THE CASE FOR ELIMINATING ACPERA'S SUPPLEMENTAL COOPERATION REQUIREMENT FOR AMNESTY APPLICANTS

Michael W. Scarborough and Dylan I. Ballard[★]

I. INTRODUCTION

The U.S. Department of Justice Antitrust Division's corporate leniency program (also referred to colloquially as the "amnesty program") is rooted in the premise that effective deterrence, detection, and prosecution of antitrust conspiracies fundamentally depends on the willingness of corporate violators to break ranks and cooperate with the government. To encourage such cooperation, the amnesty program offers a straightforward bargain to the first violator to come forward with evidence of a conspiracy: provide the Division with complete cooperation and receive automatic protection from federal criminal prosecution. This relatively simple scheme—*absolute* cooperation in exchange for *absolute* criminal amnesty—has been credited as a primary driver of the dramatic increase in antitrust fines collected in recent years, and has been hailed by the Division as "the single greatest investigative tool available to anti-cartel enforcers."[1] Indeed, the Division reports that *90 percent* of the roughly $5 billion in criminal fines it has collected since 1996 is "tied to investigations assisted by leniency applicants."[2] In turn, the Division's criminal investigations have spawned a steady stream of follow-on civil suits. In the Northern District of California alone, recent multi-district litigations alleging antitrust violations in the optical disk drive, cathode ray tube, liquid crystal display, static random access memory, and dynamic random access memory industries all have stemmed from criminal investigations assisted by amnesty applicants.[3]

Despite these successes, however, participation in the Division's leniency program arguably could be even greater but for the remaining threat of treble damages and joint and

---

★ Michael Scarborough is a partner and Dylan Ballard an associate with Sheppard Mullin Richter & Hampton LLP, resident in the firm's San Francisco office. Though the authors have served as counsel in cases and investigations cited in this Article, the views expressed are our own.

1 Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," address before the National Institute on White Collar Crime (Feb. 25, 2010); *see also* "Criminal Enforcement of U.S. Laws: The U.S. Model," address given by Asst. Attorney General Thomas O. Barnett (September 14, 2006) (available online at http://www.usdoj.gov/atr/public/speeches/218336.htm) ("Amnesty programs are invaluable in detecting cartels and in collecting the evidence necessary to obtain a conviction. It is notoriously difficult to discover cartel behavior or, once discovered, to compile sufficient evidence to successfully prosecute cartel members in court. To penetrate the elaborate concealment strategies cartels use, prosecutors must have a tool to convert cartel members into cooperative witnesses, so that prosecutors can gain access to background information, testimony, and the documents that otherwise might be destroyed. Amnesty programs are such a tool.").

2 *See id.*

3 *See, e.g., In re: Optical Disk Drive Products Antitrust Litigation*, MDL No. 2143 RS (N.D. Cal.); *In re: Cathode Ray Tube (CRT) Antitrust Litigation,* MDL No. 1917 SC (N.D. Cal.); *In re: TFT-LCD (Flat Panel) Antitrust Litigation,* MDL No. 1827 SI (N.D. Cal.); *In re: Static Random Access Memory (SRAM) Antitrust Litigation,* MDL No. 1819 CW (N.D. Cal.); *In re: Dynamic Random Access Memory (DRAM) Antitrust Litigation,* MDL No. 1486 PJH (N.D. Cal.).

several liability that typically awaits defendants in private antitrust suits, and from which the leniency program affords no protection. By disclosing evidence of anticompetitive conduct to the government, and therefore inevitably to prospective civil plaintiffs, the amnesty applicant may avoid criminal penalties, but it also risks giving rise to financially devastating, even bankrupting, private civil litigation that otherwise might never have occurred. These countervailing incentives complicate the cost-benefit analysis of whether to apply for amnesty, and ensure that the promise of criminal amnesty alone will not always be sufficient to impel antitrust violators to come forward.

In 2004, Congress enacted the Antitrust Criminal Penalty Enhancement Reform Act ("ACPERA")[4] with the goal of removing this "major disincentive" to participation in the leniency program by protecting amnesty applicants from the "potentially ruinous consequences" of traditionally heightened antitrust civil exposure.[5] ACPERA makes it possible for an amnesty recipient who has fully cooperated with the Division and otherwise complied with the terms of the leniency program to cap its potential civil liability under both state and federal antitrust laws at the *single* damages attributable to its *own* conduct in furtherance of the conspiracy. By contrast, all other conspirators remain liable for three times the damages caused by the entire conspiracy, including the damages attributable to the amnesty recipient's conduct, ensuring that civil plaintiffs' total potential recovery is undiminished.[6] Crucially, however, ACPERA does not *guarantee* reduced civil liability to amnesty applicants who fully comply with the terms of the Division's leniency program. Instead, ACPERA conditions its liability limitations on the applicant's provision of "timely" and otherwise "satisfactory cooperation" to civil plaintiffs, as determined by the court *after* a trial or other determination of liability.

In part because of questions about the clarity and effectiveness of this supplemental cooperation scheme, ACPERA has lived most of its short life under threat of execution. Originally enacted with a five-year sunset provision, Congress has twice extended that sunset date, first by one year and most recently by an additional ten years, to June 2020. Each time, Congress has declined to make the statute permanent, noting the paucity of case law or other information concerning the statute's real-world effects, and reserving the possibility of future revisions. In enacting the most recent extension, Congress instructed the Government Accountability Office to conduct a study of ACPERA's "practical impact," with a report expected to Congress this summer.[7] As part of this study, the GAO is consulting with practitioners and observers to determine what effects ACPERA's cooperation scheme has had on the decision to apply for amnesty and the litigation of follow-on civil actions.

This Article argues that ACPERA's vague supplemental cooperation standards, and the concomitant unreliability of reduced civil liability, defeat the statute's "core purpose" of

---

4 P.L. No. 108-237, § 201 *et seq.* (2004) ("ACPERA").

5 150 Cong. Rec. S3610-02 (April 2, 2004) at *S3614.

6 *Id.; see also* 150 Cong. Rec. H3654-01 (June 2, 2004) at *H3657 (because other conspirators remain jointly and severally liable and subject to treble damages, "the full scope of antitrust remedies against nonparticipating parties will remain available to the government and private antitrust plaintiffs.").

7 *See* P.L. 111-190, § 5.

encouraging those antitrust violators for whom criminal amnesty alone is an insufficient incentive to apply for amnesty. Unlike the leniency program itself, ACPERA's cooperation scheme provides a prospective amnesty applicant with no guarantees. The statute does not define what will ultimately constitute "timely" or "satisfactory" cooperation in a particular case. These questions are not answered until the trial judge makes his or her discretionary findings at the time of judgment, and only after giving plaintiffs, typically fresh from the battlefield of trial, an opportunity to opine on the quality of the cooperation received. As a result, from the very outset of the civil case, an amnesty applicant must attempt to gauge for itself, entirely unaided by case law or other empirical data, what level of "cooperation" might maximize its chances of a "satisfactoriness" ruling, while simultaneously attempting to preserve, develop and present its defenses on the merits. There is an inherent tension between these two goals. For example, is vigorous pursuit of entirely proper defenses concerning issues independent of the question of liability—such as the existence or extent of damages or the propriety of class certification—"uncooperative"? Compounding the uncertainty of this balancing act is private plaintiffs' obvious incentive to impugn whatever cooperation is provided, setting up a nightmare scenario in which the applicant provides plaintiffs with valuable cooperation, thereby undermining the strength of its case, only to see the Court subsequently determine that the cooperation was not completely "satisfactory" and therefore insufficient to justify reduced liability.[8]

Thus, rather than simplify the antitrust violator's cost-benefit analysis in deciding whether to apply for amnesty, ACPERA's cooperation scheme only makes that analysis more complicated. Indeed, it is difficult to believe that the bargain offered by ACPERA—compliance with a vague, untested cooperation standard in exchange for the uncertain possibility of a discretionary "satisfactoriness" finding somewhere down the road—could do anything but further *discourage* those potential amnesty applicants who are already unconvinced that the benefits of amnesty outweigh the costs. In other words, if anything, in this respect ACPERA may accomplish the precise opposite of its mission statement.

A remedy for ACPERA's ills is unlikely to be found by merely tinkering with the details of its cooperation provisions. Mixed incentives and inefficiencies will be inherent in any cooperation scheme that promises only *partial* protection from liability while conditioning that protection on an *ex post facto* assessment of the quality of the cooperation provided. Instead, the most effective way to ensure ACPERA realizes its purpose is also the simplest: eliminate the statute's additional cooperation obligation altogether. An ACPERA without supplemental civil cooperation requirements would offer a concrete and predictable new incentive to potential amnesty applicants—reduced civil liability *as a matter of course*—thus realizing Congress' core goal of increasing the leniency program's attractiveness. This incentive would no longer be undermined by the awkwardness and uncertainty of simultaneously defending a case and trying to determine what level of cooperation might one day be deemed "satisfactory" by the court. And by narrowing the range of possible outcomes, reducing opportunities for gamesmanship by either side,

---

8 A different nightmare occurs where the Antitrust Division ultimately concludes that the evidence provided by the amnesty applicant is not sufficiently incriminating to warrant prosecution of the applicant's coconspirators—a decision that lies fully in the Division's prosecutorial discretion and one that can be nearly impossible for a prospective applicant to predict. In that scenario, the applicant exposes itself to the risk of heightened civil liability in exchange for a grant of criminal amnesty that turns out to be effectively valueless.

and bringing the parties' starting positions closer together, a streamlined ACPERA would make it easier for private plaintiffs and amnesty applicants to achieve settlements. Indeed, such agreements will often be accompanied by significantly more valuable cooperation from the applicant than could be provided pursuant to ACPERA's existing scheme, for the simple reason that cooperation pursuant to a settlement agreement is necessarily provided *after* the applicant has ceased defending the case, and therefore no longer has any need to measure its cooperation for fear of undermining its case on the merits.

The reflexive objection to doing away with ACPERA's cooperation provisions is of course that allowing the amnesty applicant the additional benefit of reduced civil liability without extracting the additional *quid pro quo* of direct civil cooperation would understate the applicant's culpability and be unfair to civil plaintiffs. As a threshold matter, however, this objection ignores that, even under an ACPERA without supplemental cooperation, amnesty applicants remain liable for the full extent of the damages caused by their own conduct, and private plaintiffs suffer no diminishment of their ability to recover three times the damages caused by the entire conspiracy from other defendants. Moreover, and even more importantly, a strong case can be made that eliminating ACPERA's civil cooperation requirement would, far from being unfair to consumers, redound to their net benefit. To see this, it is important to understand ACPERA's cooperation scheme for what it is: at most, a *supplement* to the extensive cooperation private plaintiffs *already receive*—albeit indirectly—from the leniency program itself. In many cases, the amnesty applicant's decision to come forward is the *only* reason plaintiffs are able to bring a civil action at all, and the information provided by the applicant to the government invariably ranks among plaintiffs' most valuable (and earliest acquired) evidence. In a very tangible sense, then, the applicant's cooperation with the government *is* cooperation with civil plaintiffs, and in fact is likely to be far more valuable to plaintiffs than anything they may receive pursuant to a supplemental civil cooperation scheme. Moreover, the very existence of the leniency program, by breeding distrust and disunity between potential conspirators (and more so the more attractive leniency gets), further benefits consumers by ensuring that fewer conspiracies form, and that more of the conspiracies that do form fall apart before they are successfully implemented.

Ironically, then, the net effect of ACPERA's cooperation requirement may be to *impede* civil enforcement of the antitrust laws. Even if ACPERA means that some plaintiffs will receive moderately more valuable cooperation from amnesty applicants in particular cases (and that is far from clear), it also, by disincentivizing amnesty applications in the first place, means that fewer follow-on civil suits will be filed, and that fewer conspiracies will be deterred or destroyed before injuring consumers. Conversely, excising ACPERA's supplemental cooperation scheme, and thereby incentivizing broader participation in the leniency program, would ultimately result in *greater* deterrence, *more* criminal and civil antitrust enforcement, *more* punishment of violators, and *greater* redress of victims—not less. This is the bargain ACPERA was meant to embody, and it is one that favors antitrust enforcers and victims, not violators.

II. ACPERA'S IMPACT ON CIVIL ANTITRUST LITIGATION AND PROSPECTIVE AMNESTY APPLICANTS

Since 1993, the Antitrust Division has promulgated a "Model Leniency Letter" setting forth the core conditions of participation in its leniency program.[9] Under the terms of this letter agreement, to qualify for amnesty the applicant must generally be the first entity to provide the Division with information about the anticompetitive activity being reported,[10] and must further demonstrate to the Division that (1) it "took prompt and effective action to terminate its participation in the anticompetitive activity being reported upon discovery of the activity"; (2) "did not coerce any other party to participate in the anticompetitive activity being reported"; and (3) "was not the leader in, or the originator of, the activity."[11] As of November 19, 2008, moreover, applicants are specifically required to report "conduct constituting a criminal violation of Section 1 of the Sherman Act" as a condition of amnesty.[12]

In addition to these requirements for admission into the leniency program, the Model Leniency Letter imposes several continuing, non-exhaustive cooperation obligations, including:

> (1) "providing a full exposition of all facts known to the Applicant relating to the anticompetitive activity being reported;"
>
> (2) "providing promptly, and without requirement of subpoena, all documents, information, or other materials…wherever located, not privileged…requested by the Antitrust Division in connection with the anticompetitive activity being reported;"

---

9 *See* Antitrust Division Model Corporate Conditional Leniency Letter, effective November 19, 2008 (available online at http://www.justice.gov/atr/public/criminal/239524.htm).

10 *See id.*, Attachment (U.S. Department of Justice Antitrust Division Corporate Leniency Policy) (available online at http://www.justice.gov/atr/public/guidelines/0091.htm), § A.1. In rare cases, the first entity to come forward may fail to meet the other conditions of the leniency program, in which case the next entity "in the door" may be given an opportunity to apply for amnesty. *See id.*, § B.1.

11 *Id.*, at ¶ ¶ 1(a)-(b).

12 *See* Antitrust Division Model Corporate Conditional Leniency Letter, effective November 19, 2008, ¶ 1 (available online at http://www.justice.gov/atr/public/criminal/239524.htm). Under an earlier version of the Model Leniency Letter, an applicant was required only to report a "possible" violation of the Sherman Act, without expressly admitting to wrongdoing. *See* "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters November 19, 2008" at 6-7 (available online at http://www.justice.gov/atr/public/criminal/239583.htm) (noting that leniency agreements entered into before November 19, 2008 by their express terms only required applicant to report "possible" antitrust violation, and contained no admission of criminal wrongdoing); Antitrust Division Model Leniency Letter effective April 1, 1998) at 1 (providing that leniency recipient "desires to report to the Antitrust Division *possible* [e.g. price-fixing] activity or other conduct violative of the Sherman Act") (emphasis added).

(3) "using its best efforts to secure the ongoing, full, and truthful cooperation of the current [and former] directors, officers, and employees of Applicant, and encouraging such persons voluntarily to provide the Antitrust Division with any information they may have relevant to the anticompetitive activity being reported;"

(4) "facilitating the ability of current [and former] directors, officers, and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Division;"

(5) "using its best efforts to ensure that current [and former] directors, officers, and employees…respond completely, candidly, and truthfully to all questions asked;" and

(6) "making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported…."[13]

Criminal amnesty thus comes at a significant price. A decision to participate in the leniency program all but guarantees that any incriminating information will be revealed, first to the Antitrust Division, and ultimately to the private plaintiffs' bar. Given this built-in disincentive, ACPERA's basic premise—that some prospective applicants will need additional incentives to tip the cost-benefit analysis in favor of seeking amnesty—seems sound. And reduced civil liability is a powerful incentive that, if adequately concrete, is likely to make participation in the leniency program more attractive, resulting "in a substantial increase in the number of antitrust conspiracies being detected."[14]

As its name suggests, the Antitrust Criminal Penalties Enhancement Reform Act was primarily intended to bolster *criminal* enforcement of the antitrust laws, both by sharpening detection and prosecution of antitrust conspiracies (through broader participation in the leniency program) and increasing the criminal penalties for violators once they are uncovered. ACPERA accomplishes the latter by increasing the maximum Sherman Act fine for a corporate violator from $10 million to $100 million, increasing the maximum fine for an individual violator from $350,000 to $1 million, and increasing the maximum term of imprisonment from 3 years to 10 years.[15]

While the stick of increased criminal penalties in ACPERA's dual prong approach is clear enough, the carrot of reduced civil liability is far less straightforward. The statute provides that an amnesty applicant may receive reduced civil liability only "if the court in

---

13 *See* Antitrust Division Model Corporate Conditional Leniency Letter (available online at http://www.justice.gov/atr/public/criminal/239524.htm) at ¶ 2(a)-(f).

14 149 Cong.Rec. S13520 (October 29, 2003). DOJ has publicly endorsed this premise. Scott D. Hammond, "Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program," address before the ABA Section of Antitrust Law (Mar. 26, 2008) (protecting amnesty applicants from heightened civil exposure "removes a major disincentive for self-reporting and makes the Division's Corporate Leniency Program even more effective at detecting and prosecuting cartels.").

15 ACPERA, § 215.

which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant . . . has provided satisfactory cooperation to the claimant with respect to the civil action."[16] The statute further provides, in language that closely tracks the cooperation provisions of the Division's Model Leniency Letter, that such "satisfactory" cooperation from a corporate applicant "shall include":

> (1) "providing a full account to the claimant of all facts known to the applicant… that are potentially relevant to the civil action";
>
> (2) "furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant…wherever they are located"; and
>
> (3) using the applicant's "best efforts" to produce any individuals covered by the leniency agreement "for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require" and ensure such individuals "respond[] completely and truthfully…to all questions asked by the claimant."[17]

These vague[18] and non-exhaustive components of "satisfactory" cooperation do little to clarify how ACPERA is supposed to meaningfully supplement the cooperation already provided by an amnesty applicant under the terms of the leniency program. Indeed, it could be argued that ACPERA's "specific" cooperation requirements are largely, if not wholly, redundant. First, the Federal Rules of Civil Procedure already impose upon all civil defendants a general obligation to accede to reasonable discovery requests seeking relevant documents and other information.[19] And witnesses are obviously duty-bound, with or without ACPERA, to testify completely and truthfully at depositions and trial appearances.[20]

Further, ACPERA's cooperation requirements are virtually identical to obligations already imposed on amnesty applicants under the leniency program, including "a full exposition" of all known facts, production of all requested documents and information "wherever located," and the use of "best efforts" in securing the cooperation of witnesses.[21] The fruits of these forms of governmental cooperation—discovery of a

---

16 ACPERA, § 213(b).

17 ACPERA, § 213(b).

18 These ostensibly "specific" cooperation requirements merely add to the vague, discretionary, and therefore unpredictable factual findings a court must make in assessing the "satisfactoriness" of an applicant's cooperation record, including what facts were "potentially relevant" to the action, whether the applicant used its "best efforts" to produce witnesses, and whether the plaintiffs' requests for access to witnesses were "reasonable."

19 *See* Fed.R.Civ.Proc. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense….Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

20 *See* Fed.R.Evid. 603 ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation….").

21 *See* Antitrust Division Model Corporate Conditional Leniency Letter (available online at http://www.justice.gov/atr/public/criminal/239524.htm) at ¶ 2(a)-(f)).

previously undetected antitrust violation, an unusually well-developed factual record, pre-identification of key documents and witnesses, and (in many cases) criminal convictions that constitute *prima facie* evidence of civil liability[22]—typically accrue to private plaintiffs through ordinary discovery and publicly-available sources of information.[23] Thus, it could be argued that ACPERA's supplemental cooperation scheme is practically reducible to the requirement that an amnesty applicant faithfully adhere to its obligations under the normal rules of discovery.

Not surprisingly, plaintiffs have taken a more expansive view, arguing that ACPERA should be interpreted to demand civil cooperation significantly greater than what is required under the leniency program. Indeed, the vagueness of the statutory language, and the fact that any disputes will be resolved—if ever—*ex post facto* by the court, all but invite plaintiffs to take extremely aggressive positions on the extent of cooperation required, if only to exploit the applicant's desire to avoid an adverse "satisfactory cooperation" ruling and its expensive consequences. For instance, plaintiffs in recent class litigation have taken the position that an amnesty applicant's joinder in a motion to dismiss, or an opposition to a motion for class certification, in and of itself violates the applicant's ACPERA cooperation obligations.[24]

Yet an additional layer of vagueness, and an additional avenue for gamesmanship, was added to ACPERA by a 2010 amendment expressly requiring the court to evaluate the general "timeliness" of the amnesty applicant's cooperation as part of determining whether that cooperation was "satisfactory."[25] As with the cooperation requirements themselves, this provision practically invites plaintiffs to take aggressive positions on when an applicant must begin cooperating, using the threat of an "unsatisfactory" cooperation ruling to force the applicant to cooperate as early in the case as possible.

---

22 *See* 15 U.S.C. § 16(a) ("A final judgment or decree heretofore or hereafter rendered in any…criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto").

23 *See Emich Motors v. General Motors,* 340 U.S. 558, 568 (1951) (the important "advantage" of a preceding criminal antitrust conviction serves to "minimize the burdens of litigation for injured private suitors").

24 *See In re: TFT-LCD (Flat Panel) Antitrust Litig.,* No. M07-1827 SI, MDL No. 1827 (N.D. Cal.), Direct Purchaser Plaintiffs' Motion to Compel the Amnesty Applicant Defendant to Comply With ACPERA, Dkt. No. 953 (filed April 17, 2009) at 3:1-4 ("Far from cooperating, each defendant, including the amnesty applicant, has availed itself of every opportunity to contest and dispute Plaintiffs' claims. To date, this has included two rounds of attacks on the pleadings, discovery disputes, and other issues.").

25 ACPERA, § 213(c); 15 U.S.C. § 1 note. Prior to the 2010 amendment adding this general "timeliness" requirement, the "timeliness" of the applicant's cooperation was only an express issue under ACPERA in cases where a State had issued compulsory process or a civil action had been filed prior to the amnesty application being made. In addition to the new general "timeliness" requirement, in civil cases in which the Antitrust Division intervenes to obtain a stay of discovery pending the completion of its criminal investigation (a frequent occurrence in recent years), the amnesty applicant is required to begin cooperating with private plaintiffs "without unreasonable delay" after the stay expires or is lifted. ACPERA, § 213(d).

Indeed, even before the 2010 "timeliness" amendment, plaintiffs had taken the position that ACPERA requires that an applicant's cooperation commence immediately. In *In re TFT-LCD (Flat Panel) Antitrust Litigation*[26], the Antitrust Division confirmed to the plaintiffs that its criminal investigation of the TFT-LCD industry was assisted by an amnesty applicant, but, consistent with the Division's confidentiality policies, refused to disclose the applicant's identity.[27] The plaintiffs then brought a "motion to compel" the amnesty applicant to identify itself and immediately begin complying with ACPERA's cooperation requirements, or else forfeit its right under the statute to reduced civil liability.[28] The plaintiffs took the position that "cooperation is only satisfactory if it is provided early in the litigation," and contended that "the amnesty applicant's failure to cooperate thus far has adversely affected plaintiffs' ability to investigate the facts."[29] In opposition, one of the defendants, without confirming or denying its status as the amnesty applicant, argued that plaintiffs' attempt to compel the applicant to self-identify would undermine the essential confidentiality of the leniency program and chill future amnesty applications. Further, the defendant noted that nothing in ACPERA authorizes civil plaintiffs to "compel" amnesty applicants to cooperate *at all*, much less at the time of plaintiffs' choosing. The Antitrust Division joined these arguments, further noting that the amnesty applicant had fully complied with its cooperation obligations to the Division under the leniency program, and that such cooperation had already assisted the Division in obtaining several convictions.[30]

The Court sided with the defendant and the Division, finding "no authority under ACPERA to compel an amnesty applicant to identify itself and cooperate with plaintiffs."[31] Instead, the Court held that its "assessment of an applicant's cooperation," including the timing of that cooperation, is only made "if and when an amnesty applicant seeks to limit liability under ACPERA," which under the statute occurs "at the time of imposing judgment or otherwise determining liability and damages."[32]

While this holding is certainly favorable to amnesty applicants, it is unlikely to deter plaintiffs from pressuring applicants to immediately identify themselves and commence cooperating. While plaintiffs lack any legal basis for *compelling* applicants to cooperate, ACPERA does promise plaintiffs an opportunity to oppose any attempt by the applicant

---

26 618 F.Supp.2d 1194 (N.D. Ca. 2009).

27 *See* U.S. Antitrust Division press release available at http://www.usdoj.gov/atr/foia/leniency-letters.htm) (DOJ "considers the confidentiality afforded in its leniency program to be a hallmark of the program and holds the identity of . . . leniency applicants in strict confidence"); *accord Stolt-Nielsen Transp. Group Ltd. v. U.S.,* 480 F.Supp.2d 166, 179-180 (D.D.C. 2007) ("The confidential nature of [amnesty] agreements and the parties that enter into them is crucial to the nature of the [amnesty] program, and the revelation of these materials could reasonably be expected to interfere with ongoing and prospective anti-cartel enforcement proceedings by having a chilling effect on the program and the cooperation of participants in it.").

28 618 F.Supp.2d at 1194.

29 *Id.* at 1195.

30 *Id.* at n. 1.

31 *Id.* at 1196.

32 *Id.*

to obtain reduced liability and disparage any cooperation provided.[33] In practice, then, plaintiffs retain significant leverage in coercing early cooperation.

Once an applicant has decided to cooperate, for the remainder of the litigation it must attempt to strike a careful and evolving balance between cooperating and defending, with little to no guidance as to where ACPERA requires that line to be drawn. Once again, plaintiffs are incentivized to take (and have taken) the most aggressive possible position that any attempt by an applicant to defend a civil suit automatically precludes a finding of "satisfactory" cooperation. As a result, ACPERA threatens to deter applicants from advancing perfectly meritorious positions, for fear that doing so will ultimately doom them to heightened civil liability. ACPERA cannot have been intended to so undermine the basic principle that cases should be resolved according to their merits.

It has been suggested by some observers that the amnesty applicant's ACPERA dilemma—either fail to cooperate and risk being subjected to heightened civil liability, or attempt to cooperate and risk fatally undermining one's case on the merits (and still fail to secure any guarantee of reduced liability)—does not often obtain in practice because amnesty applicants typically lack strong defenses on the merits. But amnesty applicants are no less likely than other defendants to lack meritorious defenses in civil suits. Even in cases where the fact of conspiracy is effectively uncontested, important (and potentially dispositive) issues are often hotly disputed, such as with respect to the Court's subject matter jurisdiction, the propriety of class certification, the application of the statute of limitations, and the existence and quantification of impact and damages.[34] The applicant's participation in the leniency program does not itself waive or even necessarily weaken any of these defenses.[35] There is no basis for assuming such defenses are somehow less valid or compelling simply because they are asserted by an amnesty applicant.

Other commentators have suggested that ACPERA's "uncertainty" may tend to have a salutary effect on civil litigation by making early settlements "more attractive" to litigants.[36] It is important to note, however, that ACPERA's "uncertainties" weigh far heavier on amnesty applicants than they do on civil plaintiffs. The burden to divine what might constitute "timely" and otherwise "satisfactory" cooperation falls squarely on the applicant, and ACPERA imposes no reciprocal obligations on plaintiffs. The worst case scenario for plaintiffs is that, after receiving significant cooperation from the applicant (and presumably strengthening their case against other defendants) they will only be able to recover from the applicant actual damages, with no effect on their total potential recovery. The worst case scenario for the applicant—providing valuable cooperation, only to find that cooperation used by plaintiffs to impose liability for three times the damages caused by the entire

---

33 ACPERA, § 213(b) (the Court determines "satisfactory" cooperation "after considering any appropriate pleadings from the claimant").

34 In addition, legal and factual disputes unique to indirect purchaser actions (e.g., concerning the existence and quantification of "pass-through" of overcharges, and the interpretation of state antitrust laws) will not be addressed in, much less foreclosed by, prior federal criminal litigation).

35 While under the Antitrust Division's recently amended model leniency letter an amnesty applicant is required to admit to a criminal violation of the Sherman Act, such admission is not itself inconsistent with any of the civil defenses noted above.

36 Eric Mahr and Perry A. Lange, "ACPERA—A Glass Half Full," Competition Law 360 (October 25, 2010).

conspiracy—is far more catastrophic. Thus, to the extent ACPERA does motivate earlier settlements, they are likely to be settlements that reflect the powerful leverage ACPERA bestows on civil plaintiffs, and are less likely to reflect the true value of the case.

Moreover, there is good reason to believe that ACPERA in fact will tend to complicate and delay the settlement of civil actions. If a settlement is a mutual appraisal of risk, settlements are most likely not simply where the result is "uncertain," but where the parties have some basis for valuating that uncertainty. ACPERA severely complicates this process by creating a new world of virtually unquantifiable risks—risks concerning whether, when, and to what extent the amnesty applicant elects to "cooperate," what effects those decisions will have on the applicant's defenses on the merits, and whether the court will ultimately deem those decisions "satisfactory." Many of these risks will be capable of any valuation at all only after the applicant has had a meaningful opportunity to investigate and develop its case. Thus, ACPERA's proliferation of such risks will tend to make it less likely, other things being equal, that the parties will come to an early agreement on what the case is worth.

III. PROSPECTS FOR IMPROVING ACPERA'S COOPERATION SCHEME

It has been suggested that ACPERA's vague cooperation standards will be given content by the courts.[37] Seven years after ACPERA's enactment, however, there remains virtually no case law interpreting or applying the statute and, because of the way the statute is structured, there is reason to doubt there ever will be a sufficiently robust body of precedent to provide meaningful guidance to litigants. Because of the extreme risks associated with an adverse result, which in larger cartel cases can effectively increase or decrease an applicant's potential exposure by hundreds of millions or even billions of dollars, few litigants—plaintiffs and amnesty applicants alike—are likely to take the nuclear option of submitting a disputed issue of "satisfactory cooperation" for post-trial determination by the court.

Only slightly more promising are "ACPERA agreements", under which the amnesty applicant agrees to provide plaintiffs with specified forms of cooperation in exchange for a promise from plaintiffs not to oppose a subsequent motion for a "satisfactory cooperation" determination. Because the parties to ACPERA agreements remain adversaries in active litigation, such agreements have just as much potential to serve as fodder for gamesmanship as ACPERA's cooperation provisions themselves. Similarly, both parties have incentives to avoid defining the cooperation obligations in an ACPERA agreement too specifically—plaintiffs because they want to retain leeway in decreeing what forms of cooperation are appropriate, and the amnesty applicant because it wants to retain leeway in refusing to provide forms of cooperation that it considers unduly onerous. As a result, ACPERA agreements are unlikely to put much meat on ACPERA's skeletal cooperation provisions.

---

37 *See* Michael D. Hausfeld, *et al.,* "Observations From The Field: ACPERA's First Five Years," The Sedona Conference Journal, Vol. 10, Fall 2009, p. 101 ("the full scope of the cooperation required by ACPERA will ultimately be defined by the courts").

There are only two reported cases involving a cooperating amnesty applicant, and both involved an ACPERA agreement. In *In re Municipal Derivatives Antitrust Litigation*,[38] the amnesty applicant and certain named plaintiffs entered into a pre-complaint ACPERA agreement requiring the leniency applicant to provide evidence regarding the alleged conspiracy in exchange for plaintiffs' promise not to seek to subject the applicant to heightened civil liability. Counsel for certain other named plaintiffs argued that the firms who negotiated the ACPERA agreement should not be designated as interim lead class counsel because they had improperly waived their clients' right to obtain treble damages from the amnesty applicant.[39] The court disagreed, holding that ACPERA specifically licensed such an arrangement, and noting that the plaintiffs retained their ability to seek treble damages and impose joint and several liability on all other defendants.[40]

In *In re Sulfuric Acid Antitrust Litig.*,[41] the parties entered into an ACPERA agreement requiring the plaintiffs to join in a motion for a "satisfactory cooperation" determination in exchange for certain forms of cooperation. Pursuant to the agreement, the applicant and plaintiffs brought a joint "satisfactory cooperation" motion that was granted by the court in a summary minute order.[42] Later, the plaintiffs brought a motion to compel the applicant to provide certain forms of discovery, arguing that the applicant's refusal to make two of its employees available for deposition was a violation of their ACPERA agreement. While the agreement itself was maintained under seal, the court's references to the agreement suggest that it closely tracked the language of ACPERA's cooperation provisions, including requiring the applicant to use its "best efforts to secure and facilitate from cooperating individuals their participation in …depositions" and "make available, upon reasonable notice, their current directors, officers and employees who are believed to have [relevant] knowledge…by…providing testimony at deposition."[43] The court held that the agreement's reference to "reasonable notice," which it noted simply tracked the statutory language,[44] meant that the applicant was not required "to be at the plaintiffs' beck and call," and was not precluded "from claiming that the notices of deposition were untimely and unreasonable."[45] The court further held that plaintiffs' joinder in the prior motion for a "satisfactory cooperation" determination now foreclosed them from disparaging the applicant's cooperation.[46]

This sparse case law only reinforces the notion that ACPERA agreements are an unlikely vehicle for the addition more precise interpretations of the statute's cooperation provisions. As a result, even with such agreements in place, the vast majority of litigants will settle before giving the court an opportunity to decide whether the cooperation provided under the agreement was indeed "satisfactory." The sequence of events in *Sulfuric*

---

38 252 F.R.D. 184 (S.D.N.Y. 2008).

39 *Id.* at 187.

40 *Id.*

41 231 F.R.D. 320 (N.D. Ill. 2005).

42 *In re Sulfuric Acid Antitrust Litig.,* No. 03 C 4576, Dkt No. 192, Minute Order (N.D. Ill. July 7, 2005).

43 231 F.R.D. at 329 (quoting parties' ACPERA agreement) (emphasis omitted).

44 *Id.* at 329, n. 13.

45 *Id.* at 329.

46 *Id.* at 330.

Acid (a finding of "satisfactory cooperation" while the case was still pending and while cooperation was ongoing) is unusual and unlikely to be repeated, especially given how the premature "satisfactoriness" ruling came back to bite the plaintiffs in that case.

Finally, some commentators have suggested that ACPERA's vagueness might be remedied by amending the statute to clearly define what constitutes "satisfactory" cooperation. However, it is difficult to surmise what language could be sufficiently specific to give an amnesty applicant meaningful guidance and security, while remaining sufficiently broad to account for the vagaries of particular cases. Indeed, so long as the cooperation required by ACPERA must be provided while the amnesty applicant is an active defendant, and the sufficiency of that cooperation turns on factual issues that are resolved by the Court within its discretion—both core features of ACPERA's scheme—the major uncertainties and dilemmas that make ACPERA such an unattractive bargain will remain. The vagueness of ACPERA's cooperation scheme is likely intractable. The only remaining question is whether we can live without it.

IV. ENVISIONING ANTITRUST ENFORCEMENT WITHOUT SUPPLEMENTAL CIVIL COOPERATION

A guarantee of reduced liability would open the doors of the leniency program to an entire class of antitrust violators for whom criminal protection alone is an inadequate justification for assuming the costs of amnesty. For example, the current statutory scheme tends to deter amnesty applications in borderline cases that involve conduct that is insufficiently severe to warrant criminal prosecution (meaning criminal amnesty is unnecessary) but may be more than sufficient to support a civil damages award—given the lower burden of proof in civil actions—in the amount of three times the damages caused by the entire conspiracy. A world in which ACPERA guarantees an amnesty applicant protection from heightened civil liability would fully foreclose this nightmare scenario and incentivize amnesty applications in borderline cases. Similarly, eliminating the risk of treble damages and joint and several liability helps make the leniency program a viable option for smaller and less well-funded antitrust violators, on whom the weight of heightened civil liability tends to fall most heavily.

Enhancing the attractiveness of the leniency program for a broader range of potential applicants would have benefits both preventive and retributive. By breeding distrust among conspirators (or would-be conspirators), the leniency policy does not just make it more likely that conspiracies will be detected and punished, but also that conspiracies will never form in the first place, or will fail to be effective.[47] This crucial (and sometimes overlooked) deterrent aspect of the leniency program could only be enhanced by sparing amnesty applicants a civil cooperation obligation.

The likely objection to excising ACPERA's cooperation scheme is that it would provide amnesty applicants with a benefit (protection from heightened civil liability) while unfairly depriving private plaintiffs of their right to supplemental civil cooperation. For one thing, however, this objection focuses only on what private plaintiffs would lose by

---

47 *See* 150 Cong.Rec. S3610-02 at *S3614 ("the increased self-reporting incentive [provided by ACPERA] will serve to further de-stabilize and deter the formation of criminal antitrust conspiracies.").

eliminating ACPERA's cooperation requirement, while ignoring entirely what they (and the general public) would gain: broader participation in the leniency program, with all of its concomitant benefits on both public and private antitrust enforcement.

Ironically, moreover, doing away with ACPERA's cooperation provisions is likely to result in civil plaintiffs receiving more—and more valuable—civil cooperation, not less.[48] Before ACPERA, it was a common practice for amnesty applicants (and other antitrust defendants) to voluntarily assume cooperation obligations as part of their settlement agreements with civil plaintiffs.[49] The cooperation provided under such settlements is likely to be significantly more valuable than that provided under ACPERA. First, because ACPERA requires an amnesty applicant to "satisfactorily" cooperate *while the case is pending*, in exchange for the mere *possibility* of a *partial* reduction in civil liability (which plaintiffs are very likely to oppose), it forces the applicant to carefully measure its cooperation for fear of doing irreparable harm to its case on the merits and receiving nothing in return. By contrast, because cooperation under a settlement agreement is provided *after the applicant has been dismissed from the case*, the applicant need have no fear that its cooperation may be used against it, and thus has no incentive to measure its cooperation in light of how much it may strengthen the plaintiffs' case.

Similarly, because ACPERA's cooperation scheme is statutory rather than contractual, it does not impose any obligation on private plaintiffs to exercise good faith in assessing quality and quantity of the applicant's cooperation—leading to increased opportunities for gamesmanship. Because the parties to a settlement are free to negotiate what specific forms of cooperation will be provided in exchange for what consideration, and those terms may be judicially enforced by either party, the bargain is symmetrical, and the opportunities for gamesmanship reduced. And just as the Antitrust Division has an incentive not to unreasonably contest the sufficiency of an applicant's cooperation under the leniency program, for fear of deterring future participation in the leniency program, plaintiffs have an incentive not to unreasonably disparage the cooperation provided pursuant to a settlement agreement, lest they deter other defendants from entering into cooperation-based settlement agreements.

In these ways, cooperation pursuant to a civil settlement shares all of the best features—reciprocal contractual rights,[50] assurances that cooperation will confer no adversarial advantage—of the cooperation scheme at the heart of the wildly successful leniency program, features which are glaringly absent from ACPERA's cooperation scheme.

---

48 As discussed above, the forms of cooperation currently required by ACPERA are mostly identical to the forms of cooperation owed by an amnesty applicant to the Antitrust Division under the terms of the leniency program—many of the benefits of will accrue to private plaintiffs through civil discovery even without a supplemental civil cooperation scheme.

49 See Competition Law 360, "ACPERA—A Glass Half Full," Eric Mahr and Perry A. Lange (October 25, 2010) (noting "the standard practice before [ACPERA's] passage: the DOJ leniency applicant normally was the first, or among the first, civil defendants to settle, and typically would settle for an amount approximating or below single damages in exchange for providing information and support to plaintiffs in their claims against the remaining defendants.").

50 *See, e.g., U.S. v. Carrillo,* 709 F.2d 35, 37 (9th Cir. 1983) (cooperation-immunity agreements are contractual in nature and enforceable according to contract law principles); *People v. C.S.A.*, 181 Cal.App.4th 773 (2010) (same).

Eliminating ACPERA's "cooperation" requirement would motivate earlier cooperation-based settlements, by simplifying the range of possible outcomes and bringing the parties' initial bargaining positions closer together. Moreover, a *sans*-cooperation ACPERA would free the parties to identify what specific forms of cooperation are considered most valuable and to place a price tag on such cooperation. As it stands, ACPERA artificially constricts this dialogue by telling the parties how much the amnesty applicant's "cooperation" is worth (*i.e.*, the difference between joint and several liability for treble damages and single damages based on the applicant's own conduct) and then leaving it to the parties to work backward in defining what that "cooperation" should entail.

Thus, in addition to the more systemic benefits to public and private antitrust enforcement discussed above, there are good reasons for expecting that elimination of ACPERA's cooperation requirement will encourage more cooperation-based civil settlements, and that the cooperation provided pursuant to these settlements will tend to be significantly less measured—and thus more valuable to private plaintiffs—than cooperation provided under ACPERA's existing scheme.

V. CONCLUSION

The Antitrust Division's leniency program is the foundation of cartel enforcement in the United States in all its forms. The program is far and away the best available engine for detecting antitrust violations, and as such is the primary driver of both criminal prosecutions and private suits. Its looming presence (and impressive rate of success in generating convictions and civil recoveries) likely deters a large number of would-be conspiracies from ever forming, or from being successfully implemented. Expanding the reach and effectiveness of the leniency program would redound to the benefit of all antitrust enforcers, both public and private, and to antitrust victims real and potential.

ACPERA has an important role to play in incentivizing further participation in the leniency program by eliminating the risk of heightened civil liability for amnesty applicants. But by making its protections contingent on a vague, supplemental "cooperation" requirement, the statute as written is cold comfort to potential applicants. If anything, litigating a civil case under the yoke of an undefined (and likely indefinable) cooperation obligation is an even riskier proposition for applicants than was civil litigation before ACPERA.

Excising ACPERA's cooperation scheme would allow the statute to achieve its mission statement. With the risk of heightened civil liability *eliminated* (not merely made contingent) the cost-benefit analysis for a significant class of potential applicants would tip decisively in favor of seeking amnesty. The objections to this solution—that it would unfairly deprive private plaintiffs of supplemental civil cooperation, or understate the culpability of the amnesty applicant—myopically ignore the benefits a functioning ACPERA would have on the antitrust enforcement system as a whole. A reduction in plaintiffs' potential recovery from a single defendant (while leaving plaintiffs' *total* potential recovery undiminished) is a more than a fair price to pay for enhanced deterrence and detection of antitrust violations, more criminal investigations, prosecutions and convictions, and more private suits armed with better evidence and a more efficient path to recovery.