# ACPERA and the Value of Uncertainty

Uncertainty and mystery are energies of life. Don't let them scare you unduly, for they keep boredom at bay and spark creativity.
*-R.I. Fitzhenry*

By Thomas Mueller and Gregory Evans

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (hereinafter "ACPERA") has been an effective addition to the Antitrust Division's battery of incentives for corporations to expose their own antitrust misconduct to the Department of Justice. ACPERA provides potential leniency applicants with the comfort of avoiding the punitive elements of U.S. antitrust civil litigation if they extend their cooperation with the government to the civil plaintiffs. The value and the cost of the statutory bargain are largely undefined and it is that uncertainty on both sides of the equation that causes ACPERA not only to work effectively but also precludes it from becoming a burden on the decision as to whether to apply for leniency in the first place. While some have called for additional clarification of how and when a leniency applicant must comply with ACPERA's requirements (possibly altering it from a permissive to compulsory regime), the uncertainty about the cooperation is precisely the prescription for prompt, compensatory and non-punitive civil resolutions with leniency applicants.

## The Origins of ACPERA

Congress conceived of ACPERA as a way to enhance the DOJ's already effective Corporate Leniency Program by adding even greater incentive for corporations facing potential prosecution to cooperate with the Antitrust Division. In 2003, prior to ACPERA's passage, James Griffin, then Deputy Assistant Attorney General for Criminal Enforcement, called the

Leniency Program "the Division's most effective generator of international cartel cases," noting that amnesty applications had increased twelve-fold since the program's revision, resulting in some $1.5 billion in criminal fines.[1] Yet despite the success of the revised Corporate Leniency Program, the Antitrust Division admitted that "the risk of exposing themselves to liability for treble damages in private antitrust litigation has from time to time prevented firms from taking advantage of our amnesty program."[2] Indeed, immediately following ACPERA's passage, the DOJ forecasted that the law would "enhance[] the incentive for corporations to self report illegal conduct" by limiting resultant civil damages to those "actually inflicted by the amnesty applicant's conduct."[3]

When ACPERA became law, it provided two added incentives for potential leniency applicants to initiate cooperation with the Antitrust Division. First, ACPERA eliminated the leniency applicant's joint and several liability stemming from any federal or state civil suit arising from the reported conduct. Civil plaintiffs could only recover damages actually attributable to the defendant and thus limited the exposure to harm inflicted on its own customers. Second, ACPERA provided for single actual damages, eliminating the punitive trebling of damages and potentially limiting the duplicative recovery by direct and indirect purchasers. The net result is that today's leniency applicant has the opportunity to limit its civil exposure to a one-time overcharge paid by its customers. Of course, neither the actual quantification of

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[1] A Summary of the Antitrust Division's Criminal Enforcement Program, James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, ABA Section of Antitrust Law Annual Meeting (August 12, 2003), available at http://www.justice.gov/atr/public/speeches/201477.htm.

[2] Antitrust Enforcement Priorities: A Year in Review, Thomas O. Barnett, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, ABA Section of Antitrust Law Fall Forum (November 19, 2004), available at http://www.justice.gov/atr/public/speeches/206455.htm. *See* Michael D. Hausfield, "The Value of ACPERA," CompetitionLaw 360, June 2, 2009, available at http://www.hausfeldllp.com/pages/articles/239/the-value-of-acpera (stating that all criminal amnesty applicants must logically consider the civil litigation consequences of admitting criminal liability).

[3] Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004, DOJ Press Release (June 23, 2004), available at http://www.justice.gov/atr/public/press_releases/2004/204319.htm.

damages nor the method of quantification is codified and remains subject to negotiation or determination by a jury or other finder of fact.

The limitation of civil exposure does not come without strings attached. In order for the leniency applicant to obtain the benefit, it must satisfactorily cooperate with the claimant. Admittedly, the cooperation obligations are quite vague, falling into three basic elements: a defendant must (1) provide civil plaintiffs with a "full account" of known facts concerning the cartel; (2) "furnish[] all documents or other items … potentially relevant to the civil action;" and (3) use "best efforts to secure and facilitate" cooperation from individuals encompassed by the leniency agreement.[4] The adequacy of its cooperation is to be adjudicated by the court.

The key element of the statute is that it is not compulsory. A leniency applicant may litigate a case fully without providing any cooperation to the claimant. The applicant simply then forfeits the opportunity to avoid joint and several liability and trebling of any damages found.

President Bush signed ACPERA into law on June 22, 2004.[5] The 2004 law was originally set to expire on June 22, 2009.[6] However, in June 2009, President Obama signed into law a one-year extension of all of the law's original provisions.[7] Thus, a defendant corporation that enters into a new amnesty agreement with the Antirust Division by June 22, 2010 is eligible for all ACPERA incentives.

[4] Pub. L. No. 108-237, § 213(b) .
[5] Pub. L. No. 108-237, 15 U.S.C.A. § 1 note.
[6] *Id.*
[7] Pub. L. No. 111-30.

**ACPERA's Cooperation Obligations Have Remained Uncertain**

While ACPERA has been in effect for over five years, the contours of the law have yet to be fully defined.[8] For example, in *TFT-LCD Antitrust Litigation*, class plaintiffs filed an unsuccessful motion to compel the unknown leniency applicant to identify itself and provide cooperation during the pre-trial phase. What precisely qualified as an applicant's substantial compliance, and when it must occur, still remains unclear.[9] Moreover, there have been very few judicial decisions in this area, with just one other case examining the issue.[10] Thus, some in the field might be tempted to call for a more explicit statute to outline what might constitute compliance. For example, during ACPERA's renewal discussions, two practitioners noted that that "there has been virtually no analysis of ACPERA in the courts" and recommended, among other points, that a renewed ACPERA specify what precisely what would constitute appropriate cooperation in terms of factual accounting and timing of the applicant's cooperation.[11]

Some scholars may even be inspired by a 2004 DOJ statement that the primary lesson that the Antitrust Division had learned in administering the leniency process was that "uncertainty in the application process will kill an amnesty program."[12] Yet the need for clarity in the Leniency Program as to the requirements to avoid criminal prosecution should not be confused with a need to for rigidity as to cooperation with civil claimants. The principal reason for the distinction is that civil liability for the leniency applicant is not reduced to zero, unlike its

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[8] *See, e.g.*, Michael D. Hausfeld, Michael P. Lehmann, & Megan E. Jones, "Observations from the Field: ACPERA's First Five Years," 10 The Sedona Conference Journal 95, 104–10 (noting that after five years of ACPERA as effective law, the timeliness and scope of cooperation under ACPERA has largely been left to realm of judicial discretion).

[9] See, e.g., Jay L. Himes, "Ain't It Funny How Time Slips Away: Amnesty Recipient Cooperation in Civil Antitrust Litigation," Global Competition Policy, August 2009, available at http://www.labaton.com/en/ourpeople/upload/Global-Competition-Policy-August-2009-Himes.pdf (arguing that the timing and scope of cooperation under ACPERA should be left solely to the discretion of the presiding judge, not the amnesty applicant) .

[10] *See* In re Sulfuric Acid Antitrust Litigation, No. 1:03-cv-04576, slip op. (July 7, 2005 N.D. Ill.).

[11] Benjamin G. Bradshaw & Angela Thaler Wilks, *ACPERA – Lasting Limits or Fleeting Experiment?*, Law 360, March 27, 2009, available at http://www.law360.com/print_article/92936.

[12] International Anti-Cartel Enforcement, R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 2004 ICN Cartels Workshop (November 21, 2004), available at http://www.justice.gov/atr/public/speeches/206428.htm.

criminal liability. In instituting the Leniency Program, the Antitrust Division has provided the opportunity to avoid criminal prosecution in return for full cooperation. It is critical to that program that the offer be unambiguous and that the Division not have prosecutorial discretion in whether to consummate that bargain, but instead must keep the bargain open for all takers.

On the other hand, so long as the leniency applicant's civil liability remains uncertain, it is critical that ACPERA's cooperation obligations remain voluntary and uncertain, so that a) leniency applicants will view ACPERA as an opportunity to remove the punitive elements of civil litigation rather than a burden on their ability to litigate the claims and b) leniency applicants and claimants will both have an incentive to agree on appropriate terms for restitution and the parameters of the cooperation.

**Uncertainty is Critical to Promoting Leniency Applications and Prompt Restitution to Claimants**

Advocates for ACPERA reform must remember that each potential leniency applicant faces two key decision points. The first decision is, of course, whether to file for leniency with the Division. Congress penned ACPERA in order to tip the scales towards the leniency applicant, while at the same time preserving the ability of claimants to obtain restitution from the leniency applicant. ACPERA in its current form achieves that objective through its permissive and open structure. It provides additional comfort that the applicant will be able to resolve its liability on a fair and reasonable basis. However, if the cooperation were made compulsory or the nature of the cooperation were fixed more clearly, a potential applicant is likely to view ACPERA as a burden rather than a relief. At this early stage, the leniency applicant is unlikely to have an accurate sense of damages, will have no sense as to the damages expectations of its customers

and their counsel, will be uncertain as to the reasonableness or willingness of class counsel to seek to come to a resolution, and most of all will recognize that fully litigating a case while at the same time cooperating with claimants will create difficulties. So a regime that is open-ended and permissive will be viewed as a further benefit or opportunity created by a leniency application, while a structured or compulsory regime will be viewed with skepticism and potentially deter rather than foster a leniency application.

When actually confronted with claims, the leniency applicant faces the second decision: whether to cooperate and likely seek a negotiated resolution. Generally in U.S. civil litigation, each party possesses excellent information regarding the strengths and weaknesses of its own case, while it lacks complete information regarding the strength of its opposition. Based on this risk-reward structure, the two parties must assess whether to continue expending resources litigating the matter, or reach a settlement to limit the risk of loss. In the context of settlement, the primary points of negotiation are typically the amount of compensation and the cooperation that a defendant can provide to claimants to pursue compensation from other defendants. If Congress amended ACPERA to eliminate the uncertainty as to the timing and nature of such cooperation, it would remove a key point of negotiation, as well as a powerful incentive on both leniency applicant and claimant to reach a mutually agreeable resolution. The leniency applicant is pushed to the negotiating table recognizing the uncertainty it faces as to whether the cooperation that it chooses to provide will be found to be satisfactory by the court, either in terms of timeliness or quality of cooperation – it is much preferable to remove that risk. On the other side, claimants who typically have more informational needs at the beginning of a case are pushed to the table to secure that uncertain cooperation. Without that uncertainty, the only issue for settlement is the amount of damages. A leniency applicant would view that single

dimensional negotiation in the context of rigid and effectively compulsory cooperation regime as lopsided, with every advantage afforded to claimants. That situation will both be viewed as a potential deterrent to the leniency application in the first place and it would remove the key dynamic that leads to prompt resolution and restitution being negotiated by claimants and paid by leniency applicants.

**Renewal of ACPERA**

As the Division, Congress and the Administration look this spring as to whether to extend ACPERA or make it permanent, it is important to remember its primary mission: the encouragement of leniency applications and the prompt payment of restitution by the leniency applicant. Those two aims could easily conflict with each other. As currently structured, ACPERA achieves those goals by using a permissive and open-ended structure that takes full advantage of the dynamics of civil litigation. Removing the uncertainty of cooperation in the statute may not only cause those goals to conflict, but may result in undermining both goals.

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