-in status, the big issue was whether to seek amnesty. As you know, the only benefit the company gets, at least in the U.S., not that it's unimportant, is to avoid criminal charges and to protect its cooperating employees. But there are a number of significant downsides that come with this role, making defense counsel these days think real hard whether to advise their clients to seek leniency. Among other concerns, the company becomes the government's partner in prosecuting the matter. That's an extremely burdensome and expensive role to play.

Also, leniency is not guaranteed until the end of the investigation, leaving concern that something may end up resulting in not getting it. Further, Pandora's box is opened with respect to private actions where the ACPERA benefits remain uncertain and are not known until potentially the end of a trial. And also, if you're going to let the cat out of the bag, you have to worry about all the other jurisdictions that may be involved. So it's not clear that a company should rush to seek leniency. Frankly, the more experience I've had with it in the past 20 years, the less sure I am that leniency cooperation is necessarily the right thing to pursue.

Interesting. So one change is a relatively new sort of hesitance to recommend leniency even if you think there's a violation. I know it certainly can be a difficult balancing act and you Paul, used the word rush. I think that's right. Ideally, if you're going to go in, you do it pretty quickly.

Paul Victor: Oh, that's true. There are many different considerations in play. It's a complicated analysis, but time is of the essence. Your competitors are also contemplating leniency, and if they get in there first, you're in deeper trouble.

True. Let me switch gears a little bit to private cases. Like a class action. What changes have you seen there in terms of defending a client in those situations?

Paul Victor: Well, just about every criminal matter results in treble damages, class actions and/or opt out actions in the United States, and they're really a nightmare for clients. There's a very strong and active plaintiffs' bar in the United States, and they're willing to invest and vigorously pursue direct and indirect purchaser actions in the U.S. courts. They're extremely expensive and burdensome and almost always result in significant settlements to alleviate the risks that are inherently involved. And it's not only the U.S., you have to worry about. Canada and increasingly many other jurisdictions allow follow-on actions. So you're often litigating cases worldwide. I just learned the other night that a certain American plaintiffs' firm, has 20 lawyers now just in their Berlin office, and that's where they're having their next retreat. Anyway, so that's one of the downsides of self-reporting as you open up the private damages litigation side as well. It's great for the lawyers, but it isn't fun for the clients.

Let me go back to lysine for a second. What do you think was the most interesting aspect of this practice back then?

Paul Victor: Well, before the government got the benefit of the massive cooperation that it's been getting these days, it wasn't so easy for them to win cases in court. I don't recall the exact statistics, but there was something like the government lost in some 50% of the cases it tried against companies, and in some 70% of the cases it tried against individuals. Those numbers have significantly changed these days. I don't know what they are off the top of my head, but in the lysine and pre-lysine days, criminal antitrust cases were not the major bread and butter matters for the DOJ that they are today, except for local situations like road construction cases.

What about now?

Paul Victor: Well, in one sense it's less interesting in that we live in a world of widespread cooperation with the government where the defense counsel are really in the business of making the cases out for the government lawyers, rather than the government lawyers trying to make their own cases. But it's still quite challenging to be advising a company or an individual what to do in this current world of cooperation. What will be interesting to see is whether the cooperation road is permanently becoming less attractive, given all the negatives that accompany deciding to cooperate. Will there be somewhat of a return to making the government do its work if it wants to try to convict companies of an antitrust crime? I believe that leniency applications today are down, I think some 40% from their heyday. You have to check me on that, but I do know there's a significant reduction in leniency applications.

Yeah, I think that's right. Well, here's a related question. Say you end up cooperating, but you're not the amnesty company and you have to negotiate a plea deal. How should the negotiations be approached? Do companies that are destined to plead guilty have any leverage in those situations?

Paul Victor: Yes, they do. If pleading guilty makes sense, then getting in early and providing significant cooperation —which really means evidence—also makes sense because depending upon whether you're second in or third in or fourth in, it's going to have a significant impact on the benefits you're going to get for cooperating. Second ins can generally get up to a 30% discount in the fine, and there are other benefits you can negotiate for such as a reduced scope of the conspiracy period, fewer employee carve-outs, a lower start in the fine range, et cetera, et cetera. So the further down the cooperation line you are, the fewer benefits will be available.

Understood. Let me ask a question about representing individuals rather than companies. I know you've probably represented many individuals in these situations, so what is the greatest challenge in your opinion in terms of representing an individual?

Paul Victor: Well, I think making sure you're being told the truth and trying to find out from company counsel and from counsel for other individuals as much as you can about the case and about what the government knows to enable you to make the best arguments that are possible on your own clients' behalf. That means trying to get copies of all relevant documents relating to your client, learning what others are saying about your client, et cetera. Clients don't typically tell you the truth the first time around. Generally speaking, until you really get the documents and can confront the client with documents, you're not going to get the whole story.

All right, so we're sort of running low on time, so I want to ask you two wrap-up questions. The first is, looking back, do you have a favorite matter or war story from your experience defending clients involved in cartels?

Paul Victor: I do. It involved a criminal investigation of the carbon fiber industry. I represented a major Japanese producer of that product, and there were four or five other producers from Japan, Korea, one even from the United States. There were some not very good documents, but everything was circumstantial. The government was sure we did it, but no company and no company employee involved in the matter believed that any price-fixing agreement had actually been entered into. Therefore, not one company nor one employee sought leniency or otherwise cooperated with the government, other than to provide documents that had been subpoenaed or give mandated testimony to the grand jury.

In such circumstances, you can have a joint defense counsel arrangement in a criminal matter. And we did. It was a fantastic group effort, and we shared documents and interview notes and preparation of witnesses under our joint defense agreement. And we knew as much as the government knew about the matter. Normally that's not the case. It was great. And after six years, quite reluctantly, the government closed the grand jury investigation, and no one was charged with a crime.

Good result. And it sounds really fun. It reminds me of another matter, Paul, that you and I did here at Winston where we obtained a very good result for a client on the criminal side, and the joint effort on the civil side has been very impressive as well. Okay, so here's my last question. What's the advice you would give a young lawyer considering a specialty in antitrust?

Paul Victor: Well, I would tell the young lawyer why I like the antitrust space as a practice choice. It's federal law, which I prefer, although state laws can be involved as well, as you know. It involves economics and business, and it has a widespread impact on consumers, markets, industries, namely the economy. It involves government

investigations as well as litigation and administrative law proceedings. It's international in scope, giving one exposure to other legal systems and lawyers and businessmen and women from around the world. In short, to me it's fun, and it's also meaningful.

All right, good advice, Paul, and thank you very much. We're out of time for today, but this has been a great episode and we really appreciate your time.

Paul Victor: It's been my pleasure. Thank you.

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