

## Observations from the Field: ACPERA's First Five Years

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# OBSERVATIONS FROM THE FIELD: ACPERA'S FIRST FIVE YEARS

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## I. INTRODUCTION

While some areas of antitrust law may involve varying degrees of uncertainty, price-fixing cartels are almost universally condemned.<sup>1</sup> This is due to the unequivocal acknowledgement of “tremendous harm caused by hard core cartels to businesses and consumers.”<sup>2</sup> As the Deputy Assistant Attorney General for the United States Department of Justice’s Antitrust Division has said, price-fixing cartels constitute “a crime – no different than common fraud or theft,” akin to stealing money “just as if they had lifted cash right out of their [victims] wallets.”<sup>3</sup> Such cartels “cheat their customers out of honest competition, and they pad their pockets with the profits of their conspiracy.”<sup>4</sup> They are “sophisticated, premeditated crimes committed by highly-educated individuals in absolute secrecy.”<sup>5</sup> The extent and nature of the offense makes clear the “contempt and disregard that the members of the cartel typically have for antitrust laws and enforcement.”<sup>6</sup> Price fixing cartels are the equivalent of modern day pirates—enemies of the global economy.<sup>7</sup> There are now even rewards for their capture and identity.<sup>8</sup>

It is not surprising, then, that Justice Scalia described price-fixing cartels as “the supreme evil of antitrust.”<sup>9</sup> Hardly a new position, the U.S. Supreme Court has long held that enforcement of the antitrust laws is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>10</sup> In addition

- 1 See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 421–23 (1990); *Ariz. v. Maricopa Med. Soc’y*, 457 U.S. 332, 342 (1982); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); R. Hewitt Pate, Acting Assistant Attorney Gen., Antitrust Div., Speech Before the British Institute of International and Comparative Law: Anti-Cartel Enforcement: The Core Antitrust Mission (May 16, 2003) (“Since 1890, the Sherman Act has reflected the United States’ abiding faith that the elimination of competition in business [is] morally and economically wrong.”) (internal quotes omitted), (transcript available at <http://www.usdoj.gov/atr/public/speeches/201199.htm>); *U.S. v. Alton Box Bd. Co.*, No. 76 CR 199, 1977 WL 1374, at \*11 (N.D. Ill. March 4, 1977) (noting the Department of Justice view that the price-fixing violation before the court “represents immoral, antisocial, and calculated conduct which should be punished as such”).
- 2 See speeches by Scott D. Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dept. of Justice, Caught in the Act – Inside an International Cartel, Presented at OECD Paris, France (October 18, 2005) at 1 (transcript available at <http://www.usdoj.gov/atr/public/speeches/212266.htm>) [hereinafter “Caught in the Act”]. See also Scott Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dept. of Justice, An Update of the Antitrust Division’s Criminal Enforcement Program (Nov. 16, 2005 at 1) (transcript available at <http://www.usdoj.gov/atr/public/speeches/213247.htm>) [hereinafter 2005 Update] (the “detection, prosecution, and deterrence of cartel offenses continue to be the highest priority of the Antitrust Division”); and Scott Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dept. of Justice, From Hollywood to Hong Kong: Criminal Antitrust Enforcement Is Coming To A City Near You (Nov. 9, 2001) at 5 (transcript available at <http://www.usdoj.gov/atr/public/speeches/9891.htm>) [hereinafter “Hollywood to Hong Kong”] (“[I]bly using informers, tape recordings, and search warrants, the message to the business community was clearly communicated – we will not pull any punches. These are the bare knuckle tools that the Division will use to detect and crack antitrust crimes.”).
- 3 Caught in the Act, *supra* note 2, at 1. Even law firms known for antitrust defense work observe that cartels are “now branded a sophisticated form of theft.” See HOWREY TRANSATLANTIC CARTEL EXPERIENCE, [http://www.howrey.com/docs/TACT\\_Brochure\\_April2005.pdf](http://www.howrey.com/docs/TACT_Brochure_April2005.pdf) (last visited August 27, 2007). See also Memorandum of Understanding Between the Antitrust Div. and The Immigration and Naturalization Serv. (May 15, 1996) (available at <http://www.usdoj.gov/atr/public/criminal/9951.htm>) (last visited April 17, 2008) (“Whereas, the INS considers criminal violations of the Sherman Antitrust Act, 15 U.S.C. Section 1, to be crimes involving moral turpitude, which may subject an alien to exclusion or deportation from the United States”).
- 4 Scott Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dept. of Justice, Beating Cartels At Their Own Game—Sharing Information In The Fight Against Cartels (Nov. 20, 2003) at 7 (transcript available at <http://www.usdoj.gov/atr/public/speeches/201614.htm>) [hereinafter Beating Cartels].
- 5 Caught in the Act, *supra* note 2, at 8.
- 6 Caught in the Act, *supra* note 2, at 2.
- 7 See OECD, HARD CORE CARTELS at 5 (2000), available at <http://www.oecd.org/dataoecd/39/63/2752129.pdf>. This is an attitude shared by antitrust enforcers in other countries as well. For example, Neelie Kroes, European Commissioner for Competition Policy said in February of 2008, “[i]n terms of economic governance, ... we have to ask ourselves how best to keep a grip on global actors in a global economy, if their anti-competitive behaviour is damaging the interest of the Union, its businesses or its citizens. Ideally, faced with global problems we would design truly global solutions.” First Symposium in Innsbruck (Feb. 7, 2008), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/61&format=HTML&aged=0&language=EN&guiLanguage=en>. These global solutions may be developing. Professor Richard Schmalensee of the MIT Sloan School of Management noted in November 2007 that “[f]or better or for worse, the rest of the world seems to be modeling their competition laws and competition authorities on those in the European Community. Over 100 countries have established competition laws, a number that has increased two-fold since 1990 as more developing countries move towards market economies. In addition, countries that have had antitrust laws on the books have started enforcing those laws more aggressively in recent years.” <http://www.globalcompetitionpolicy.org/index.php?id=592&action=907> (last visited March 24, 2008). And Sir Anthony Clark, Master of the Rolls, stated in a speech given at an American Bar Association conference in London on October 3, 2007 that “[i]n today’s global village we can no longer live as islands unto ourselves. The continued growth of our ever-increasing globalised economy, of multi-national corporations, of the free movement of capital and services, of financial markets, of private international law and ever more common standards of human rights has an important consequence for us all. We must all ensure in this increasingly complex and interconnected world that our national civil justice systems are able effectively to respond to disputes with cross national boundaries.” (available at [http://www.judiciary.gov.uk/docs/speeches/mr\\_american\\_bar\\_assoc\\_031007.pdf](http://www.judiciary.gov.uk/docs/speeches/mr_american_bar_assoc_031007.pdf)). Most recently, on March 26, 2009, the European Parliament voted 498 to 11 (with 17 abstentions) to adopt a 2008 White Paper recommending private damage actions to enforce EC rules against cartel activity. Melisa Lipman, *EU Parliament Backs Antitrust Relief For Victims*, Law 360, Mar. 26, 2009, [http://www.law360.com/print\\_article/93881](http://www.law360.com/print_article/93881).
- 8 The United Kingdom’s Office of Fair Trading (“OFT”) announced in February of 2008 that it will pay financial incentives of up to £100,000 in return for information which helps it to identify and take action against illegal cartels. <http://www.of.gov.uk/news/press/2008/31-08> (last visited March 24, 2008).
- 9 *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).
- 10 *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 56 n.19 (1982) (quoting *U. S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)). The OFT has advocated this view strongly during the last few years. In April of 2007, it issued a discussion paper recommending expanded private enforcement of the U.K.’s antitrust laws. The paper stated: “[s]trong competition regimes are essential for open, dynamic markets. They drive productivity and innovation and ensure the efficient allocation of resources, and are good for consumers and businesses.” OFT, PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS, p. 3 (Apr. 2007) (available at [http://www.of.gov.uk/shared\\_of/reports/comp\\_policy/of07916.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/of07916.pdf)) (last visited March 24, 2008). The same paper went on to note that: “[i]f, under a system in which an action may only be brought on behalf of named individuals, an action does not proceed at all (or proceeds on behalf of only a small minority of those harmed...), an infringing undertaking will not be held to account for compensation that reflects either the harm caused to all the consumers affected by its anti-competitive behaviour, or its ‘ill-gotten gain’ from the infringing conduct.” *Id.* at p. 21. Philip Collins, the OFT’s Chairman, said at the time of the promulgation of the discussion paper that “[a] more effective private actions system would promote a greater culture of compliance with competition law and ensure that public enforcement and private actions work together to the best effect for businesses and consumers.” <http://www.of.gov.uk/news/press/2007/63-07> (last visited March 24, 2008).

to government enforcement, “[i]t is well recognized that private enforcement of [antitrust] laws is a necessary supplement to government action.”<sup>11</sup> Such private enforcement—*e.g.*, civil litigation and in particular class action lawsuits—is a vital part of “the federal scheme for deterring anti-competitive behavior.”<sup>12</sup> It has “long been recognized that class actions play an important role in the private enforcement of antitrust actions.”<sup>13</sup> Government and private antitrust enforcement have historically gone hand-in-hand.<sup>14</sup> Thus, in the most recent amendment to the antitrust laws, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, P.L. 108-237 (“ACPERA”) provided significant benefits to enhance both arms of antitrust enforcement.

With the passage of ACPERA, an Applicant gets all previous benefits of government immunity, as well as significant private enforcement benefits. If an Amnesty Applicant agrees to cooperate with civil litigants, ACPERA de-trebles an Amnesty Applicant’s civil exposure to actual damages attributable to the commerce done by it in the goods or services affected by the violation. Therefore, an Amnesty Applicant can enter the United States Department of Justice’s (“DOJ” or “Department”) leniency program to blow the whistle on its co-cartelists but no longer has to weigh exposure to joint and several treble damages through resulting civil antitrust litigation by the private bar. Accordingly, an Amnesty Applicant now receives significant civil liability benefits as well as an additional incentive to seek criminal immunity from the DOJ. This article examines some of the practical issues and competing interests that have been raised since ACPERA’s enactment.

This article is structured in five sections. Section two briefly summarizes the DOJ’s antitrust leniency program prior to the effective date of ACPERA. It also provides a brief overview of the basic features of ACPERA. Section three addresses to whom ACPERA cooperation is owed. Sections four offers an in-depth analysis of some key features of the statute relevant to private antitrust suits: when the duty of cooperation by the Amnesty Applicant under ACPERA is triggered and the scope of such cooperation. Section five addresses the implications of potential competing civil and criminal ACPERA obligations.

## II. THE DOJ’S CORPORATE LENIENCY PROGRAM AND THE PROVISIONS OF ACPERA

### A. The Pre-ACPERA DOJ Corporate Leniency Program

The DOJ has “a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions.”<sup>15</sup> In 1993, the Department substantially revised its corporate leniency or amnesty program.<sup>16</sup> Under these revisions, a corporation that either brought to the DOJ’s attention a cartel of which DOJ had been unaware, or was the first to come forward to cooperate in an investigation that was already underway, would, subject to certain conditions<sup>17</sup> set out in the amnesty policy, receive complete immunity from prosecution for itself and for all its executives who cooperated in the investigation.

The policy behind the DOJ’s program was “to destabilize cartels, and [cause] the members of the cartels to turn against one another in a race to the Government.”<sup>18</sup> The success of this program is evident in its statistics: Under the pre-1993 program, the DOJ received roughly one amnesty application per month; and under the post-1993 program, the application rate jumped to roughly two a month.<sup>19</sup> “[I]n fiscal years 2004 and 2005, and so far in 2006, the Antitrust Division of the

11 *Cumberland Farms, Inc. v. Browning-Ferris Indus.*, 120 F.R.D. 642, 645 (E.D. Pa. 1988) (citations omitted).

12 *In re Bulk Extruded Graphite Prods. Antitrust Litig.*, 2006 WL 891362, at \*4 (D.N.J. April 4, 2006).

13 *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C. 2002) [hereinafter *Vitamins*].

14 Neelie Kroes, European Commissioner for Competition Policy, First Symposium in Innsbruck (February 7, 2008).

15 See Corporate Leniency Policy (Aug. 10, 1993), at 1, [www.usdoj.gov/atr/public/guidelines/0091.htm](http://www.usdoj.gov/atr/public/guidelines/0091.htm) [hereinafter Corporate Leniency Policy]. “Leniency” means not charging such a firm criminally for the activity being reported.” *Id.*

16 See Corporate Leniency Policy, *supra* note 15.

17 The Corporate Leniency program automatically grants amnesty to any corporation that reports illegal pre-investigation antitrust activity provided six conditions are met: (1) DOJ has not received information about the illegal activity from any other source; (2) once discovered, it acted promptly and effectively to end its participation in the activity; (3) it is candid and complete in reporting and cooperates fully with the DOJ investigation; (4) its confession is truly a corporate act, not isolated confessions from individuals; (5) where possible, it makes restitution to injured parties; and (6) it did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity.

18 See Cong. Rec. at S3614 (Apr. 2, 2004).

19 See 2005 Update at 9.

Department of Justice has obtained fines of \$360 million, \$338 million, and \$473 million, respectively, and has brought criminal cases against 69 firms.<sup>20</sup> Cooperation obtained by the program has “led to the detection and prosecution of massive international cartels that cost businesses and consumers billions of dollars and has led to the largest fines in the Antitrust Division’s history.”<sup>21</sup> The Division’s cartel enforcement efforts for the 2007 fiscal year imposed almost 30,000 jail days for participating corporate executives; recovered over \$630 million in fines and succeeded in obtaining the longest jail sentence (14 months) for a foreign national charged with a violation of U.S. antitrust laws.<sup>22</sup>

However, an Amnesty Defendant, once entering the DOJ amnesty program, was almost guaranteed to face private civil litigation usually in the form of class actions for damages and injunctive relief. An amnesty application is, in essence, the functional equivalent of an acknowledgement of the existence of an illegal cartel;<sup>23</sup> therefore, the acknowledgement, by itself, established a strong foundation for future civil exposure to often large amounts. Under the provisions of the 1993 Act, the government could waive its right to criminal fines, but the Amnesty Defendant still faced joint and several treble damages in civil litigation.<sup>24</sup> This threat to the Applicant was a major impediment to corporate confessions to the DOJ.<sup>25</sup>

According to one antitrust defense firm, “part of the calculus of determining to seek amnesty [pre-ACPERA] has traditionally been that while doing so eliminates the risk of criminal sanctions, amnesty leaves the recipient exposed to federal and state private lawsuits seeking treble damages.”<sup>26</sup> “In other words, before voluntarily disclosing its criminal conduct, a potential Amnesty Applicant [had to] weigh the potential ruinous consequences of subjecting itself to liability for three times the damages that the entire conspiracy caused.”<sup>27</sup> Thus, prior to the 2003 amendments to ACPERA, DOJ amnesty came at a high price to corporations: “the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy.”<sup>28</sup>

## B. ACPERA Removes a Significant Disincentive to Reporting Antitrust Violations

ACPERA applies to corporate antitrust leniency applicants<sup>29</sup> and their cooperating individuals<sup>30</sup> who enter into either a conditional or final amnesty agreement<sup>31</sup> with the DOJ.

- 20 Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Criminal Enforcement Of Antitrust Laws: The U.S. Model (September 14, 2006) at 1 (transcript available at <http://www.usdoj.gov/atr/public/speeches/218336.htm>) (hereinafter “Criminal Enforcement”). The European Commission (“EC”) issued its notice on immunity from fines in cartel cases in 2006, which replaced an earlier policy from 1996. See Commission Notice on Immunity from Fines And Reduction of Fines in Cartel Cases, 2006/C298/11, 2006 O.J. (C298)17. Between February of 2002 and the end of 2005, the EC received 167 applications for leniency, 87 for immunity and 80 for reductions in fines. Europa Press Release, Competition: Commission Leniency Notice Frequently Asked Questions (Dec. 7, 2006) (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/470&format=HTML&aged=1&language=EN&guiLanguage=en>). From February of 2002, through the end of 2006, the EC has taken formal decisions in six cartel cases in which companies co-operated with the investigations under its Leniency Notice. Since the entry into force of the current Leniency Notice on February 14, 2002 until the present, the Commission has taken formal decisions in 6 cartel cases in which companies co-operated with the investigations under the 2002 Leniency Notice.
- 21 See Cong. Rec. at S3614 (Apr. 2, 2004).
- 22 Prepared Remarks Of Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., At The Task Force On Antitrust And Competition Comm., On The Judiciary U.S. H.R. (Sept. 25, 2007). (“these accomplishments reflect great strides in the Division’s efforts to rid the marketplace of cartels and their harm to consumers.”) *But cf.* Nathan Miller, Strategic Leniency And Cartel Enforcement 25 (Sept. 2007) (available at [http://www.con.berkeley.edu/users/webfac/gilbert/e221\\_F07/miller.pdf](http://www.con.berkeley.edu/users/webfac/gilbert/e221_F07/miller.pdf)) (last visited March 24, 2008) (“[a]s shown there is no discernable increase in [cartel] discoveries immediately following the introduction of ACPERA. The results suggest that ACPERA may have little substantial impact on detection capabilities.”)
- 23 See fn. 17.
- 24 See 15 U.S.C. Section 15. As Neelie Kroes of the EC said in a November 2007 speech: “[g]iven the costs of bringing a damages action in the competition field and the uncertainty in the outcome, the balance of risk and reward is often unfavourable to consumers. So consumers rarely if ever go to court... Out-of-court settlements can only really work if they are coupled with a realistic chance of effective court action. And when court action can only be taken by each consumer individually, no consumer will ever make it to the court room: collective redress mechanisms are therefore an absolute must.” (Nov. 9, 2007) (transcript available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/698&format=HTML&aged=0&language=EN&guiLanguage=en>).
- 25 See Cong. Rec. at S3614 (Apr. 2, 2004).
- 26 See Antitrust Update, New Federal Antitrust Legislation Alters Risk Assessments (August 2004) at [www.weil.com](http://www.weil.com). (last visited March 24, 2008) (“Weil article”).
- 27 See Cong. Rec. at S3614 (Apr. 2, 2004).
- 28 *Id.*
- 29 Antitrust leniency applicant “means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.” See ACPERA at Section 212(3).
- 30 Cooperating individual “means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.” See ACPERA Section 212 (5) (emphasis added).
- 31 An amnesty agreement, or “antitrust leniency agreement” as it is termed in ACPERA, “means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of the execution of the agreement.” See ACPERA at Section 212(2). See also Gary R. Spratling, Dep. Asst. Attorney Gen., Antitrust Div., U.S. Dept. of Justice, Making Companies An Offer They Shouldn’t Refuse,” The Bar Ass’n of D.C.’s 35th Annual Symposium on Associations and Antitrust (February 16, 1999) at Ex. 2 (transcript available at [www.usdoj.gov/atr/public/speeches/2247.htm](http://www.usdoj.gov/atr/public/speeches/2247.htm)) (hereinafter Making An Offer) (“In cases in which the Division’s investigation ultimately reveals that the amnesty applicant has not engaged in any criminal conduct, the Division will not grant amnesty because it is unnecessary.”) Thus, a corporation that is investigated, but is ultimately not found to have violated the antitrust laws, owes no duty of cooperation to civil plaintiffs.

The passage of ACPERA<sup>32</sup> in June of 2004 allowed “the Justice Department, in appropriate circumstances, to limit a cooperating company’s civil liability to actual, rather than treble, damages in return for the company’s cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct.”<sup>33</sup> Hewitt Pate, the Assistant Attorney General for the Antitrust Division, noted in June of 2004 that “the de-trebling provision of the Act removes a major disincentive for submitting amnesty applications,”<sup>34</sup> aiming to increase the incentives “for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate” with the DOJ and civil plaintiffs.<sup>35,36</sup> One of the primary goals of ACPERA’s de-trebling provision was to advance cartel detection by encouraging self-reporting among corporations by removing the threat of treble damage civil suits. This is particularly valuable since cartel activity can be particularly difficult to uncover and prove without cooperation from a co-conspirator.<sup>37</sup> As a result of ACPERA, the DOJ gets crucial<sup>38</sup> cooperation and can pursue and detect more cartels. “The central purpose of [ACPERA] is to bolster the leniency program already utilized by the Antitrust Division so that antitrust prosecutors can more effectively go after antitrust violators.... cognizant of the needs of victims.”<sup>39</sup>

Because of the laudable benefit of increasing self-reporting of cartels, as well as the fact that “[t]he bottom line is [that] a business is far more likely to be the victim of a cartel than a member of one,”<sup>40</sup> ACPERA was met with little to no opposition and quickly passed into law less than one year after its introduction in committee. Its sponsor in the U.S. House of Representatives described it as “truly bipartisan and bicameral in nature.”<sup>41</sup>

### 1. ACPERA’s Single Damages Protection

Section 213(a) of ACPERA, entitled “Limitation on Recovery,” states that the “amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant . . . shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.”<sup>42</sup> Often referred to as the de-trebling provision, the Act effectively “amends the antitrust laws to modify the damage recovery from a corporation and its executives to actual damages.”<sup>43</sup> In other words, “the total liability of a successful leniency applicant would be limited to single damages without joint and several liability.”<sup>44</sup> An ACPERA Amnesty Applicant “would only be liable for the actual damages attributable

32 ACPERA consists of five numbered sections (Sections 211-215), as Title II of H.R. 1086. It was introduced on March 5, 2003 by sponsoring Congressman Sensenbrenner. There were 16 co-sponsors, which notably included both Republican and Democratic sponsors. Senator Hatch, on November 6, 2003, at the Committee on the Judiciary, reported the bill with an amendment in the nature of a substitute — which included the language of ACPERA — without a written committee report. Representative Sensenbrenner appended a committee report to his floor statement in June of 2004. A helpful overview of the legislative history of ACPERA is found in Harrison & Bell at 219-21, *infra* note 35.

33 See Cong. Rec. at S3613 (April 2, 2004).

34 See ACPERA Press Release. Legislators also noted that ACPERA was created to eliminate this same “disincentive to self-reporting.” See Cong. Rec. at S3614 (April 2, 2004).

35 See Cong. Rec. at S3613 (April 2, 2004). See Glenn Harrison & Matthew Bell, *Recent Enhancements In Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 Houston Bus. & Tax L.J. 207, 226 (2006) [hereinafter Harrison & Bell].

36 The benefits of ACPERA were further described by Senator Hatch: “more companies will disclose antitrust crimes, which will have several benefits. First, I expect that the total compensation to victims of antitrust conspiracies will be increased because of the requirement that amnesty applicants cooperate. Second, the increased self-reporting incentive will serve to further de-stabilize and deter the formation of criminal antitrust conspiracies. In turn, these changes will lead to more open and competitive markets.” See Cong. Rec. S3614 (April 2, 2004). See also *Scouring Pad Maker Will Plead Guilty to Charges of Conspiring to Fix Prices*, BNA Antitrust & Trade Reg. Rep., Nov. 4, 1993, at 585. (“[J]ust and swift resolution of the matter that otherwise might be complex and difficult to investigate was made possible by early and complete cooperation by one of the participants.”)

37 See Makan Delrahim, Deputy Assistant Attorney General, U. S. Dept. of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, address before the American Bar Association Section of Antitrust Law Fall Forum at 8-9 (Nov. 18, 2003) (available at <http://www.usdoj.gov/atr/public/speeches/201509.pdf>).

38 Cooperation by cartels is increasingly valuable as detection becomes more difficult, and cartelists employ more sophisticated means to conceal their crime. “[C]artelists are criminals” and “adept at concealment.” See Thomas O. Barnett, Ass’t Attorney General, Antitrust Div., U.S. Dept. of Justice, *Seven Steps to Better Cartel Enforcement*, 11th Annual Competition Law & Policy Workshop (June 2, 2006) at 8 [hereinafter *Seven Steps*]. See also *Caught in the Act*, *supra* note 2, at 2 (“[t]he conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover-up their actions — such as using code names with one another, meeting in secret venues around the world, creating false ‘covers’ — *i.e.*, facially legal justifications — for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy”); *Seven Steps* at 8 (“True to type, many [cartelists] react to an investigation by actively obstructing the investigations of antitrust prosecutors.”); Scott Hammond, Deputy Ass’t Attorney Gen., Antitrust Div., U.S. Dept. of Justice, *Ten Strategies for Winning the Fight Against Hardcore Cartels*, (October 18, 2005) (“When No ‘Hot Documents’ Are Uncovered by Investigators — a Frequent Event As Increased Deterrence Will Cause Cartels to Become More Sophisticated — Individual Admissions Are Needed to Prove Existence of Cartels”).

39 See Cong. Rec. at H3660 (June 2, 2004).

40 See Hollywood to Hong Kong, *supra* note 2, at 7-8; see also *Beating Cartels*, *supra* note 4, at 12 (“[i]t just makes no sense that honest businesses operating in a free market economy would not have strong cartel enforcement.”). A similar sentiment was expressed in a recent letter to the editor of the U.K. newspaper, *The Financial Times*: “[i]f there is a guiding principle that dictates the way we do business in the U.K. it is that it should be conducted fairly.... Those operating a cartel are engaging in theft and should face [sanctions] . . . I will not defend the indefensible....” The author was none other than David Lennan, who serves as Director General of the British Chamber of Commerce. Hollywood to Hong Kong, *supra* note 2.

41 Cong. Rec. at H3657 (June 2, 2004).

42 ACPERA Section 213(a).

43 *Id.*

44 See Cong. Rec. at S3614 (Apr. 2, 2004).

to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy.<sup>45</sup> This significant damages reduction comes with a price: an Amnesty Applicant must provide substantial, timely cooperation to the civil plaintiffs.<sup>46</sup>

Importantly, ACPERA affects only the division of responsibility for damages, leaving the remaining non-Amnesty Applicants jointly and severally responsible for remaining market-wide trebled damages, including the Amnesty Applicant's sales. While the Amnesty Applicant's exposure is limited to single damages "caused by its own actions," "the rest of its non-cooperating co-conspirators ... remain jointly and severally liable."<sup>47</sup> Nothing in ACPERA "affect[s], in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title."<sup>48</sup>

This "damages-preserving" provision was explained by Senator Hatch as being necessary and justified: "because all other conspirator firms would remain jointly and severally liable for three times the total damages caused by the conspiracy, the victims' potential total recovery would not be reduced."<sup>49</sup> The remaining defendants "will be fully, jointly and severally liable for the treble damages the conspiracy caused, minus only the amount actually paid by the leniency applicant."<sup>50</sup> Indeed, Congress anticipated that ACPERA would effectively increase the recovery by private plaintiffs.<sup>51</sup> As a result, "the full scope of antitrust remedies against [non-ACPERA] parties will remain available to the government and private antitrust plaintiffs."<sup>52</sup>

## 2. ACPERA'S Duty of Cooperation

One of the most significant components of ACPERA, and key for its success in ensuring that those harmed by the cartel are justly compensated, is its mandate that Amnesty Applicants cooperate with the civil plaintiffs in private litigation in order to be entitled to single damages protection. Specifically, ACPERA provides broad outlines of three areas of cooperation:

1. the Amnesty Applicant must provide a "full account" of "all facts known to the applicant. . . that are potentially relevant to the civil action;"
2. the Amnesty Applicant must "furnish[] all documents or other items" that are "potentially relevant to the civil action" that are in the applicant's or cooperating individual's possession or control "wherever they are located;" and
3. the Amnesty Applicant must use its "best efforts to secure and facilitate" from cooperating individuals covered by an agreement.<sup>53</sup>

Thus, an Amnesty Applicant is required to uncloak the full nature, scope, extent and impact of the conspiracy to civil plaintiffs timely and fully in order to provide "satisfactory cooperation to the claimant with respect to the civil action."<sup>54</sup> This includes revealing the participants, dates, times, meetings, amounts, products, pricing, and communications in any forum, directly or indirectly, relating to the conspiracy. In fact, it was expected that this cooperation be so complete and

45 *Id.* This actual damages limitation, however, is applicable only to conduct covered by the amnesty agreement. An Amnesty Applicant remains jointly and severally liable for treble damages for conduct outside its amnesty agreement (e.g., for periods or commerce not covered by the amnesty agreement).

46 ACPERA Section 213(a)-(b).

47 See Cong. Rec. at S3615 (Apr. 2, 2004). See also Cong. Rec. H3657 (June 2, 2004) ("while a cooperating party would be liable only damages attributable to that party's conduct, noncooperating conspirators will remain jointly and severally liable for treble damages") and Cong. Rec. H3659 (June 2, 2004) (only "the remaining [noncooperating] conspirators remain jointly and severally liable to treble damages").

48 See ACPERA Section 214(3).

49 See Cong. Rec. at S3614 (Apr. 2, 2004).

50 See Cong. Rec. at H3658 (June 2, 2004). See also Cong. Rec. at S3615 (Apr. 2, 2004) ("and while a party that receives leniency would only be liable for the portion of the damages actually caused by its own actions, the rest of the non-cooperating co-conspirators would remain jointly and severally liable for the entire amount of damages, which would then be trebled, to ensure that no injured party will fail to enjoy financial redress.")

51 *Id.*

52 See Cong. Rec. at H3657 (June 2, 2004).

53 See ACPERA Section 213(b)(1)-(3).

54 See ACPERA Section 213(b).

useful<sup>55</sup> to civil plaintiffs in their litigation “...that the total compensation to victims of antitrust conspiracies will be increased because of the requirement that Amnesty Applicants cooperate.”<sup>56</sup>

An individual Amnesty Applicant (*e.g.*, a corporate executive with amnesty protection) is similarly subject to ACPERA's cooperation requirements by (i) “making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require;” and (ii) by “responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all<sup>57</sup> questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action.”<sup>58</sup>

Not surprisingly, Amnesty Applicants and civil plaintiffs may interpret ACPERA's cooperation requirements differently. And given the statute's relatively recent passage, the precise contours of the cooperation required by ACPERA still need to be defined by the courts. To date, only one court—the district court in the *Sulfuric Acid Antitrust Litigation*—has entered an order finding satisfactory cooperation and a limitation of damages pursuant to ACPERA, and did so with no supporting explanation.<sup>59</sup>

### 3. ACPERA's Requirement Of Judicial Determination Of Satisfactory Cooperation

In order to qualify for single damages, an Amnesty Applicant must seek certification from the court that its cooperation to civil plaintiffs has been satisfactory. “The court in which the civil action is brought is empowered to determine whether the necessary cooperation has occurred.”<sup>60</sup> Such a determination occurs “after considering any appropriate pleadings from the claimant.”<sup>61</sup> Thus, the full scope of the cooperation required by ACPERA will ultimately be defined by the courts, after being informed by the claimants about the sufficiency of cooperation,<sup>62</sup> at the conclusion of litigation – by settlement, trial and appeal.<sup>63</sup>

### 4. ACPERA's Expiration

By the statute's own terms, Sections 211-14 of ACPERA shall cease to have effect five years from the date of its enactment, June 22, 2004.<sup>64</sup> The statute does provide an exception that protects Amnesty Applicants whose case is still pending upon ACPERA's expiration: “[w]ith respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.”<sup>65</sup> Only Section 215 of ACPERA, which increased the maximums in criminal fines and penalties for antitrust violations, will be effective past June 2009.

55 ACPERA cooperation makes civil litigation much more efficient because it defines the contours of the cartel, rather than requiring deductions from discovery about cartels that “operate in secret, and [whose] members usually do not co-operate with investigations of their conduct.” See Organisation for Economic Co-operation and Development, Global Forum on Competition, “Prosecuting Cartels Without Direct Evidence of Agreement”, Sept. 11, 2006 at 18. Cartel “participants understand their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it.” *Id.* at 20. They use “extreme measures to conceal the existence of a cartel, including everything from creating bogus trade associations, the use of code names, and sophisticated ruses to keep general counsel in the dark, to hiding incriminating evidence in the attic of a cartel member's grandparent's home, wholesale document destruction and witness tampering after an investigation begins.” Beating Cartels, *supra* note 4, at 6. Early ACPERA cooperation with civil plaintiffs can even indirectly benefit the remaining co-cartelists, relieving them from defending against an overly broad complaint.

56 See Cong. Rec. at S3614 (Apr. 2, 2004).

57 Civil plaintiffs who find themselves faced with recalcitrant Amnesty Applicants may want to consider naming individuals cooperating with DOJ as defendants. ACPERA's testimony requirements appear to be more stringent for cooperating individuals than for corporations.

58 ACPERA Section 213(b)(3)(A)(i)-(ii).

59 Minute Order (July 7, 2005) *In re Sulfuric Acid Antitrust Litig.*, No. 03 C 4576 (N.D. Ill. July 7, 2005). See I ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 758 (6th ed. 2007).

60 See Cong. Rec. at H3658 (“The power of the court is the same whether the court is a state or federal court and whether the antitrust claims have been brought under state or federal laws”).

61 ACPERA Section 213(b).

62 *Id.* (court will determine whether the Amnesty Defendant “has provided satisfactory cooperation to the claimant with respect to the civil action”).

63 See discussion at page 107, *infra*.

64 *Id.* at Section 211(a).

65 *Id.* at Section 211(b).



### III. ACPERA COOPERATION: TO WHOM?

A threshold question about the Amnesty Applicant's duty to cooperate under ACPERA is: to whom does that duty extend?

The statute answers this question to some degree, stating that a corporate Amnesty Applicant must provide a full account of all potentially relevant facts of which it knows to the "claimant" and furnish all potentially relevant documents "to the civil action."<sup>66</sup> Cooperating individuals must also make themselves available for interviews, deposition or testimony to the "claimant."<sup>67</sup> "Claimant" is statutorily defined as "a person or class" that has brought an action under the Sherman Act or any similar state law (except for a state or its sub-divisions).<sup>68</sup> The Congressional history refers to cooperation being provided to "any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct."<sup>69</sup> Commentators have routinely viewed the statute's protections as applying to private plaintiffs generally who file such civil suits.

The Act itself raises several fundamental definitional issues, however.

Does the "claimant" include those who opt out of a class and pursue a separate action? No court has addressed the topic, but the statutory definition would seem to encompass such opt-out plaintiffs ("opt-out"), even if the opt-out does not identify itself until after proceedings have commenced. What if the civil actions are brought by classes of direct purchasers under federal law and indirect purchasers under state law? Again, although no court has addressed the topic, the statutory definition on its face seems to encompass suits raising state law claims as well.<sup>70</sup>

Both of these definitional issues have practical management considerations. Does the Amnesty Applicant have to provide separate cooperation, for example, to a class of federal claimants, state claimants and multiple individual opt-outs? If one set of claims is filed significantly later than the other, does the obligation of cooperation require duplicate efforts on the part of the Applicant or does the court (or the parties) have the authority to fashion an approach which controls, consolidates and coordinates such cooperation? Such a coordinated approach would seem sensible, particularly if it did not operate to prejudice any of the claimants to whom the obligation is owed.

Another issue arises with respect to the meaning of the civil liability exposure only to "that portion of the actual damages sustained by such claimant that is attributable to the commerce done by the applicant in the good or services affected by the violation."<sup>71</sup> Does this mean the duty of cooperation extends only to plaintiffs or class members who did business with or made purchases from the Amnesty Applicant? Again, the broad definition of "claimant" provided by ACPERA, as well as the inability to sever the effect of one member of a cartel on the entire market, militates against such a narrow construction.<sup>72</sup> Certainly, no such distinctions were drawn by the Amnesty Applicants in cases such as *Sulfuric Acid* or *Air Cargo*. The better approach, and that supported by the limited case law to date, is that the Amnesty Applicant's cooperation inures to the benefit of all plaintiffs and all members of any class, all of whom have a collective and indivisible interest in receiving the benefits of such cooperation.<sup>73</sup>

66 *Id.* at Section 213(a)(1)-(2).

67 *Id.* at Section 213(a)(3)(A)(i).

68 *Id.* at Section 212 (4).

69 Cong. Rec. at S3614 (Apr. 2, 2004).

70 In *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775(J6)(VVP) (E.D.N.Y. June 27, 2006), [hereinafter *Air Cargo*] the Amnesty Applicant has provided cooperation to both direct and indirect purchaser classes. The legislative history also refers to cooperation in state law actions. Cong. Rec. at H3658 (June 2, 2004).

71 ACPERA, Section 213 (a). The duty of cooperation differs substantively from the issue of whether the cooperation from the Applicant can be limited to its purchases. See footnote 44, *supra*.

72 See *Dolphin Tours, Inc. v. Pacifico Creative Servs., Inc.*, 773 F.2d 1506, 1511 (9th Cir.1985) ("Defendants whose illegal conduct operates to exclude others from the relevant market, should not benefit because their wrongdoing makes it more difficult for the plaintiff to establish the precise amount of its injury."); *In re Aluminum Phosphide*, 893 F.Supp. at 1499 ("[C]ausation of injury may be found as a matter of just and reasonable inference from proof of defendants' wrongful acts and their tendency to injure plaintiffs, and from evidence of change in prices not shown to be attributable to other causes."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969) ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.")

73 Of course, the fact that an Amnesty Applicant owes a duty of cooperation to all claimants does not mean that it has an obligation to settle with all claimants. It may choose to litigate defenses to some claims while settling others.

Lastly, cooperation is owed to civil plaintiffs until the conclusion of their lawsuit, accomplished by settlement or trial. In the *Sulfuric Acid Litigation*, civil plaintiffs observed that prematurely joining in a defendant's motion to certify a finding of "satisfactory cooperation" under ACPERA may limit their ability to compel ACPERA cooperation after the court has entered an order certifying the cooperation as satisfactory.<sup>74</sup> Because ACPERA cooperation continues until completion of trial,<sup>75</sup> there should be no prior certification of satisfaction at all until the completion of the trial or until the last defendant has settled with civil plaintiffs and all settlements are final, including appeals.<sup>76</sup>

#### IV. ACPERA COOPERATION: WHEN AND HOW MUCH?

Another critical question under ACPERA involves the timeliness and scope of the obligated cooperation.

One set of commentators has noted that "ACPERA contains little on operating mechanics and governing standards, leaving litigants uncertain about its application and impact on individual cases."<sup>77</sup>

Two other commentators have noted:

Clearly, the supervising judge of the civil action has the key role in determining whether the amnesty candidate has qualified for the benefits of Section 213(a) of the Act, specifically de-trebling of damages and removal of joint and several liability; and the ultimate determination as to the effectiveness of Section 213(a) appears to depend on the court's willingness to undertake the role of arbitrating inevitable disputes over the extent of an applicant's "cooperation." Further, it appears that the civil litigation plaintiff ("claimant") has a role in determining whether the applicant has cooperated enough to be eligible for de-trebling and removal from joint and several liability. Additionally, to the extent a claimant desires to hold an additional defendant fully liable, the claimant may mendaciously oppose a finding of satisfactory cooperation. Obviously, the effectiveness of section 213 will depend on the results of actual cases.<sup>78</sup>

Likewise, in *Air Cargo*, Judge Edward Infante, a retired judge, prepared a report in support of a motion for preliminary approval of an \$85 million settlement with Amnesty Applicant Lufthansa Airlines in which he opined that "ACPERA provides little guidance on the cooperation necessary to limit an Amnesty Applicant's liability under the statute," and noted that the settlement agreement with Lufthansa set forth "the scope of the parties' cooperation obligations with a level of definition that is absent from the ACPERA statute itself."<sup>79</sup> This is because ACPERA describes the tools through which cooperation is to be provided (interviews, depositions, documents, etc.) and the general obligation of such cooperation, but not its specific quantity, frequency or quality. Because the extent of cooperation needed for each antitrust case is necessarily case specific, the drafters of ACPERA wisely left such determinations about sufficiency to the trial court.

74 *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 330 (N.D. Ill. 2005) ("[I]itigants who take one view of the facts and prevail are equitably estopped to assert the opposite later.") Thus, because they had already joined in defendant's motion to certify its ACPERA cooperation as satisfactory, civil plaintiffs were forestalled later from arguing that not producing a witness for deposition was a violation of ACPERA cooperation by the defendant. This is despite the fact that plaintiffs joined in the motion upon the condition of ongoing future cooperation. This forward-looking caveat provided them little protection, and cautious civil plaintiffs would be wise to only seek certification once the case concludes.

75 For instance, an Amnesty Applicant may have produced documents under ACPERA. Without proper authentication, however, the use of such documents may be severely limited at trial. Moreover, civil plaintiffs cannot anticipate what rebuttal witnesses may be necessary at trial. Delaying cooperation certification permits civil plaintiffs to fully utilize an Amnesty Applicant's cooperation.

76 ACPERA expires by its own terms on June 22, 2009. As of May 28, 2009, no new legislation has been presented to replace it and the issue did not come up during the March 10, 2009 confirmation hearings for Christine Varney, President Barack Obama's nominee to be Assistant Attorney General for Antitrust. <<http://web.omm.com/files/upload/ACPERA%20-%20Lasting%20Limits%20Or%20Fleeting%20Experiment.pdf>>.

77 *Clery Gottlieb, Litigation & Arbitration Report*, at 10 (Sept. 2005), available at [http://www.cgsh.com/files/tbl\\_s47Details%5CFileUpload265%5C5049%5CCGSH\\_Cleary\\_Gottlieb\\_Litigation\\_Arbitration\\_Report\\_-\\_Sept\\_05.pdf](http://www.cgsh.com/files/tbl_s47Details%5CFileUpload265%5C5049%5CCGSH_Cleary_Gottlieb_Litigation_Arbitration_Report_-_Sept_05.pdf) (last visited March 24, 2008) [hereinafter CGSH Article].

78 Harrison & Bell, *supra* note 35, at 227, 230 (footnotes omitted). See also Michael Hausfeld, Steig Olson & Seth Gassman, *Antitrust Class Actions: Continued Vitality*, Antitrust Review of the Americas at 73 (2008) (available at [http://www.globalcompetitionreview.com/ara/19\\_classactions.cfm](http://www.globalcompetitionreview.com/ara/19_classactions.cfm)) (last visited March 24, 2008). [hereinafter Hausfeld Article]; CGSH Article, *supra* note 76, at 14.

79 Declaration of Magistrate Judge Edward A. Infante (Ret.), at 9 (July 13, 2007) [hereinafter Infante Declaration], attached as Exhibit 1 to the Declaration of Andrea L. Hertzfeld (July 13, 2007) [hereinafter Hertzfeld Decl.], filed in *Air Cargo*, No. 06-MD-1775(J6)(VVP).

## A. Timeliness of Cooperation

How timely should cooperation be under ACPERA?

An ACPERA Amnesty Applicant's cooperation must be provided in a "timely" fashion. The legislative history emphasizes the materiality of this element. Congressmen in both the House of Representatives and the Senate preconditioned single damages on the provision of such timely ACPERA cooperation to civil plaintiffs. On the Senate side, Senator Hatch stated that "[i]mportantly, the limitation on damages is *only* available to corporations... if they provide *adequate and timely cooperation* . . . to any subsequent private plaintiffs bringing a civil suit."<sup>80</sup> On the House side, Representative Scott stated that the DOJ "will *only* grant such leniency if the company provides *adequate and timely* cooperation to both the government and any subsequent private plaintiffs in civil suits."<sup>81</sup> An Amnesty Applicant has an affirmative obligation under the Act to provide civil plaintiffs with full cooperation (as discussed below) early and continuously until their case is concluded (either through settlement(s) or trial).<sup>82</sup>

However, there is no unanimity on the "triggering events" for the "timely" provision of ACPERA cooperation. For instance, the Act contains no requirement that the Applicant identify itself to the civil claimants. It would be consistent however with the letter and spirit of the Act for claimants to demand and the court to order that in those private antitrust matters which involve an Amnesty Applicant, the Applicant identify itself to the claimants and the court at the earliest practicable time if seeking ACPERA de-trebbling of damages. In litigation involving multiple claims, such disclosure would be appropriate after the entry of a case management order and prior to scheduling the filing of a consolidated complaint. Congress clearly intended that an Amnesty Applicant seeking single damages protection owes civil plaintiffs its cooperation at the point in the case where it can be "adequate[ly] and timely"<sup>83</sup> used by civil plaintiffs. Cooperation in such circumstances, should be provided timely in order to help civil plaintiffs "prepare and pursue" their litigation. This should occur in time to assist civil plaintiffs survive motions to dismiss, file amended complaints, and inform their discovery requests, among other tasks. To hold otherwise would inequitably deprive civil plaintiffs of the intended benefits of cost and time savings of ACPERA cooperation, while permitting the cartelist to attempt to claim the savings of the single damage ceiling.

The obvious corollary of this principle is that cooperation under ACPERA should not necessarily be tied to settlement with civil plaintiffs. Often, the two do go hand in hand. But, as discussed below, that is not uniformly the case. The Amnesty Applicant has no right to insist that its timely cooperation under the statute be contingent upon execution of a successful settlement.

Yet there may be Amnesty Applicants who may not seek the civil damage protection afforded by the Act. In the *TFT-LCD Antitrust Litigation*, the class plaintiffs filed a motion to compel the Amnesty Applicant—believed to be Samsung Electronics Company, Ltd.—to identify itself as the Applicant and provide full cooperation recognized under ACPERA<sup>84</sup> during the pretrial phase of the litigation or forfeit its right to have its civil exposure limited to single damages. Samsung filed a response asserting that the motion was premature, saying it is the Amnesty Applicant who applies to the Court for a reduction of liability and the court should be asked to rule on such a request in light of the cooperation by the Amnesty Applicant over the course of the litigation as a whole and in light of the reasonableness of plaintiffs' demands.<sup>85</sup>

80 Cong. Rec. at S3614 (Apr. 2, 2004) (emphasis added).

81 Cong. Rec. at H3659 (June 2, 2004) (emphasis added). See also Remarks of Rep. Conyers, at Cong. Rec. at H3660 (June 2, 2004) (the DOJ "will *only* grant such leniency if the company provides *adequate and timely* cooperation to both the government and any subsequent private plaintiffs in civil suits") (emphasis added).

82 Most often, a DOJ or other governmental investigation is announced and subsequent private litigants have no way of knowing the identity of the Amnesty Applicant(s).

83 Cong. Rec. at H3659 (June 4, 2004) (emphasis added).

84 See "Direct Purchaser Plaintiffs' Notice of Motion And Motion To Compel The Amnesty Applicant Defendant To Comply With ACPERA Or Forfeit Any Right It May Have To Claim Reduced Civil Liability; Memorandum Of Points And Authorities In Support Thereof" (April 17, 2009), filed in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1826 (N.D. Cal.).

85 See "Samsung Corporation's Memorandum of Points And Authorities In Opposition To Direct Purchaser Plaintiffs' Motion To Compel The Amnesty Applicant Defendant To Comply With ACPERA Or Forfeit Any Right It May Have To Claim Reduced Civil Liability" (May 1, 2009), filed in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1826 (N.D. Cal.).

Interestingly, the DOJ filed a submission in favor of Samsung's position.<sup>86</sup> It agreed that the plaintiffs' motion was premature because the decision to impose treble damages comes at the end of a case and because an Amnesty Applicant may not seek reduced civil damages in a private follow-on civil action. The DOJ also expressed the concern that compelled early disclosure of the identity of the Amnesty Applicant might impede the DOJ's enforcement efforts.

The district court denied the plaintiffs' motion.<sup>87</sup> The Court found no provision in the statute or any case law that would support the plaintiffs' position. It went on to state:

To the contrary, the language of ACPERA suggests that the Court's assessment of an applicant's cooperation occurs at the time of imposing judgment or otherwise determining liability and damages. Plaintiffs argue persuasively that the value of an applicant's cooperation diminishes with time, and they note that plaintiffs are about to embark on significant and costly discovery that, at least in part, could be obviated if the applicant cooperated with plaintiffs. While the Court is mindful of these concerns, and will certainly consider all of these factors if and when an amnesty applicant seeks to limit liability under ACPERA, the Court finds no authority under ACPERA to compel an amnesty applicant to identify itself and cooperate with plaintiffs.<sup>88</sup>

While it is true that the text of the statute might give little guidance, the legislative history cited above, which the court did not discuss, does so. Nonetheless, the court did say it was sympathetic to plaintiffs' concerns and would weigh them in granting any reduction to single damages for the Amnesty Applicant.

The notion advanced in the briefing of this motion that an Amnesty Applicant might not seek reduction of civil liability under ACPERA seems far fetched. However, defense counsel have argued that such a scenario is possible. One defense counsel has remarked: "[t]he motion [by plaintiffs in TFT-LCDs] implies that an amnesty applicant...must acknowledge the violation and cooperate with plaintiffs immediately. That's not the real world....There are all sorts of reasons why an amnesty applicant might want to wait and see how things play out, and in particular to consider whether defending the case is less expensive than cooperating with civil plaintiffs."<sup>89</sup>

Likewise, the argument that disclosure of the identity of the Amnesty Applicant might impede DOJ enforcement is a *non sequitur*. In 2007, the Bank of America promptly disclosed in press releases and SEC filings its amnesty application to the DOJ in connection with the government's investigation of bid-rigging in the municipal derivatives industry. Likewise, in 2009, Tecumseh Products Company disclosed in SEC filings its cooperation with the DOJ with respect to the latter's investigation into the worldwide hermetic compressors cartel. There has been no basis to conclude that these disclosures in any way impeded the government's investigations.

Indeed, the government's position in *LCDs* is at odds with the precepts underlying its own antitrust leniency program. With respect to Type B leniency—leniency sought even after the DOJ has received information about the illegal antitrust activity—the government requires that “[t]he corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation.”<sup>90</sup> Why, if determined not to jeopardize an ongoing investigation, should the requirement be any less as to cooperation with civil plaintiffs under ACPERA?

86 See “United States’ Opposition to Direct Purchaser Plaintiffs’ Motion To Compel the Amnesty Applicant Defendant To Comply With ACPERA Or Forfeit Any Right It May Have To Claim Reduced Civil Liability” (May 1, 2009), filed in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1826 (N.D. Cal.).

87 “Order Denying Direct Purchaser Plaintiffs’ Motion To Compel Amnesty Application Defendant To Comply With ACPERA” (May 19, 2009), filed in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1826 (N.D. Cal.).

88 *Id.* at 3.

89 Evan Hill, “Samsung Cooperation: Now or Never?” *The Recorder* at p.1 (Apr. 22, 2009).

90 Scott D. Hammond & Belinda Barnett, “Frequently Asked Questions Regarding The Antitrust Division’s Leniency Program And Model Leniency Letters” (Nov. 18, 2008) available at <http://www.usdoj.gov/atr/public/criminal/239583.htm>.

Despite the obvious intention of ACPERA to extend a civil benefit as an element of a criminal immunity process, it is not axiomatic that every Amnesty Applicant may always seek that benefit. The Act was designed with the dual purpose of aiding both public enforcement and private restitution. Applicants should not be able to undermine this purpose by accepting the benefit of single damages but treating the obligation as an option which it can accept, reject or delay selecting at its discretion.

Specific consideration should be given to the timeliness of cooperation at different stages of litigation.

### 1. Cooperation and Settlement

Is cooperation dependent on settlement? Can an Applicant truly afford to cooperate before it finalizes its civil exposure even under its statutorily limited liability?

Amnesty Applicants negotiating a settlement face:

a chicken-and-egg problem. How can Amnesty Applicants cooperate with plaintiffs without the protection of a finalized settlement agreement in hand? But how can Amnesty Applicants achieve a settlement agreement based on the liability limitations of ACPERA until they first meet ACPERA's requirements by cooperating?

The seeming circularity will usually be resolved through the same give and take of many other civil antitrust settlement negotiations. Each side will signal its willingness to assent both to the cooperation and to the settlement agreement. For example, these same negotiations occur when cooperation is a part of a settlement agreement outside the ACPERA context: the defendant must assure plaintiffs that the cooperation will be sufficient, but the defendant will not want to fully disclose its cooperation until after the settlement agreement is signed, lest it prematurely give away its bargaining chip. In that same spirit, plaintiffs and Amnesty Applicants will likely be able to come to settlement agreements based on good faith negotiations, using the same mechanisms already present in settlement discussions.<sup>91</sup>

In the *Air Cargo* case, Lufthansa, the Amnesty Applicant, engaged in detailed and substantial cooperation<sup>92</sup> with plaintiffs' counsel prior to the approval of any settlement agreement and prior to the onset of any discovery.<sup>93</sup> Thus, for example, the settlement agreement provided that documents given to investigating authorities had to be made available, and counsel had to provide descriptions of the conduct at issue, commencing ten business days after the execution of the agreement.<sup>94</sup> Likewise, in the *Hydrogen Peroxide Antitrust Litigation*,<sup>95</sup> the Amnesty Applicant, Degussa, provided substantial cooperation in order to assure its entitlement to single damage protection under the Act while simultaneously advancing its probabilities of settlement.

Both of these examples demonstrate that cooperation need not be coupled with nor conditioned on settlement.

### 2. Pre-Filing

Does "timely" mean once a civil suit is filed or even before? Or does it mean once a civil suit is filed and a leadership organization for the putative settlement class is selected? While

<sup>91</sup> CGSH Article, *supra* note 76, at 14.

<sup>92</sup> Cooperation under the Lufthansa agreement was provided 10 days after execution of the settlement agreement and over a year and a half prior to preliminary approval papers were entered by the court.

<sup>93</sup> Infante Declaration at 10.

<sup>94</sup> Hertzfeld Decl., Exh. 2 at Paragraphs 54(g), (j).

<sup>95</sup> *In re Hydrogen Peroxide Antitrust Litig.*, MDL No. 1682 (E.D. Pa., filed Feb. 11, 2005).

“timely” can certainly be defined differently by either the recipient or the provider of the cooperation, the legislative history sheds some light on its meaning. “[T]he legislation *requires* the Amnesty Applicant to provide *full cooperation* to the victims as they *prepare and pursue* their civil lawsuit.”<sup>96</sup> Senator Hatch’s use of the words “prepare and pursue” would seem to indicate that an Amnesty Applicant was obligated to cooperate early as the case is being prepared and continuously as the case is being litigated.<sup>97</sup> Two recent litigations provide practical illustrations of how and when timeliness may be triggered.

In a recently filed lawsuit involving bid rigging of municipal derivatives, Bank of America acknowledged that:<sup>98</sup>

Plaintiffs and Defendant Bank of America have engaged in confidential discussions about some of the facts and circumstances detailed in this Complaint over the last eight months in the context of a settlement process, including a number of sessions overseen by the Honorable Daniel Weinstein (Ret.) of JAMS. Judge Weinstein is one of the nation’s preeminent mediators of complex civil disputes. These discussions have been conducted pursuant to, among other things, an agreement that requires full and timely cooperation by Defendant Bank of America, which has been received. The information contained in this Complaint comes in part from information obtained from Defendant Bank of America and in part from publicly-available information, including regulatory filings.<sup>99</sup>

Even in this case, however, the cooperation that the Bank of America was able to provide was limited by what the DOJ allowed it to disclose, with the result that a consolidated amended complaint was dismissed with leave to replead, with the court saying that more defendants could be added back in, once the bank was able to provide discovery about their participation in the alleged conspiracy.<sup>100</sup>

Similarly, after the filing of multiple suits, Lufthansa provided cooperation prior to the filing of a consolidated amended complaint. As noted earlier,<sup>101</sup> this initial cooperation allowed “claimants” to assert their claims with greater specificity and clarity than they otherwise could have been able to do. It allowed the fashioning of a complaint that focused on the evidence for which Lufthansa received amnesty for its participation in a revealed conspiracy. In both of these instances, provision of early ACPERA cooperation accomplished one of ACPERA’s principal goals: to “reduce the cost for victims to recover the damages they suffer from criminal antitrust conspiracies.”<sup>102</sup>

The timing of cooperation, even with a willing Applicant, can be effected by other factors unrelated to the actual parties to the civil litigation. Some cases have delayed ACPERA cooperation obligations due to stays sought by the DOJ or otherwise imposed by the presiding court.<sup>103</sup> Such delays may be inevitable due to the legitimate public enforcement needs.

<sup>96</sup> Cong. Rec. at S3614 (Apr. 2, 2004) (emphasis added).

<sup>97</sup> Statements on the floor by the committee member in charge of the bill [Senator Hatch; Representative Sensenbrenner] “are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports.” 2A SUTHERLAND ON STATUTORY CONSTRUCTION §48.14 at 220 (4th ed. 1973); Me. Pub. Utils. Comm’n v. FERC, 454 F.3d 278, 282 (D.C. Cir. 2006) (“the court applies the traditional tools of statutory interpretation in determining congressional intent, looking to the text, structure, purpose, and legislative history of a statute.”) *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110 (2d Cir. 2000) (noting the “sponsor/floor manager statement” as an “authoritative and reliable” source of legislative history); *See also Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 611 n.4 (1991) (“[c]ommon sense suggests that inquiry benefits from reviewing additional information rather than from ignoring it”); *U.S. v. Am. Trucking Ass’n., Inc.*, 310 U.S. 534, 543-544 (1940) (“when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination’” (footnote omitted)); *U.S. v. Fisher*, 2 Cranch 358, 386 (1805) (“where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived”).

<sup>98</sup> It remains to be determined what percentage of members of the proposed class are actually owed ACPERA cooperation. See ACPERA, §212(4).

<sup>99</sup> Class Action Complaint at 2, *Fairfax County v. Bank of Am.*, No. 1:08-cv-0433 (D.D.C. March 12, 2008). *See In re Municipal Derivatives Antitrust Litigation*, 232 F.R.D. 184, 185-87 (S.D.N.Y. 2008) (court discussed benefits of obtaining cooperation with the Bank of America in deciding whom to appoint as interim class counsel). While Bank of America may not statutorily owe ACPERA cooperation to municipalities or states, it signed an agreement obligating itself to provide “ACPERA cooperation” to such municipalities and states.

<sup>100</sup> *See* “Decision And Order” (Apr. 30, 2009) in *In re Municipal Derivatives Antitrust Litig.*, MDL No. 1950 (S.D.N.Y.).

<sup>101</sup> *See* note 82 and accompanying text, *supra*.

<sup>102</sup> *See* An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program Scott Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dept’t of Justice, 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.htm>).

<sup>103</sup> The recognition of legitimate governmental needs in private enforcement proceedings is examined *infra* at Section V.

However, if there is a showing that no prejudice results from a necessary coordination of public and private enforcement, completion of defined stages of public enforcement should not delay an earlier performance of cooperation to civil litigants.<sup>104</sup>

### 3. Motion To Dismiss Prior to Commencement of Discovery

Ever since the Supreme Court's decision in *Twombly*, defendants in price fixing cartels have sought mechanical refuge in the decisions language of "plausibility." Seemingly without reflection, horizontal price fixing complaints are routinely met with motions to dismiss on the grounds of conspiratorial implausibility.<sup>105</sup> If the cartel includes an Amnesty Applicant, does ACPERA's obligation of cooperation require the Applicant to disclose the facts of the cartel as revealed to the DOJ so that the court is apprised of all information which must inform its decision on plausibility?

An Applicant's admission into the DOJ leniency program should alone be sufficient to establish that a similarly based complaint raises "enough fact to raise a reasonable expectation that discovery will reveal evidence of [a plausible] illegal agreement".

Unquestionably, an Applicant's obligation to provide must be triggered by the filing of a "Twombly motion." If not offered prior to such a filing, the Applicant should be required to provide the factual "context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action" to civil plaintiffs to include in their response.<sup>106</sup> Such cooperation would remove most ambiguity that the challenged conspiracy was just as "much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" would be the genesis of an expensive and protracted antitrust case.<sup>107</sup> In fact, in light of an amnesty application to the DOJ and its explicit and implicit admissions,<sup>108</sup> the Supreme Court's concerns that an "implausible" conspiracy claim could involve the judicial system and the defendants in an unjustifiably expensive and protracted antitrust litigation evaporates.<sup>109</sup> The existence of an Amnesty Applicant in a criminal investigation as to the same conspiracy alleged in civil proceedings should mandate the denial of the vast majority of *Twombly* motions.<sup>110</sup>

### 4. Class Certification

What cooperation obligations are owed by an Amnesty Applicant at the time of class certification?

The reality of routine class treatment of antitrust claims is specifically anticipated by the terms of ACPERA. First, the definition of a claimant under the act, to whom the duty of cooperation is owed, explicitly includes a "class," on "whose behalf [a civil action] has been brought."<sup>111</sup> Thus, the duty of cooperation, described in Section 213(b) as being owed to the "claimant," is, by its terms, extended to class members and the specifics of their civil action. Second, the satisfactory nature of cooperation, "with respect to the civil action" as a whole. Therefore, a duty of cooperation must be triggered by the time of class certification and in fact, is owed to the class of victims it injured.

104 An ACPERA Amnesty Applicant's answer to the complaint that denies facts that are the foundation of its leniency agreement represents a failure to provide a "full account" of all "potentially relevant facts" required by ACPERA. Certainly, such denials could be later submitted to the court as evidence of lack of cooperation with civil plaintiffs under Section 213(b), endangering single damages protection. Thus, an answer to a civil complaint would clearly appear to be a triggering event for the commencement of ACPERA cooperation.

105 Indeed, in an opinion issued just two weeks after *Twombly*, *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), the Court, citing *Twombly*, reaffirmed "the liberal pleading standards set forth by Rule 8(a)(2)" and held that "[s]pecific facts are not necessary" at the pleading stage. See *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (holding "[s]pecific facts are not necessary" at the pleading stage, and citing *Twombly*). Accord *Twombly*, 127 S. Ct. at 1973 n.14 ("Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized]'; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.") (internal citation omitted); *Arista Records, LLC v. Does 1-27*, 2008 U.S. Dist. LEXIS 6241 (D. Me. Jan. 25, 2008) (Kravchuk, M.J.) ("Nothing in *Twombly* forbids lower courts from drawing inferences or accepting conclusory recitations as true for purposes of a motion to dismiss so long as the factual content that is supplied in the complaint demonstrates the plausibility of any necessary inferences").

106 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1966 (2007).

107 *Id.* at 1964.

108 See fn. 17.

109 *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir.1998) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,

588 (1986)).

110 See *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH) 2000 U.S. Dist. LEXIS 7397, at \*77 (D.D.C. 2000) (denying defendants' motion to sever based on the terms of their negotiated criminal pleas because "criminal guilty please do not establish boundaries for this civil litigation").

111 ACPERA, Section 212(4).

## B. Breadth & Adequacy of Cooperation

### 1. Breadth of cooperation.

How extensive is the obligation of cooperation under the Act?

Both the language of ACPERA and its legislative history emphasize that Congress anticipated that Amnesty Applicants must provide civil plaintiffs with cooperation that extends beyond that required under the current federal discovery rules.

First, ACPERA requires that an Amnesty Applicant provide comprehensive and fulsome facts and documents to civil plaintiffs regarding its conduct: a “full account” of “all facts” is required as well as the production of “all documents” that are “potentially relevant to the civil action.”<sup>112</sup> Congress did not limit the provision of such facts or documents to a subset of information or topics.<sup>113</sup>

Despite explicit language to the contrary, some defense counsel nonetheless attempt to limit or restrict ACPERA cooperation to “merits,” or “just what was proffered to the DOJ,” or “all non-jurisdictional facts,” or “only the facts contained within the leniency agreement.” However, the text of ACPERA is clear regarding the intended breadth of cooperation: an ACPERA Amnesty Applicant must disclose “all facts” and “all documents” that are “potentially relevant to the civil action.”<sup>114</sup>

Second, ACPERA focuses on “potentially relevant” facts and documents needed to be provided to civil plaintiffs.<sup>115</sup> The inclusion of the modifier “potentially” creates a discovery requirement *broader* both in scope and in reach than that allowed by the Federal Rules of Civil Procedure, which reaches only “relevant” documents. The Committee Report explicitly states that ACPERA’s “use of the term ‘potentially relevant’ is intended to preclude a parsimonious view of the facts or documents to which a claimant is entitled.”<sup>116</sup> Indeed, this comports with recent interpretations generally of discovery obligations in antitrust cases.<sup>117, 118</sup>

Third, ACPERA requires that a corporate Amnesty Applicant use its “best efforts” to secure testimony of individuals “covered by the [leniency] agreement.”<sup>119</sup> Although no court has as yet defined this provision, its language imposes a higher degree of cooperation than mere “reasonable

112 ACPERA Section 213(b)(1)-(2).

113 Occasionally, an Amnesty Applicant seeks to limit its cooperation under ACPERA by contending that a portion of its conduct was immunized or beyond the jurisdictional reach of U.S. courts. The propriety of such an attempted limitation has not yet been litigated.

114 *Id.*

115 *Id.*

116 See Cong. Rec. H3658 (June 2, 2004).

117 Courts presiding over antitrust cases generally take a liberal view of relevance in determining the scope of discovery. See *New Park Entertainment, LLC v. Elec. Factory Concerns, Inc.*, No. Civ. A. 98-775, 2000 WL 62315, at \*3 (E.D.Pa. Jan.13, 2000) (internal quotations omitted) *Accord In re Potash Antitrust Litig.*, No. 3-93-197, 1994 WL 1108312, at \*14 n.20 (D.Minn. Dec. 5, 1994) (“[t]he Courts have traditionally allowed liberal discovery, particularly when there are allegations of conspiracy and where ‘broad discovery may be needed to uncover evidence of invidious design, pattern or intent.’”)

118 The DOJ has recognized that “[i]nternational borders can not serve as barriers to our ability to investigate. There can be no safe harbors from which cartel members can operate.” Beating Cartels, *supra* note 4, at 2. The Deputy Assistant Attorney General of Criminal Enforcement was even more specific when he stated: “[w]e must gain access to subjects, evidence and witnesses that are located outside our borders.” *Id.* “The fact that the United States is the relevant market in this case does not necessarily limit discovery to the United States...A general policy of allowing liberal discovery in antitrust cases’ has been observed by this Court because ‘broad discovery may be needed to uncover evidence of invidious design, pattern, or intent.’” (*U.S. v. Densply Int'l, Inc.*, No. Civ. A-99-5 MMS, 2000 WL 654286, at \*5 (D. Del. May 10, 2000)). For this reason, the scope of document production in antitrust litigation is often quite expensive. See *In re Automotive Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 494-96 (E.D. Pa. 2005) (subpoena allowed against Belgian trade association); *In re Plastics Additives Antitrust Litig.*, No. 03-2038, 2004 WL 2743591 at \*13-14 (E.D. Pa. Nov. 29, 2004) (court allowed discovery of materials produced to foreign antitrust regulatory bodies); *In re Vitamins Antitrust Litig.*, 2000 U.S. Dist. LEXIS 7397 (D.D.C. 2000) (court considered the context of specific discovery requests in order to determine if jurisdictional discovery against foreign defendants proceeded under the Federal Rules of Civil Procedure, rather than the Hague Convention); *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2001 WL 1049433, at \*11-12 (D.D.C. June 20, 2001) (refusing to place geographic limitation on merits-based discovery in global price-fixing case because acts or communications outside the United States may be admissible to establish existence of conspiracy); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 818 (3d Cir. 1982) (no abuse of discretion where trial court permitted taking of 270 depositions and production of nearly two million documents in complex, nationwide antitrust claim); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997) (pretrial discovery involved more than 1,000 depositions and over fifty million pages of documents); *In re Linerboard Antitrust Litig.*, 296 F.Supp.2d 568, 577 (E.D. Pa. 2003) (pretrial discovery required production of millions of pages of documents).

119 ACPERA Sections 213(b)(3)(B).



efforts.<sup>120</sup> The best efforts called for in the context of ACPERA could reasonably include making every available effort to ensure that an Amnesty Applicant's employees and officers provide cooperation to private plaintiffs.<sup>121</sup> A cooperating Amnesty Applicant may, for example, be required to pay for individuals' counsel or otherwise pay expenses of those individuals cooperating with civil plaintiffs if such payment would encourage their cooperation. If these individuals choose not to cooperate (either because they are retired, based abroad, or they take the Fifth Amendment), such non-participation should be weighed by the court in determining whether they have provided satisfactory cooperation to civil plaintiffs.

This is not a radical or unfair position. With regard to a corporation's entry into the DOJ's leniency program, for example, "the number and significance of the individuals who fail to cooperate, and the steps taken by the company to secure their cooperation, are relevant in the Division's determination as to whether the corporation's cooperation is truly 'full, continuing and complete.'<sup>122</sup> Similarly, the number and significance of individuals who fail to cooperate should also be relevant to the court's evaluation of an ACPERA Amnesty Applicant's cooperation with civil plaintiffs.<sup>123</sup> If however, such a failure results despite the actual best efforts of the Amnesty Applicant, the failure of the individual cannot and should not be attributed to the corporation. Practical solutions are available to distinguish the consequences of such a situation and should provide for the corporate retention of Amnesty benefits while removing those benefits only as to the truly recalcitrant individual.<sup>124</sup>

## 2. Substantial Nature of Cooperation

How material must the Amnesty Applicant's cooperation be under ACPERA?

The cooperation owed by an Amnesty Applicant was designed to be "substantial."<sup>125</sup> The quality of cooperative information was the price for protection from joint and several treble damages, which often constitutes hundreds of millions of dollars. Under ACPERA, "to qualify for amnesty, a party must provide substantial cooperation . . . in any civil case brought by private parties that is based on the same unlawful conduct."<sup>126</sup> The enormous savings provided by detrebbling dwarfs any associated costs of providing cooperation by an Amnesty Defendant. Indeed, the legal expenses and costs to the corporation associated with providing such substantial cooperation, even if required through trial, would rarely approach a defendant's damage exposure for joint and several treble damages.

At a minimum, such cooperation to civil plaintiffs would appear to include: (a) a detailed account of all known facts<sup>127</sup> relevant to the litigation through interviews with current and former

120 Unfortunately, it seems probable that courts will also have to grapple with the meaning of "best efforts." Some counsel seem to think that merely extending the request to cooperate with civil plaintiffs – and no more – to former employees will satisfy this obligation. Cursory review of analogous case law shows that the standard for "best efforts" will not be that lightly interpreted. See, e.g., E. Allan Farnsworth, *On Trying to Keep One's Promise: The Duty of Best Efforts In Contract Law*, 46 U. Pitt. L. Rev. 1, 8 (1984) ("courts sometimes confuse the standard of best efforts with that of good faith . . . . Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting").

121 *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 652 (5th Cir.1999) (employment case; "Best efforts" means "such efforts as are reasonable in the light of that party's ability and the means at its disposal and of the other party's justifiable expectations").

122 See *Making an Offer*, *supra* note 31, at 4.

123 Other international antitrust enforcement authorities have adopted similar approaches with respect to an Amnesty Applicant's duty to cooperate with investigating authorities. Under the EC's 2006 Notice on Immunity from Fines and Reductions of Fines in Cartel Cases (which replaced earlier policies from 1996 and 2002), the undertaking seeking leniency must cooperate "genuinely, fully and on a continuous basis"; the EC spells out the requirements of such full cooperation in great detail. See Europa Press Release, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006/C 298/11, 2006 O.J. (C298) 17, Paragraphs 9, 12 (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>). The U.K.'s Office of Fair Trading issued a leniency policy in 2000 OFT's Guidance As to the Appropriate Amount of a Penalty, Office of Fair Trading (2004) (available at [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft423.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf)) (last visited March 24, 2008), which it updated in 2005 and 2006 with a guidance on Leniency and No-Action, Office of Fair Trading (2006) (available at [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft803a.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft803a.pdf)) (last visited March 24, 2008). The latter refers to the applicant's "continuous and complete duty of cooperation."

124 For example, in the *Hydrogen Peroxide* litigation, counsel anticipated recalcitrant former employees and drafted the settlement agreement accordingly. Thus, individuals (whose right to assert the Fifth Amendment was preserved in the settlement agreement) were only able to "obtain the benefits of the Release contained in this Agreement if they cooperate with Plaintiffs...."

125 Cong. Rec., at S3615 (Apr. 2, 2004).

126 *Id.*

127 For a price-fixing case, such facts should at least include: a description of the specific product that was fixed, including the dynamics of the market for it; specific mechanism of how the prices were fixed, including frequency; the identity of the primary actors that effectuated the price fix, including those of its co-cartelists; the dates, times and methods of communication between the co-cartelists; the effect of the price fix; the time period of the price fix; and the geographical scope of the price fix.

employees<sup>128</sup> and outside counsel; (b) production of all potentially relevant documents and data; (c) production and explanation of transactional data; (d) industry and merits witnesses for deposition; (e) discovery responses (*e.g.*, interrogatories or requests to admit);<sup>129</sup> (f) agreement to provide factual proffers as often as is reasonable and necessary to support plaintiffs' prosecution of the action;<sup>130</sup> (g) provision of means to authenticate an Amnesty Applicant's documents if needed at trial (via stipulation or testimony); and (h) access to and provision of witnesses if needed for trial.

ACPERA's substantial civil damage limitation must be achieved the "old fashioned way," by earning it.

### 3. Case Studies of Cooperation

The obligation of an Amnesty Applicant to cooperate under ACPERA has had differing results.

In *Sulfuric Acid*, the two Amnesty Applicants: (a) provided plaintiffs "with a detailed account of all known facts relevant to the litigation" through interviews with current employees, former employees and outside counsel; (b) furnished plaintiffs with 35,000 pages of documents; (c) furnished plaintiffs with interrogatory responses; (d) provided plaintiffs with "numerous documents and information" regarding the DOJ's investigation of the sulfuric acid industry; and (e) "used their best efforts to locate witnesses with knowledge of the factual underpinnings of this litigation."<sup>131</sup> This cooperation commenced shortly after the defendants were named as parties.

Similarly, in *Air Cargo*, Lufthansa provided attorney proffers in advance of submission of any settlement for court approval. The settlement agreement required it to, *inter alia*: (a) provide current and former officers, directors and employees knowledgeable about the DOJ investigation into the airline industry and/or having knowledge of relevant facts for interviews, conferences, testimony, document authentication and declarations; (b) production of transactional and substantive documents, including documents produced to the DOJ; and (c) provide proffers relating to the conduct at issue and eventually to meet as often as is reasonable and necessary to support plaintiffs' prosecution of the actions.<sup>132</sup> As Judge Infante noted in *Air Cargo*, "[c]lass members have already received some of the benefit of the information provided by Lufthansa. This is clearly reflected in the recently-filed First Amended Consolidated Complaint, which substantially expands on the inner workings of the antitrust law violations at issue. As a further result of the information provided by Lufthansa, new parties were added and unnecessary defendants were removed."<sup>133</sup>

And in *Hydrogen Peroxide*, Degussa, the Amnesty Applicant met with plaintiffs' counsel prior to class certification, made multiple evidentiary proffers, and provided documents and interviews that were quite valuable in shaping the claims in the case.<sup>134</sup>

There are contrary experiences, however. In the *Urethanes Antitrust Litigation*,<sup>135</sup> for example, defendant Chemtura Corporation unilaterally decided that its obligation of cooperation could be satisfied by: (a) providing a full account of the alleged conspiracy at the commencement of merits discovery, (b) producing documents given to the DOJ at the commencement of class certification discovery; and (c) making some effort to procure the cooperation of two former

128 Under ACPERA, an Amnesty Applicant is obligated to use its "best efforts to secure and facilitate" cooperation from individuals covered by the leniency agreement. ACPERA, Section 213(b)(3)(B).

129 See Cong. Rec. H3658 (June 2, 2004) ("[r]ecognizing that there are discovery tools that plaintiffs can use in discovery of entities, this section is intended to require cooperation of entities in such discovery").

130 ACPERA, Section 213(b)(1) (ACPERA requires "a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action").

131 Marsulex Brief, p. 6.

132 Infante Declaration, *supra* note 78, at 5-6.

133 Infante Declaration, *supra* note 78, at 9.

134 Memorandum of Law in Support of Direct Purchaser Class Plaintiffs' Unopposed Motion for Final Approval of Proposed Settlement with Degussa Corp., *In re Hydrogen Peroxide Antitrust Litig.*, No. 05-666 (E.D. Pa. Nov. 2, 2007).

135 *In re Urethanes Antitrust Litig.*, MDL No. 1616, 2008 WL 696244 (D. Kan. March 13, 2008).

employees. In mid-litigation, it sought a judicial determination that it had satisfied its ACPERA obligations even though the cooperation contemplated by the statute is an ongoing one that spans the entirety of the follow-on civil litigation.<sup>136</sup>

In the *Publication Paper Antitrust Litigation*,<sup>137</sup> the Amnesty Applicant, UPM-Kymmene Corporation, delayed its cooperation substantially, asserting that it did not want to do anything that would cause it to run afoul of EC authorities, who were conducting a parallel investigation. A similar issue arose in the *Automotive Paint Refinishing Antitrust Litigation*,<sup>138</sup> when the Amnesty Applicant took the position that it would provide no cooperation under ACPERA until a parallel EC investigation was closed and any appeals were exhausted.<sup>139</sup>

Finally, in matters involving global cartels, foreign investigations may impede domestic statutory obligations. Cooperation with private plaintiffs required under ACPERA is sometimes delayed based on the excuse of a parallel EC investigation.<sup>140</sup> The EC's involvement in U.S. private antitrust actions contradicts U.S. policy with respect to Amnesty Applicants. It appears that the EC is using the threat of revocation of amnesty if the Amnesty Applicant for example, discloses the EC's statement of objections to a cartel.<sup>141</sup> The basis for the EC's authority to do so is unclear, since the policy reason behind protecting the investigatory process is to keep confidential that information that is not known to the other accused cartelists. The EC's Statement of Objections, however, is routinely made available to every named company. Arguably, there is a denial of due process to the civil plaintiffs who are precluded from obtaining that information while the defendants, including the Amnesty Applicant, are in possession of it.<sup>142</sup>

## V. ACPERA'S INTERSECTION WITH CIVIL AND CRIMINAL PROCEEDINGS

Delayed cooperation resulting from the pendency of public enforcement proceedings raises concerns about the integration of public and private antitrust enforcement.

### A. DOJ Investigations

Compliance with the requirements of ACPERA may intersect with an Amnesty Applicant's obligations to the DOJ. For example, if the DOJ begins an investigation, when should an Amnesty Applicant begin cooperation with civil plaintiffs? What happens to cooperation under ACPERA if the government investigation leads to no prosecution? Courts, litigants, and the DOJ are still mapping out what to do in these circumstances. While civil plaintiffs have a right to cooperation as soon as possible, the DOJ may legitimately need to delay the start of such cooperation in order to protect its ongoing investigation.

Anticipating this intersection, Section 214(1) of ACPERA holds that nothing in ACPERA shall be construed to "affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement."

136 See Motion for Leave to File Under Seal Chemtura's Motion For a Finding of 'Satisfactory Cooperation' And Limitation of Damages Pursuant To The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 20, 2007); *In re Urethanes Antitrust Litig.*, 2008 WL 696244, No. 04-1616-JWL (D. Kan. March 13, 2008). The motion was not ruled on because Chemtura soon settled.

137 *In re Publ'n Paper Antitrust Litig.*, 346 F. Supp. 2d 1370 (D. Conn. 2004).

138 *Automotive Paint*, 229 F.R.D. 482.

139 Foreign blocking statutes can also potentially impose an obstacle. See, e.g., *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 480 F.Supp. 1138, 1148 (N.D. Ill. 1979).

140 In a Notice of Correspondence from the European Commission (Dec. 11, 2006), filed *In re Methyl Methacrylate (MMA) Antitrust Litig.*, No. 06-md-1768 (E.D. Pa.), the Director of Anti-Cartel Enforcement at the EC's Directorate General for Competition took the positions that admissions of cartel activity to the EC should not be used to seek damages in other allegedly unaffected jurisdictions.

141 The statement of objections is a statement that is distributed to all potential targets of the investigation so that each accused cartelist knows that information proffered by the EC.

142 See generally *Schad v. Ariz.*, 501 U.S. 624, 637 (1991) (the concept of due process demands fundamental fairness and rationality that is an essential component of that fairness); *Quill Corp. v. N.D. Bay and Through Heitkamp*, 504 U.S. 298, 312 (1992) ("[d]ue process centrally concerns the fundamental fairness of governmental activity").

Courts have taken differing approaches on this issue, as reflected in several recent decisions from the federal district court in the Northern District of California. In the *SRAM Antitrust Litigation*, the court ordered immediate production of documents produced to the federal grand jury in the ongoing parallel criminal investigation.<sup>143</sup> In the *DRAM Antitrust Litigation*, the court, in response to the DOJ's request (and prior to ACPERA), stayed depositions on the merits, but allowed production of grand jury documents.<sup>144</sup> In the *TFT-LCD Antitrust Litigation*, however, the court, again at the DOJ's request, stayed all merits discovery, including documentary discovery.<sup>145</sup> Other cases have taken a similar approach.<sup>146</sup>

However, civil plaintiffs could propose a hybrid cooperation – a form of cooperation less than required under ACPERA but more than would be permitted under a stay – until the DOJ concludes its investigation or prosecution, and then seek full ACPERA cooperation only after that juncture. Possible aspects of such a compromise could include: (a) proffers by and interviews of an Amnesty Applicant, which the DOJ would not oppose; (b) production of materials produced by the Amnesty Applicant to the DOJ under a suitable confidentiality agreement; (c) no stay of discovery being sought by the DOJ that would encompass matters relating to personal jurisdiction or maintenance of records; (d) no limitations on third-party discovery; and (e) the DOJ advising the relevant court that an Amnesty Applicant exists and has informed the agency of conspiratorial conduct consistent with plaintiffs' allegations. Such a compromise would permit civil plaintiffs to prepare and pursue their case<sup>147</sup> while preserving the ability of the DOJ to investigate and criminally prosecute the cartel.

## B. Foreign Antitrust Enforcement

Likewise, due to the international nature of some cartels, some defendants may be faced with the competing aspects and requirements of the U.S. and European Union leniency programs. If an Amnesty Applicant is prohibited by the E.C. from disclosing potentially relevant facts or documents to the civil plaintiffs in the U.S., should that same Amnesty Applicant be permitted to qualify for ACPERA single damages protection? If a civil plaintiff files, prepares, and litigates its case without the benefit of such cooperation, it seems inequitable to permit an Amnesty Applicant to claim at the end of the litigation less than valuable cooperation (that a civil plaintiff has taken the time, expense and effort to already gather on its own) in exchange for single damages savings. Courts will need to determine similar scenarios whether delayed or partial cooperation by global cartelists qualifies under ACPERA.

In *Publication Paper* for example, parallel governmental investigations are ongoing, in both the U.S. and elsewhere (such as the EC), the Amnesty Applicant may feel that its cooperation should be deferred until the foreign investigation is completed or it may even be told by foreign regulators that it may not cooperate until the foreign investigation has run its course. This creates a clear conflict for an Applicant. In light of recent decisions unequivocally ordering the production of foreign documents, the Applicant is directed to provide information "wherever" it is located.<sup>148</sup> Yet if it does, it may be penalized for doing so in the parallel foreign proceedings. The legislative history of the Act makes clear that these "[d]ocuments or other items in the applicant's possession, custody or control

143 Supplemental Case Management Order No. 1 (June 21, 2007) in *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C 07-1819 (N.D. Cal.).

144 Stipulation & Order Limiting the Scope of Discovery, (Apr. 16, 2003) *In re Dynamic Random Access (DRAM) Antitrust Litig.*, No. MDL C-02-1486 PJH (N.D. Cal.).

145 *In re TFT-LCD Antitrust Litig.*, No. M-07-1827 SI, 2007 WL 2782951 (N.D. Cal. Sept. 27, 2007). For the DOJ's viewpoint on this intersection, see Niall E. Lynch, *PARALLEL PROCEEDINGS: THE GOVERNMENT PERSPECTIVE*, ABA SECTION OF ANTITRUST LAW 51ST ANNUAL SPRING MEETING COURSE MATERIALS 455 (Apr. 3, 2003).

146 See, e.g., "Stipulation And Order for Limited Discovery Stay" (Sept. 12, 2008), filed in *In re Cathode Ray Tubes (CRT) Antitrust Litig.*, MDL No. 1917 (N.D. Ca.); Order of April 20, 2009 in *In re Aftermarket Automotive Lighting Antitrust Litig.*, No. 09-MJ-2007 (C.D. Cal.); "Order Granting Motion of United States To Intervene And Stay Discovery" (Oct. 24, 2008) in *Albee v. Korean Air Lines Co., Ltd.*, MDL No. 1891 (C.D. Cal.). See also "Order No. 4" (Feb. 18, 2009) in *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ (W.D. Wash.).

147 See, e.g., *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F.Supp.2d 573, 575 (S.D.N.Y. 2000) (concluding that "it would be perverse if plaintiffs who claim to be the victims of criminal activity were to receive slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities"). It is "only through the discovery procedure that a plaintiff can determine the merit (or lack of merit) in his [or her] case and develop the strategy which will guide him [or her] throughout the litigation." *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980). See also *In re Residential Doors Antitrust Litig.*, 900 F.Supp. 749, 756 (E.D. Pa. 1995) (rejecting argument that discovery can be stayed without prejudice to plaintiffs until completion of government's criminal investigation of unspecified others at unknown future date).

148 ACPERA, Section 213.

[are to] be produced even if they are arguably located outside the jurisdiction of the U.S. courts.<sup>149</sup> No courts, however, have as yet resolved this issue.<sup>150</sup>

Foreign corporate Amnesty Applicants (or foreign parents of U.S. Amnesty Applicants) may present additional complexities. For instance, a foreign Amnesty Applicant may move to dismiss a civil case for lack of personal jurisdiction. This may be a first signal of non-cooperation under ACPERA. Since the Applicant has presumably already consented to the jurisdiction of the U.S. Department of Justice, in the criminal context if it resists a U.S. court's civil jurisdiction, a foreign Amnesty Applicant is arguably not satisfying its duty under the Leniency Program to make restitution to injured parties. Similarly, civil plaintiffs could request that a cooperating foreign Amnesty Applicant not resist service or insist on service of discovery under the cumbersome Hague Convention procedures.<sup>151</sup>

## VI. CONCLUSION

Leniency programs have dramatically altered the landscape of criminal antitrust enforcement, both in and outside the United States. The program implemented by the DOJ not only pioneered the field in the context of criminal accountability, it is the only system in place currently that provides civil incentives to enhance its effectiveness. Within the DOJ system, an Applicant can achieve criminal peace and unprecedented civil damage limitation. That benefit however has a price – timely and full cooperation with civil claimants in order to restore market integrity and promptly retribute damages caused by its conduct.

ACPERA is a powerful tool in reshaping both public and private cartel enforcement. Its obligations are equally powerful and should be imposed accordingly. Application of the obligation should not be without exception. But exceptions should be extended only for reasons and on terms or conditions which do not diminish, detract or defeat the letter and/or spirit of the Act.

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149 Cong. Rec. at H3658 (June 2, 2004).

150 U.S. courts have faced issues of blocking disclosure of leniency materials submitted to foreign antitrust regulatory authorities and the results have been mixed. *Compare In re Rubber Chem. Antitrust Litig.*, 484 F.Supp.2d 1078, 1080-84 (N.D. Cal. 2007) (denying access to leniency materials provided to EC) *with* Memorandum Opinion Re Bioproducts' Rule 53 Objection (Dec. 18, 2002) in *In re Vitamins Antitrust Litig.*, 2000 U.S. Dist. LEXIS 7397 (permitting discovery of EC submission and communications with Canadian enforcement authorities).

151 The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: 23 UST 2555; TIAS 7444; 847 UNTS 231; 28 USCA 1782 (1975 Cum. Supp.); 28 USCA 1781 (Supp. 1979); 81 LM 37 (1969).