

## ACPERA's Civil Damages Limitation Provisions Extended for 10 Years

Last month, Congress extended for 10 years (the Extension Act) the controversial civil damages limitation provisions of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) of 2004.<sup>1</sup> These provisions were intended to increase the incentives for firms involved in criminal antitrust conduct to participate in the US Department of Justice's (DOJ's) Corporate Leniency Program by creating the opportunity for them to augment the benefits of *criminal* non-prosecution by limiting their exposure in *civil* damages litigation as well—to single (as opposed to treble) damages based on their own sales (as opposed to potential joint and several liability).

Five years later, however, there is little agreement about whether these provisions have been effective in achieving one of ACPERA's important goals—increasing the number of companies participating in the DOJ's Corporate Leniency Program.<sup>2</sup> There has also been significant uncertainty regarding precisely how some of the statute's requirements should be applied. While the Extension Act has attempted to address a number of these outstanding issues, the changes amount to a relatively minor tinkering around the edges of the statutory scheme, and we do not believe that there are likely to be significant practical effects for firms considering whether to avail themselves of the ACPERA damage limitation provisions.

### Background of ACPERA

In 1993, the DOJ Antitrust Division revised its Corporate Leniency Program to make it easier and more attractive for companies to self-report illegal activity. The DOJ considers its leniency program to be an “extraordinary success,”<sup>3</sup> and reports that, since its revision in 1993, the leniency program “has been the [Antitrust] Division's *most* effective investigative

<sup>1</sup> Certain provisions of ACPERA—but not the increases in Sherman Act statutory criminal penalties effected by the statute—were originally set to expire in June 2009. Congress then extended these provisions for an additional year. On June 9, 2010, as the second expiration date neared, the President signed the Extension Act. The Extension Act also commissions a US Government Accountability Office (GAO) report to evaluate the effectiveness of ACPERA.

<sup>2</sup> See 156 Cong. Rec. H3716-17 (daily ed. May 24, 2010) (statement of Rep. Nadler); 149 Cong. Rec. S13519 (daily ed. Oct. 29, 2003) (statement of Sen. Dewine).

<sup>3</sup> See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, US Department of Justice, Address at the ABA Section of Antitrust Law Cartel Enforcement Roundtable: Update of the Antitrust Division's Criminal Enforcement Program (November 16, 2005) available at <http://www.justice.gov/atr/public/speeches/213247.htm>.

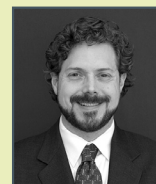
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tool” in identifying and destabilizing cartels.<sup>4</sup>

The program offers amnesty from criminal prosecution to the first corporate participant in a cartel that comes forward to report the illegal conduct. However, the reporting firm (the leniency “applicant”) still faces the threat of civil claims based on the same conduct. Until the passage of ACPERA, the possibility of paying treble damages, coupled with the exposure to joint and several liability, posed a major disincentive to participation in the program.

ACPERA increases the maximum Sherman Act corporate fine to US\$100 million, the maximum individual fine to US\$1 million, and the maximum Sherman Act jail term to 10 years. The Act also enhances the incentive for corporations to participate in the leniency program by limiting the damages recoverable from a corporate amnesty applicant to the damages actually inflicted by the applicant’s conduct. This provision effectively de-trebles damages and eliminates any joint and several liability otherwise faced by the applicant. The benefits this provision confers are available (1) only to those companies that have entered into a leniency agreement, whether conditional or final, with the DOJ Antitrust Division pursuant to the Antitrust Division’s Corporate Leniency Policy; and (2) “if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual... has provided satisfactory cooperation to the claimant with respect to the civil action....”<sup>5</sup>

## Uncertainties in the Law

Since ACPERA was first enacted there has been significant uncertainty with respect to the requirements and timing of the “satisfactory cooperation” referenced in the statute.<sup>6</sup>

Corporations or individuals seeking to reap the benefits of ACPERA are required to provide a full account to the civil plaintiff of all facts that are potentially relevant to the civil action, and furnish all documents or other items potentially relevant to the civil action that are in the possession or control of the leniency applicant. Cooperating individuals must make themselves available for interviews, depositions, or testimony in connection with the civil action as the plaintiff may reasonably require. The cooperating corporation must use its “best efforts to secure and facilitate” this cooperation from individuals.<sup>7</sup>

While these basic requirements are set forth in the statute, ACPERA leaves the determination of whether the applicant’s cooperation has been “satisfactory” to the discretion of the judge presiding over the civil case.<sup>8</sup> As the statutory language regarding the requirements for such cooperation is relatively open-ended, and cooperation necessarily extends through much or all of the litigation, the defendant has no way of knowing at the time it embarks upon an effort to cooperate with plaintiffs and obtain the damage limitations benefits of ACPERA whether the judge will ultimately deem its cooperation “satisfactory.” Because such cooperation may be found lacking at some later point in the litigation, the defendant is placed in the odd position of simultaneously cooperating with, and defending against, the plaintiff’s efforts to prove civil claims.

The timing of the required cooperation also has been unclear, and this has created some tension between the goals of the DOJ and those of counsel for the civil plaintiffs. Especially in the wake of the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*,<sup>9</sup> civil plaintiffs are eager to seek substantial early discovery in order to plead antitrust violations with greater particularity. However, civil discovery can potentially compromise any ongoing criminal investigation by the DOJ into the same conduct. The timing of a defendant’s cooperation with a civil plaintiff therefore can affect whether

4 See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, US Department of Justice, Address at OECD Competition Committee Working Party No. 3 Prosecutors Program: Cracking Cartels with Leniency Programs (October 18, 2005) available at <http://www.justice.gov/atr/public/speeches/212269.htm>.

5 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(b), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

6 § 213(b).

7 § 213(b)(3)(B).

8 § 213(b).

9 550 U.S. 544 (2007).

there is conflict or interference between civil and criminal proceedings involving the same conduct.

Some also question the overall effectiveness of the civil damages provisions of ACPERA in encouraging amnesty applicants to come forward. Critics contend that the damage limitation provisions of ACPERA are unnecessary.<sup>10</sup> They maintain that “the real determining factors that prompt wrongdoers to seek corporate amnesty are (1) the threat of prison time for high-level executives involved in the antitrust violation; and (2) the necessity of making amnesty application decisions on a global scale and seeking leniency in various jurisdictions simultaneously, which arguably minimizes the potential effect that treble damage exposure in United States civil litigation exerts in the decision-making.”<sup>11</sup> These critics also contend that, in many cases, the cartel would have been discovered even without the applicant’s information. Therefore, the leniency applicant would not have avoided criminal prosecution if it had remained silent.<sup>12</sup> Finally, some have pointed out that before ACPERA, leniency applicants already routinely exchanged cooperation in civil cases for relatively small settlement amounts that represented single damages or less for the applicant.<sup>13</sup>

The dearth of case law that applies ACPERA’s provisions further exacerbates the uncertainty over the statute’s effectiveness.

## Amendments to ACPERA

The Extension Act keeps intact the main substantive provisions of ACPERA. The increases in fines and jail terms, and the potential limitation of liability to single damages without joint and several liability for amnesty applicants, remain the same. The Extension Act, however, does attempt

to clarify some of the uncertainties described above. The Extension Act amends ACPERA in the following ways:

- **Extension:** ACPERA, which was scheduled to expire on June 22, 2010, is extended for 10 years.
- **Timeliness of Cooperation:** The Extension Act removes the specific conditions that govern when a court should consider the timeliness of an applicant’s cooperation. Instead, ACPERA will now simply state that “[t]he court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant’s or cooperating individual’s cooperation with the claimant.”<sup>14</sup>

This change reinforces the importance of the timeliness of an applicant’s cooperation by directing courts to consider this requirement in *all* cases, not just cases where the leniency applicant first contacts the Antitrust Division after the issuance of compulsory process by a state, or after the filing of a civil action, as provided for in the original version of the statute.<sup>15</sup>

- **Cooperation after Termination of Stay or Protective Order:** The Extension Act adds an additional subsection concerning the cooperation of a leniency applicant after the expiration of a stay or protective order. The new subsection states that, if the Antitrust Division obtains a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement, and the stay or protective order later expires or terminates, then the antitrust leniency applicant and cooperating individuals must provide, without any unreasonable delay, any cooperation that previously had been prohibited by the stay or protective order. The requirement set forth in this subsection must be met in order for the applicant’s cooperation to be deemed satisfactory.

The change addresses the difficulty described above in

<sup>10</sup> See Letter from James A. Wilson, Chair of the ABA’s Section on Antitrust Law, to the Chairmen and Ranking Members of the Senate and House Committees on the Judiciary (May 8, 2009) available at: [http://www.abanet.org/antitrust/at-comments/2010/03-10/Congress\\_ACPERA\\_coverletter.pdf](http://www.abanet.org/antitrust/at-comments/2010/03-10/Congress_ACPERA_coverletter.pdf) (summarizing criticism from various commenters).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Antitrust Criminal Penalties Enforcement and Reform Act of 2004 Extension Act of 2010, H.R. 5330, 111th Cong. § 3(a) (2010).

<sup>15</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §213(c), 118 Stat. 665, 666 (codified as amended at 15 U.S.C. § 1 note).

ensuring that an applicant cooperates with civil plaintiffs in a timely manner without disrupting an ongoing DOJ investigation. The amendment makes clear that timeliness does not require a defendant to provide information it is prohibited from sharing under a stay or protective order, but that a defendant in that situation must provide any such information within a reasonable time after the stay is lifted.

- **Effect of Law's "Sunset" on Companies in the Amnesty Process:** The Extension Act also amends ACPERA to minimize the adverse effects of the law's "sunset" on companies that are in the process of applying for amnesty. The Extension Act allows a person who receives a "marker" (an assurance given by the Antitrust Division to a candidate for corporate leniency that no other company will be considered for leniency, for some finite period of time, while the candidate is given an opportunity to perfect its leniency application) before the expiration of the Act and later executes an antitrust leniency agreement to reap the benefits of ACPERA even if the law expires before the leniency agreement is executed.

This change increases the appeal of participating in the leniency program by ensuring that the law's sunset will not result in adverse effects for those companies who have entered into the application process, but have not yet executed a leniency agreement.

- **GAO Report:** The Extension Act commissions a GAO report on the effectiveness of ACPERA, both in criminal investigation and enforcement by the Department of Justice and in private civil actions, due no later than June 9, 2011. This provision should provide a mechanism for measuring ACPERA's effectiveness. The report will allow both proponents and detractors to rest their claims of ACPERA's effectiveness, or lack thereof, on systematically gathered data.

## Outlook for the Future

We suspect that, on balance, the changes to ACPERA adopted by Congress in its latest extension legislation will affect only modestly the difficult choices facing a DOJ leniency applicant that is considering whether (if so, how and when) to avail itself of ACPERA's civil damage limitation provisions. It is imperative for any firm facing such issues to carefully consider the potential drawbacks, as well as the benefits, of early cooperation with civil plaintiffs in light of the particular facts and circumstances presented.

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*We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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