Making ACPERA Work

BY ERIC MAHR AND SARAH LICHT

GIVEN THE IMPORTANCE OF THE DOJ leniency program to criminal cartel enforcement in the United States, one might expect the civil version of that program—codified in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA)[1]—to have the same kind of impact. After ten years of experience, however, it remains unclear whether ACPERA really has made a difference in U.S. civil cartel litigation, or instead merely provides a rough (and inarticulate) codification of what was and continues to be the standard practice in civil cartel cases.

ACPERA is easy enough to understand in theory: antitrust leniency applicants who render what a court determines to be "satisfactory cooperation" to plaintiffs in follow-on civil litigation are shielded from the Sherman Act's treble damages and joint and several liability provisions. In terms of its practical application, however, parties and their counsel have had little guidance as to what is required before a leniency defendant may lay claim to ACPERA's protections. ACPERA's language is broad, and its legislative history sparse. Since its enactment in 2004, only a handful of cases have even mentioned the statute and, of those, the two providing the most potentially useful guidance offer contradictory (and somewhat extreme) interpretations of the scope of ACPERA's cooperation requirements.

In this issue, author Bonny Sweeney suggests that a single case, *In re Aftermarket Automotive Lighting Products Antitrust Litigation* (*Auto Lights*),[2] provides the blueprint for interpreting ACPERA's cooperation requirements.[3] Relying solely on *Auto Lights* as the standard interpretation of ACPERA places too much weight on that decision and ignores contradicting case law, ACPERA's legislative history, and the need for cooperation between plaintiffs and defendants in cartel litigation.

Further, most civil cartel matters, if not dismissed, resolve in settlement. This is especially true for DOJ leniency applicants, to whom ACPERA exclusively applies. And once settlement is chosen as the means for resolving a case, well-counseled parties will ensure that the terms of the settlement agreement detail the specific actions that will constitute satisfactory cooperation in terms that satisfy ACPERA. This places responsibility for ACPERA's future success squarely in the hands of the private antitrust bar. To make ACPERA work, parties must put aside their most extreme interpretations of the statute's broadly written provisions and cooperate to ensure that plaintiffs get what they are reasonably entitled to under the statute and leniency applicants do not find the burdens of ACPERA to outweigh its benefits.

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Background on ACPERA

In 1993, the DOJ's Antitrust Division introduced a "Corporate Leniency Program" as part of its ongoing battle against unlawful cartels. Under the program, the first cartel participant to report conduct that violates the antitrust laws—called the leniency applicant—receives amnesty from criminal prosecution in exchange for its full cooperation in the investigation and prosecution of the remaining cartel members. This provides the leniency applicant complete immunity from potentially massive corporate fines as well as from the incarceration of its directors, officers, and employees covered by the grant.

The DOJ's leniency program does not, however, provide an applicant any protection from the civil consequences of its conduct. Prior to ACPERA's passage, a potential amnesty applicant was forced to weigh the potentially "ruinous consequences of subjecting itself to liability for three times the damages that the entire conspiracy caused."[4] The prospect of such substantial civil liability was seen—by Congress, at least[5]—as a major hindrance to the DOJ's leniency program. To address this perceived disincentive, Congress passed ACPERA in 2004.[6] The statute's legislative history explains that ACPERA's central purpose is to provide "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with the Justice Department's Antitrust Division" by limiting "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."[7] A (perhaps distant) secondary purpose of ACPERA was to aid civil plaintiffs in bringing actions for damages caused by cartels.[8]

To these ends, Section 213(a) of ACPERA, entitled "Limitation on Recovery," provides that a claimant bringing civil

suit against an antitrust leniency applicant who provides "satisfactory cooperation" can recover from the applicant only those damages actually caused by the applicant, without trebling or joint and several liability.[9] Section 213(b) makes the court presiding over the civil litigation responsible for determining whether the leniency applicant has performed all of the requirements necessary for "satisfactory cooperation." These include: (1) providing a "full account" of all facts potentially relevant to the civil action; (2) furnishing "all documents or other items potentially relevant to the civil action" in its possession, custody, or control "wherever they are located"; and (3) using best efforts to facilitate interviews, depositions, and testimony at trial from "cooperating individuals" covered by the leniency defendant's application.[10] Neither ACPERA's language, nor its legislative history, offers insight into the fundamental concepts presented by the statute, such as when cooperation must be provided, to whom it must be provided in the case of multiple plaintiffs, and, most importantly, just what constitutes "satisfactory cooperation" in a given case.

The Courts and ACPERA

The limited case law on ACPERA sheds little light on the questions left open by the statutory language and legislative history. The prevalence of settlement through private agreements means that few courts have scrutinized ACPERA, and the two that have done so in any depth have reached contradictory interpretations.

The first case to address ACPERA's cooperation requirements was *In re Sulfuric Acid Antitrust Litigation* (*Sulfuric Acid*) in the Northern District of Illinois.[11] The *Sulfuric Acid* plaintiffs moved to compel the leniency defendants to respond to certain discovery requests. The court found some of the plaintiffs' discovery requests to be unreasonable, and therefore denied the motion under the Federal Rules of Civil Procedure.[12] In the alternative, the plaintiffs argued that the discovery at issue was required by ACPERA, which had been expressly incorporated into a cooperation agreement into which the parties had entered. The plaintiffs argued that ACPERA required more of defendants than did the Federal Rules. After reviewing the parties' cooperation agreement, the court determined that ACPERA's language, as expressed in that agreement, did not obligate the defendants to comply with unreasonable discovery requests. "In short," the court stated, "the Cooperation Agreement did not require [the leniency defendants] to be at the plaintiff's beck and call."[13]

Technically, the court's opinion interprets the language of the parties' private cooperation agreement, and not ACPERA itself. The *Sulfuric Acid* opinion does, however, provide support for the notion that ACPERA requires little more than a defendant's robust compliance with the Federal Rules, perhaps augmented by attorney proffers and/or witness interviews that would not otherwise be required under the Rules.

A 2013 decision from the Central District of California more directly addresses ACPERA's cooperation requirements and comes down at the opposite extreme from *Sulfuric Acid*. The court in *Auto Lights* granted a pretrial motion by plaintiffs seeking an order that the leniency defendants were not entitled to ACPERA's damage limitations.[14] The defendants had provided what appears to have been a substantial amount of cooperation, including, among other things, providing the plaintiffs nine attorney proffers covering key witnesses and documents; responding promptly and accurately to scores of email and telephonic inquiries; arranging the depositions of several current and former employees; and providing "timely and fulsome" responses to all of the plaintiffs' discovery requests without requiring any motions practice.[15] These efforts went unappreciated by the court. The court granted the plaintiffs' motion, holding that the leniency defendants' cooperation was "not sufficient to limit Defendants' liability under ACPERA." The court found instead that "the cooperation provided to [plaintiffs] following the February 2010 proffer amounts to little more than compliance with discovery obligations under the federal rules. The production of documents, translations, responses to inquiries, depositions, and offer to make witnesses available were, in essence, compliance with discovery. . . . ACPERA, however, requires more."[16]

In reaching this conclusion, the court seems to gloss over valuable elements of the defendants' cooperation that were not, in fact, required under the Federal Rules of Civil Procedure. For example, the Federal Rules make no provision for attorney proffers, but the *Auto Lights* defendants provided nine of them. Such proffers can be one of the most valuable aspects of an effective cooperation program. They allow the leniency defendant to lay out an often complex and otherwise opaque factual story that might take plaintiffs months or even years to piece together if forced to do so by taking dozens of depositions and sifting through millions of documents. Similarly, nothing under the Federal Rules requires defense counsel to respond to "scores" of informal email and telephonic inquiries from plaintiffs' counsel about documents, witnesses, and specific factual issues; yet the *Auto Lights* defendants did so.

While the court characterized the defendants' efforts as merely "compliance with discovery obligations under the federal rules," the true motivating factor behind its decision appears to be that the defendants' cooperation was untimely in a critical respect. The court recognized that the leniency defendants could not be faulted for complying with court-imposed stays and protective orders prohibiting them from revealing certain information to the plaintiffs. The court found, however, that none of those prohibitions prevented the defendants from providing the plaintiffs with attorney proffers and other cooperation earlier in the case.[17] More importantly, the court found that the defendants neglected to provide the plaintiffs timely information concerning the initiation of the conduct at issue. Specifically, the court found that the defendants provided information to the DOJ showing that the conduct at issue began years earlier than the

plaintiffs had alleged, but the defendants did not disclose this information to the plaintiffs until after the time for the plaintiffs to amend their complaint had passed.[18] Largely on this basis, the court denied to the defendants ACPERA's protections.

We therefore do not view the *Auto Lights* opinion as necessarily being a condemnation of the quantity or form of the leniency defendants' cooperation efforts in that case. Instead, we see the focus as being the timing of the defendants' delivery of the cooperation. Had the defendants provided the plaintiffs with all of the information they provided to the DOJ early on in the civil litigation—typically a first step under ACPERA—we think the court would have had more difficulty finding defendants' cooperation incomplete or otherwise unsatisfactory.

In a third case, *In re TFT-LCD Antitrust Litigation*, Judge Susan Illston of the Northern District of California did not address ACPERA's substantive requirements in any depth, but confirmed that a leniency defendant cannot be compelled to cooperate with plaintiffs or even to reveal its identity.[19] The plaintiffs filed a motion to compel the leniency applicant to reveal its identity and comply with ACPERA, or forfeit its rights under the statute. Defendant Samsung (responding to the plaintiffs' motion without conceding that it was the leniency defendant) argued that a leniency applicant may decide whether and when to come forward. While noting that the value of a leniency defendant's cooperation diminishes over time, Judge Illston held that nothing in ACPERA compels a leniency defendant to cooperate at all, much less on any specific timetable.[20] In other words, whether and when to seek ACPERA's protections is up to the leniency defendant, although timing is important and delay carries risk.

All in all, these few decisions provide little guidance to plaintiffs' counsel trying to determine to what they are entitled under ACPERA or defense counsel trying to advise their clients as to how burdensome their cooperation obligations will be. In our view, this only increases the need for the parties on each side to take reasonable interpretations of the statute's requirements, several of which we turn to now.

What Is "Satisfactory Cooperation"?

ACPERA describes satisfactory cooperation as providing a "full account to the claimant of all facts known . . . that are potentially relevant to the civil action," furnishing "all documents or other items potentially relevant to the civil action," and using "best efforts" to make witnesses available for interviews, depositions, and testimony.[21] Not surprisingly, perspectives vary on what this all entails.

Commentators from the plaintiffs' bar emphasize that the "potentially relevant" standard is broader "in scope and in reach" than the general standard for discoverability under the Federal Rules of Civil Procedure.[22] They interpret "all facts" and "all documents" to encompass literally "all known facts" and all documents, arguing that "Congress did not limit the provision of such facts or documents to a subset of information or topics."[23] Such a broad view of "potentially relevant" information could easily include every piece of information even tangentially related to the defendant's business. Providing such extensive information to all claimants would be an enormously expensive and, in many cases, unfeasible task. Furthermore, interpreting ACPERA's request for "all" documents literally would require defendants to produce documents shielded by the attorney-client privilege and other relevant protections. We are confident that Congress would not have intended ACPERA's requirements to supersede the attorney-client privilege—"the oldest of the privileges for confidential communications known to the common law"[24]—without expressly saying so. We conclude that the literal all facts/all documents interpretation advanced by some plaintiffs' counsel is unrealistic, unworkable, and unlikely to prevail.

The defense perspective takes a more limited view of what ACPERA demands, arguing that ACPERA's cooperation requirements must not be interpreted in a way that undermines the statute's primary goal of increasing participation in the DOJ's leniency program. While this argument is undoubtedly correct, it likely cannot support the extreme position that ACPERA's cooperation requirements do no more than mirror the scope of regular civil discovery. In particular, the statute's requirement that the leniency defendant provide "a full account" of all facts that are "potentially relevant to the civil action" suggests that a defendant must do something more—though it is not clear how much more—than merely comply with discovery rules.

The most practical guidance is found in Section 213(b)(3)(A)(i)'s limitation of an individual leniency defendant's availability for interviews, depositions, and trial testimony to what a claimant may "reasonably require."[25] While these words appear in just one minor section of ACPERA, we think they provide the appropriate touchstone for interpretation of the statute as a whole. Undoubtedly, what is reasonably required in any given case may often be viewed differently by plaintiffs and defendants. "Reasonableness," however, is a concept with which lawyers and courts have a great deal of experience. It also allows for an appropriate degree of flexibility in ACPERA's application. We previously have pointed out that the uncertainty inherent in the statute can be advantageous in some contexts, as it allows parties to tailor cooperation agreements to their case, rather than trying to force their case into a single, inflexible framework for cooperation.[26] Application of a reasonableness standard would provide a similar benefit.

When Is Cooperation Due?

The timing of ACPERA cooperation is another area of uncertainty, since ACPERA provides little guidance as to when satisfactory cooperation must be rendered.[27] The 2010 ACPERA Extension Act, which was ostensibly intended to clarify timing issues, adds only that timeliness is a factor to

be considered in determining whether cooperation is satisfactory (a point that the courts already had made clear).[28] Even in its attempt to offer more specific guidance concerning timeliness in cases in which the DOJ has obtained a stay or protective order, the amendments provide merely that such cooperation must be rendered "without any unreasonable delay."[29] This language adds little clarity, as we are unaware of any defendant taking the position that cooperation rendered *with* unreasonable delay would be satisfactory.

Not surprisingly, plaintiffs would prefer cooperation at the very outset of the litigation, to help them draft amended complaints, survive motions to dismiss, and prepare discovery requests.[30] In plaintiffs' view, "For the statute to provide meaningful assistance to private enforcement of the antitrust laws," it should "be amended to require satisfactory cooperation at the earliest possible opportunity."[31] Defendants, on the other hand, favor the *Sulfuric Acid* court's view that "[f]or better or worse, the American system is an adversarial one, and while lawyers are constrained quite appropriately by a strict set of ethical rules, they have no obligation to assist an opponent in establishing claims."[32] Nothing in ACPERA prevents a leniency applicant from cooperating with plaintiffs while at the same time defending against their claims, particularly on such grounds as failure to satisfy the requirements of the FTAIA, standing, and challenges to class certification, among others. Accordingly, the defense perspective urges courts to interpret ACPERA in ways that enhance incentives to apply for leniency without undermining the adversarial system.

One issue that can be resolved easily is the suggestion by some plaintiffs' lawyers that—absent a stay by the DOJ—the leniency applicant should be "obligated to cooperate early as the case is being prepared," perhaps even before the civil suit has been filed.[33] The statute itself clearly forecloses that interpretation, as it requires a person or class, in order to qualify as a "claimant," to have brought a civil action.[34] Until that step is taken, no cooperation is owed.

In addition, the leniency defendant has complete discretion to decide whether or not to seek the benefits of ACPERA. If a leniency defendant chooses not to seek ACPERA's protections, it need not meet the statute's obligations.[35] At the same time, the choice of when to initiate cooperation carries with it a significant risk that the leniency defendant will begin its efforts too late for them to be deemed satisfactory by the claimants or court. The question is, then, when is too late?

Like other issues regarding cooperation, timeliness is best considered in the particular circumstances of a case. If a case is the first of its kind with respect to a product or industry, the leniency defendant's early cooperation in the form of proffers may be very valuable to plaintiffs attempting to draft a complaint that will survive a motion to dismiss. If, however, the case is later in a series of follow-on suits in the same industry, early cooperation may not matter as much because plaintiffs can use earlier cases as a roadmap. There, later cooperation in the form of witness interviews, depositions, and testimony at trial may be more valuable than earlier proffers.

When claimants file suit can also make a difference. A leniency defendant may be able to satisfy its cooperation requirements with respect to later-filing claimants by providing copies of documents and transcripts of interviews from earlier cooperation efforts. Several considerations suggest later-filing claimants should be flexible in determining how the leniency defendant will cooperate. First, as noted repeatedly by plaintiffs and courts, the value of cooperation diminishes over time because other sources of information concerning the conduct at issue emerge as a case progresses.[36] This means later-filing plaintiffs should not "reasonably require" as much cooperation as earlier plaintiffs. Second, because invoking ACPERA is optional, nothing prevents a leniency defendant from cooperating with the class but not with later-filing opt-out claimants. Finally, if the leniency defendant decides to litigate whether its cooperation has been satisfactory with respect to later-filing claimants, courts are likely to be sympathetic to a leniency defendant that already has cooperated fully with a first wave of claimants.

These considerations show through in the few cases to have addressed timeliness. In *Sulfuric Acid*, the district court appears to have been frustrated with the plaintiffs waiting "months before taking any action and even then languish[ing] in inaction after [the defendant's] response to their deposition notices."[37] There is thus some sense in which claimants have at least a soft obligation to be timely in their demands for cooperation. On the other hand, in *Auto Lights*, the court's opinion suggests that its interpretation of ACPERA was influenced heavily by the defendants' failure to provide the plaintiffs certain information until after it was too late for the plaintiffs to amend their claims.[38] Ultimately, the timeliness of cooperation should be evaluated based on the specific circumstances and needs of the parties in the case at hand. On balance, however, once the decision to cooperate has been taken, delay will rarely benefit either side.

To Whom Is Cooperation Owed?

The question seems straightforward enough at first. Section 213(b) requires that a leniency defendant provide satisfactory cooperation to the "claimant," and ACPERA defines a "claimant" as a "person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law" against the leniency defendant.[39] In practice, however, it is more complicated. There are a number of issues concerning who may qualify as a "claimant," none of which have yet been addressed by the courts.

Two preliminary matters are worth noting. First, as Judge Illston held in *TFT-LCD*, ACPERA is discretionary.[40] A leniency defendant is not obligated to provide cooperation to *anyone* unless it decides to seek the Act's damages limitations. In some circumstances, a leniency defendant might not

want to take advantage of ACPERA with respect to certain claimants. For example, a leniency defendant may choose not to cooperate with plaintiffs it believes lack standing or with a proposed class it believes will not be certified, and ACPERA does not compel it to do otherwise.

Second, ACPERA's provisions limit the particular claimants to whom the leniency applicant owes damages to just its own customers."[41] This limitation seems unlikely, however, to apply to the applicant's cooperation obligations. Under principles of joint and several liability, an antitrust defendant is liable to all claimants harmed by the challenged cartel, whether its customers or not. A leniency defendant must therefore cooperate with non-customer claimants in order to avoid that joint and several liability.

Thus, assuming the typical Section 1 case, a broad view of the term "claimant" would encompass the named plaintiff, the class itself, and individual class members, as well as opt-outs. It remains an open question whether an ACPERA defendant must cooperate separately with each of these claimants to secure the benefits of reduced civil liability. Theoretically, any number of absent class members and opt-outs could demand separate cooperation tailored to their particular circumstances and delivered to them individually. However, it would be unlikely and unwise for a court to require a leniency defendant to expend its resources duplicating its efforts where a more coordinated approach could achieve the same goals. With class sizes regularly numbering in the tens and hundreds of thousands, if not millions, unreasonable duplication could quickly undermine ACPERA's primary purpose of eliminating disincentives to seeking leniency. Plaintiffs who overburden the leniency defendant with duplicative cooperation requests are likely to encounter resistance from the defendant and eventually from the court. By doing so, they risk undermining the goals of ACPERA and, in the process, their own long-term interests in forging a cooperative, productive relationship with the leniency defendant.

As parties and their counsel work through these issues, a cooperative approach from both sides opens up a range of potential solutions depending on the circumstances of the particular case. If the class and multiple individual claimants file suit around the same time, the parties can set up a system under which the leniency defendant produces documents in a single repository to which all claimants have access, and provides proffers and initial witness interviews to all claimants at once. While not a simple process, this kind of approach does not differ substantially from the kind of discovery coordination that occurs today in almost all complex civil litigation.

Conclusion

For better or for worse, the future of ACPERA will more likely be shaped by litigants and their counsel, than by Congress or the courts. Congress is unlikely to consider the statute again before it is up for renewal in 2020, and the frequency of settlements in cartel litigation means that the courts will have few opportunities to opine on the statute.

It will therefore be left to private parties to make ACPERA work. In doing so, both plaintiffs and leniency defendants should be cautious about taking extreme positions. While many of the terms and concepts in ACPERA can be—and have been—interpreted in extreme ways by plaintiff commentators, courts are unlikely to be receptive to those extreme interpretations given that the overriding motivation behind ACPERA was to remove a perceived disincentive to seeking leniency. Likewise, leniency applicants who try to treat ACPERA as a free pass through civil follow-on litigation are likely to squander its benefits. Making ACPERA work will require parties and their counsel to come together to achieve the most reasonable result for all sides, which is what we should expect when dealing with a statutory scheme focused on "satisfactory cooperation." ■

[1] ACPERA, Pub. L. No. 108-237, Tit. II, 118 Stat. 661, 665.

[2] *In re* Aftermarket Auto. Lighting Prods. Antitrust Litig. (*Auto Lights*), 2013 WL 4536569 (C.D. Cal. Aug. 26, 2013).

[3] Bonny E. Sweeney, *Earning ACPERA's Civil Benefits: What Constitutes "Timely" and "Satisfactory" Cooperation?*, ANTITRUST, Summer 2015, at 38.

[4] *See* CONG. REC. S3614 (Apr. 2, 2004) (statement of Senator Hatch) [hereinafter Sen. Hatch Statement].

[5] Some question the validity of Congress' assumption. *See, e.g.*, Niall Lynch & Kathleen Fox, *How ACPERA Has Affected Criminal Cartel Enforcement*, LAW360 (Aug. 11, 2011) ("[T]he total number of leniency applications is up only a modest 4 percent in the six years since ACPERA's enactment."); Richard J. Leveridge & James R. Martin, *The End of 'De-Trebling?'* LAW360 (May 21, 2009) ("The past five years have failed to provide any evidence that de-trebling has incentivized companies to seek amnesty. Companies seek amnesty today for the same reasons they did before ACPERA—to avoid jail for high-level executives, escape significant criminal fines, and win the 'prisoner's dilemma' race to obtain amnesty.").

[6] The statute was originally intended to expire on June 22, 2010, but was extended for ten additional years in the Antitrust Criminal Penalties Enforcement and Reform Act of 2004 Extension Act of 2010 , H.R. 5330, 111th Cong. (2010) (ACPERA Extension Act).

[7] Sen. Hatch Statement, *supra* note 2, at S3613. As Congressman John Conyers put it, the "central purpose" of ACPERA was to curtail the possibility of treble damages and thereby "bolster the leniency program already utilized by the Antitrust Division." *See* CONG. REC. at H3660 (June 2, 2004) (Statement of Representative Conyers).

[8] In *Oracle v. Micron*, the court wrote that ACPERA's "legislative history indicates that Congress was concerned with injured private parties' ability to recover antitrust damages." Oracle Am., Inc., v. Micron Technology, Inc., 817 F. Supp. 2d 1128, 1135 (2011) (quoting Sen. Hatch Statement, *supra* note 2). The decision referenced Senator Hatch's statement that "the legislation requires the amnesty applicant to provide full cooperation to the victims as they prepare and pursue their civil lawsuit." *Id.*

[9] ACPERA § 213(a) "[I]n any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the com-

merce done by the applicant in the goods or services affected by the violation.").

[10] *Id.* § 213(b).

[11] *In re* Sulfuric Acid Antitrust Litig. (*Sulfuric Acid*), 231 F.R.D. 320 (N.D. Ill. Aug. 26, 2005).

[12] *Id.* at 329.

[13] *Id.*

[14] *Auto Lights*, 2013 WL 4536569, at *4 (C.D. Cal. Aug. 26, 2013).

[15] *Id.* at *3.

[16] *Id.* at *4.

[17] *Id.*

[18] *Id.* at *4–5.

[19] *In re* TFT-LCD Antitrust Litig., 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

[20] *Id.*

[21] ACPERA § 213(b)(1)–(3)(A).

[22] Michael D. Hausfeld et al., *Observations from the Field: ACPERA's First Five Years*, 10 Sedona Conf. J. 94, 109 (2009).

[23] *Id.* at 110.

[24] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev. 1961)).

[25] ACPERA § 213(b)(3)(A)(i).

[26] U.S. Gov't Accountability Office, GAO-11-619, Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection 35 (2011) [hereinafter GAO ACPERA Study] (citing E. Mahr & P.A. Lange, *ACPERA—A Glass Half Full*, Law360 (Oct. 25, 2010).

[27] *See, e.g.*, *Hearing on Cartel Prosecution: Stopping Price Fixers and Protecting Consumers, Before the Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Rights* (Nov. 14, 2013) (Prepared Statement of Hollis Salzman, Partner and Co-Chair, Antitrust and Trade Regulation Group, Robins, Kaplan, Miller & Ciresi, LLP, on behalf of the Committee to Support the Antitrust Laws at 2: "[I]t would greatly benefit consumers bringing private follow-on antitrust actions if Congress were to give more direction on the timing of cooperation with civil litigants needed for cartel defendants to receive leniency under the [DOJ Antitrust] Division's Corporate Leniency Program.") [hereinafter Salzman Testimony].

[28] *See* ACPERA Extension Act at § 3(a) (stating that "[t]he court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant or cooperating individual's cooperation with the claimant.").

[29] *Id.* § 3(b)(2).

[30] Hausfeld et al., *supra* note 22, at 104–05.

[31] Salzman Testimony, *supra* note 27.

[32] *Sulfuric Acid*, 231 F.R.D. at 324.

[33] *See, e.g.*, Hausfeld et al., *supra* note 22, at 106–07 (raising whether "timely" cooperation must begin "even before" a civil suit is filed and suggesting that the legislative history provides a basis for the position that the applicant is "obligated to cooperate early as the case is being prepared . . . .").

[34] ACPERA § 212(4).

[35] As the Antitrust Division stated in its brief in *TFT-LCD* (*Flat Panel*) *Antitrust Litigation*, "Under ACPERA, the leniency applicant alone determines when, and if, it will seek the benefits of ACPERA." 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 Accept Reduced Civil Liability at 5, *In re:* TFT-LCD (Flat Panel) Antitrust Litig., No. M-07-1827 SI, MDL No. 1827, Dkt. No. 695 (N.D. Cal. May 1, 2009).

[36] *See, e.g.*, *In re* TFT LCD Antitrust Litig., 618 F. Supp. 2d at 1196 ("Plaintiffs argue persuasively that the value of an applicant's cooperation diminishes with time"); *see also* Salzman Testimony, *supra* note 25; Hausfeld et al., *supra* note 22, at 106–07.

[37] *Sulfuric Acid*, 231 F.R.D. at 327 ("What would be reasonable even in a late stage of a relatively simple case with few lawyers may take on a very different cast where, as here, the case is exceedingly complex, the depositions are to occur virtually hours before the discovery cut-off, and it was obvious—or at least probable—that the schedules of the deponents and a number of lawyers would be unable to accommodate the belatedly filed notices. The plaintiffs were keenly aware of all of these facts and of the competing demands imposed by the other discovery disputes that had been percolating for some period.").

[38] *Auto Lights*, 2013 WL 4536569 at *4 ("Even accepting Defendants' argument that they were unable to verify the accuracy of that information or the specific 'start' date of the conspiracy—all of which was apparently reliable enough to provide to the DOJ—ACPERA required Defendants to provide Plaintiffs with a 'full account' of facts *potentially* relevant to the conspiracy. Defendants did not do so.").

[39] ACPERA § 212(4).

[40] *See Flat Panel*, 618 F. Supp. 2d 1194.

[41] The statute states that, if determined to have rendered satisfactory cooperation, the amount of damages a claimant may recover 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. ACPERA § 213(a).

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