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**ACPERA -- Eight Years Later, “Satisfactory Cooperation”
Lacks a “Satisfactory” Definition**

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ACPERA -- Eight Years Later, “Satisfactory Cooperation” Lacks a “Satisfactory” Definition

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Until the Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”) was passed in 2004, a potential applicant into the Antitrust Division’s successful leniency program faced a Hobson’s choice: apply for amnesty but then watch as the civil damage exposure from the plethora of follow-on civil class actions dwarfed the avoided criminal penalty.² Thus, a potential amnesty applicant’s decision to apply to the Antitrust Division’s leniency program required a careful balancing of the benefits of amnesty from criminal prosecution against massive civil exposure.

The passage of ACPERA in 2004, lauded as a “truly bipartisan” measure, changed this landscape significantly. ACPERA reduced the potential damages liability for an amnesty applicant if it provided “satisfactory cooperation” to plaintiffs.³ Eight years after passage, however, the statute itself, and the lack of case law development regarding ACPERA, continue to leave parties in the dark regarding the meaning of “satisfactory cooperation.”

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² Under the Antitrust Division’s leniency program, a company or individual who is the first to self-report a criminal antitrust violation, and who meets certain requirements, can obtain full immunity from prosecution for itself and its executives and employees. *See* Model Corporate Conditional Leniency Letter, <http://www.justice.gov/atr/public/criminal/239524.pdf>; Model Individual Conditional Leniency Letter, <http://www.justice.gov/atr/public/criminal/239526.pdf>. *See also* Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters*, (Nov. 19, 2008), <http://www.justice.gov/atr/public/criminal/239583.pdf>.

³ *See* 150 CONG. REC. H3657 (daily ed. June 2, 2004).

A. The Development of ACPERA

ACPERA brought about a number of major changes to the United States antitrust world – both from a criminal and civil perspective.⁴ From a criminal standpoint, the statute increased the maximum fine for corporations from \$10 million to \$100 million, increased the maximum prison sentence from 3 years to 10 years, and increased maximum individual fines from \$350,000 to \$1 million.⁵ The statute also created a significant civil benefit for amnesty applicants. An amnesty applicant had the opportunity to reduce its damages from treble to single damages and to avoid joint and several liability as long as it could demonstrate it had rendered “satisfactory cooperation” to plaintiffs.⁶ In contrast, non-leniency defendants still faced joint and several liability and treble damages.⁷

Unfortunately, the statute defined “satisfactory cooperation” only in the most general terms. Specifically, the language stated:

Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) 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, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include (1) providing a full accounting of the facts known to the applicant or cooperating individual, as the case may be, 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 or cooperating individual, as the case may

⁴ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004).

⁵ *Id.* at § 215.

⁶ *Id.* at § 213 (stating that assuming an amnesty applicant renders satisfactory cooperation, “the damages...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.”).

⁷ *Id.* at § 214.

be, wherever they are located; and (3)(a) in the case of a cooperating individual (i) making himself or herself available for such interviews, depositions or testimony in connection with the civil action as the claimant may reasonably require (ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).⁸

These very general guidelines, without specific enumeration of the mechanics of cooperation, left plaintiffs and defendants in a tug of war over what constituted “satisfactory cooperation.” On the plaintiffs side, counsel advocated that satisfactory cooperation required the amnesty applicant, among other things, to: (1) begin cooperating with plaintiffs regardless of the status of the investigations in the U.S. and other worldwide jurisdictions, (2) provide input on the plaintiffs’ complaint, (3) pay the legal fees of corporate personnel to ensure and facilitate employee cooperation, and (4) supply facts and documents broader in scope than what was proffered to the Antitrust Division.⁹

In one case, *In re TFT-LCD Antitrust Litigation*, plaintiffs even attempted to force a previously unidentified amnesty applicant to reveal itself or lose the protections of ACPERA.¹⁰

As the court observed:

Plaintiffs contend that because the amnesty applicant has neither identified itself nor provided plaintiffs with any cooperation, this Court cannot certify that the applicant has complied with ACPERA’s cooperation requirements. Plaintiffs contend that

⁸ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(b), 118 Stat. 661 (2004).

⁹ Michael D. Hausfeld, et al., *Observations from the Field: ACPERA’s First Five Years*, 10 SEDONA CONF. J. 95, at 106-10 (2009).

¹⁰ *In re TFT-LCD (“Flat Panel”) Antitrust Litig.* 618 F. Supp. 2d 1194 (N.D. Cal. 2009).

cooperation is only satisfactory if it is provided early in the litigation and they note that these cases have been pending for over 24 months. Plaintiffs argue that the amnesty applicant's failure to cooperate thus far has adversely affected plaintiffs' ability to investigate the facts, and the Court should order the amnesty applicant to either immediately comply with its ACPERA obligations, or affirmatively state it will not seek reduced civil liabilities.¹¹

The court rejected the plaintiffs' attempt to smoke out the amnesty applicant, finding that the plaintiffs had failed to identify "any provision that would authorize the Court to compel the amnesty applicant to identify itself and cooperate with plaintiffs, nor is the Court aware of any cases interpreting ACPERA in this manner."¹² The court, however, acknowledged that the plaintiffs persuasively had argued that the value of cooperation diminishes over time, and stated that the timeliness of the amnesty applicant's cooperation would be taken into account at the time the court determined "satisfactory cooperation."¹³

B. The Dearth of Precedent on "Satisfactory Cooperation"

Because from its inception, ACPERA has required a court to make a finding on whether an amnesty applicant has rendered satisfactory cooperation in order to confer ACPERA benefits, and the statute contains a minimal definition of cooperation, one would expect a number of court decisions elucidating the contours of "satisfactory cooperation." There appears to be only one case, however, that discusses the entry of an order of satisfactory cooperation.¹⁴ Unfortunately,

¹¹ *Flat Panel*, 618 F. Supp. 2d at 1195.

¹² *Id.*

¹³ *Id.* at 1196.

¹⁴ *See In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320 (N.D. Ill. 2005).

even that case does not give much insight because the plaintiffs and the defendants had agreed on the defendants' satisfactory cooperation.¹⁵

In *In re Sulfuric Acid Antitrust Litigation*, the amnesty applicants, Marsulex and Chemtrade, had entered into a "Cooperation Agreement" with the plaintiffs pursuant to ACPERA.¹⁶ The plaintiffs argued that the agreement required the court to grant a motion to compel the amnesty companies to produce individuals for depositions.¹⁷ In addition to noting that the plaintiffs had not raised arguments under the Cooperation Agreement until their reply brief, the court rejected plaintiffs' claim that the Cooperation Agreement had required the defendants to comply with the short timeframe dictated by the plaintiffs.¹⁸ The court determined that the Cooperation Agreement tracked the language of ACPERA, requiring a defendant to use "its best efforts to secure and facilitate from cooperating witnesses" their "availability for such interviews, depositions, or testimony in connection with the civil action as the claimant may *reasonably* require."¹⁹ The court also observed that the plaintiffs had joined in the defendants' motion seeking a certification of "satisfactory cooperation" the day before filing their motion to compel.²⁰ Accordingly, the court denied the portion of plaintiffs' motion to compel based on the cooperation obligations.²¹

¹⁵ *Id.* at 330 (stating that plaintiffs had joined defendants' motion requesting that the judge enter a certification of "satisfactory cooperation").

¹⁶ *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. at 328.

¹⁷ *Id.*

¹⁸ *Id.* at 329-330.

¹⁹ *Id.* at 329, n. 13 (emphasis in original).

²⁰ *Id.* at 330.

²¹ *Id.* at 331.

Obviously, *In re Sulfuric Acid* does not give much insight into what the court deemed satisfactory cooperation. Instead, both that case, and the dearth of case law after the amendments discussed below may hint at what actually is happening in cartel cases. Amnesty applicants are negotiating their own terms of “satisfactory cooperation” with plaintiffs. Alternatively, they are using their amnesty status, and the likelihood that they can obtain single rather than treble damages for their own sales as a negotiating point in early settlements with plaintiffs. Accordingly, parties have avoided the need to go to a court for a finding on satisfactory cooperation because the parties already have created their own agreed-upon definition.²²

C. The 2009 Extension of ACPERA – No Change to the Description of “Satisfactory Cooperation”

The statute was set to expire in 2009. As expiration drew near, potential amnesty applicants hurried to get their conditional leniency letters inked prior to expiration so that they did not lose the potential benefits of ACPERA. Luckily for the amnesty applicants whose applications were still being processed on the date of expiration, the statute was extended for one year to June 2010 right before its initial expiration. No changes to ACPERA, either on “satisfactory cooperation” or any other matter were made at that time.²³

D. The 2010 Extension of ACPERA with Amendments – No Clarity on “Satisfactory Cooperation and No Precedent to Fill the Hole

In 2010, the statute was extended for ten years to 2020 with amendments.²⁴ The amendments addressed the issues associated with the statute’s expiration, commissioned a report

²² See *In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184 (S.D.N.Y. 2008) (noting that amnesty applicant entered into a cooperation agreement with plaintiffs).

²³ See Pub. L. No. 111-30, 123 Stat. 1775 (2009).

²⁴ See Pub. L. No. 111-190, 124 Stat. 1275 (2010).

from the U.S. Government Accountability Office (“GAO”), and added a timeliness consideration to an amnesty applicant’s cooperation obligations.

First, in a nod to the anxiety earlier applicants had faced regarding whether they would obtain ACPERA’s benefits as the statute neared expiration, the amendments made provision that: “(1) a person who receives a marker on or before the date on which the provisions of the section 211 through 214 of this subtitle shall cease to have effect that later results in the execution of an antitrust leniency agreement, or (2) an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 215 of this subtitle shall cease to have effect” still will obtain the benefits of ACPERA after expiration.²⁵ Thus, if ACPERA is not extended in 2020, even a pending marker without a finalized amnesty letter at the time that ACPERA expires, will enable a potential applicant to obtain the benefits of ACPERA after expiration.²⁶

Second, the amendments commissioned a study by the GAO to assess the effectiveness of ACPERA, as well as to examine the possibility of adding whistleblower provisions.²⁷ The GAO Report is discussed below.

Third, the amendments added a timeliness requirement to “satisfactory cooperation.”²⁸ Specifically, the amendment states that “the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant’s

²⁵ See Pub. L. No. 111-190, § 1, 124 Stat. 1275 (2010).

²⁶ See 156 CONG. REC. H3717 (daily ed. May 24, 2010) (providing that the amendment “ensures that no one in the amnesty process in the future will be adversely affected if this law were to sunset in the future.”) (statement of Rep. Nadler).

²⁷ See Pub. L. No. 111-190, § 5, 124 Stat. 1275 (2010).

²⁸ See Pub. L. No. 111-190, § 3, 124 Stat. 1275 (2010).

or cooperating individual's cooperation with the claimant.”²⁹ The amendment also states that if the Antitrust Division has obtained a stay or protective order based on conduct covered by an amnesty agreement, once all or part of the stay or protective order expires or is terminated, the amnesty applicant shall provide cooperation on anything that was prohibited by the stay or protective order “without unreasonable delay . . . in order for the cooperation to be deemed satisfactory.”³⁰

Unfortunately, the amendments did not do what some had hoped: specifically define the mechanics of “satisfactory cooperation.” Section 213(b) of the amended statute retained the same description of “satisfactory cooperation” that existed in the first version of ACPERA.³¹

Moreover, seven years after *In re Sulfuric Acid*, there is no further case law guidance on what constitutes “satisfactory cooperation,” although one case may be foreshadowing an upcoming court decision.³² In *Oracle America, Inc. v. Micron Technology, Inc.*, the plaintiffs moved to strike defendants Micron Technology, Inc.'s and Micron Semiconductor Products, Inc.'s affirmative defense of ACPERA.³³ The plaintiffs claimed that ACPERA could not be applied to a case in which the amnesty application predated ACPERA, even though the filing of the lawsuit postdated ACPERA.³⁴ The court denied the plaintiffs' motion to strike.³⁵

²⁹ *Id.*

³⁰ *Id.*

³¹ Although Congressman Daniel Lungren of California stated in remarks supporting ACPERA's amendments that “[a]fter months of discussions with the stakeholders, we have made some changes to ACPERA to require defendants to disclose more information to plaintiffs in the follow-on class action suits,” no changes were made to the provisions of the statute regarding cooperation other than timing. 156 CONG. REC. H3717 (daily ed. May 24, 2010).

³² A Lexis search for “ACPERA” or “Antitrust Criminal Penalty Enforcement and Reform Act” nets only 21 cases. Only *TFT-LCD*, discussed supra, relates to entry of an order of “satisfactory cooperation.”

³³ No. C10-4340, 2011 U.S. Dist. LEXIS 108095, at * 1 (N.D. Cal. Sept. 16, 2011).

³⁴ *Id.*

Considering the parties’ opposing positions on the affirmative defense, a struggle over “satisfactory cooperation,” including a discussion of what constitutes timely cooperation, may be coming and may offer some insight into how a court might assess such cooperation if it plays out before a judge.

E. The GAO Report

1. General Findings

As mentioned above, the 2010 amendments to ACPERA commissioned a study by the U.S. GAO. The 71 page report, which was issued last July, made a number of findings.

First, the report concluded that while one of the aims of ACPERA was to reduce civil liability in order to increase the incentive for self-reporting of antitrust violations, the number of amnesty applications had not changed significantly post ACPERA.³⁶ The report stated that there were 78 leniency applications in the six years before ACPERA and 81 applications in the six years post-dating ACPERA.³⁷ Of those submitted, there were 54 successful amnesty applications in the six years preceding ACPERA and 56 successful amnesty applications in the six years after ACPERA. Thus, the number of leniency applications withdrawn or rejected also was essentially static.³⁸ The report observed one change: the number of Type A applications where the Antitrust Division has no preexisting knowledge of cartel activity in the industry had

³⁵ *Id.*

³⁶ U.S. Gov’t Accountability Office, *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection*, GAO-11-619 at 1, (July 2011) <http://www.gao.gov/new.items/d11619.pdf>, [hereinafter GAO Report].

³⁷ See GAO Report at 16.

³⁸ These statistics are further evidence that satisfactory cooperation is not being addressed in the courts. Fifty plus amnesty applicants indicate that there should be over 50 amnesty applicants involved in civil cases – yet there has been only one case in eight years that references an order of satisfactory cooperation. See GAO Report at 16.

increased after ACPERA.³⁹ In the six years predating ACPERA, there were 17 Type A applications for leniency, but in the six years after ACPERA, there were 33 applications.⁴⁰

Second, the study reported that higher fines and prison sentences were handed out post ACPERA. The study noted, however, that this result may be due to policy changes at the Antitrust Division regarding pursuit of larger multistate and international cartels.⁴¹

Third, the study determined that ACPERA had a “slight positive effect” on company decisions to pursue amnesty. The GAO noted, however, that “the threat of jail time and corporate fines were the most motivating factors both before and after ACPERA’s enactment.”⁴²

Fourth, on the whistleblower provisions, the study concluded that there were mixed views on whether whistleblower incentives should be added to ACPERA. Many interviewed for the study were supportive of adding anti-retaliatory *protections* for whistleblowers.⁴³

2. “Satisfactory Cooperation” Findings

Not surprisingly, regarding “satisfactory cooperation,” the study commented on the lack of consensus on what level of cooperation qualifies as “satisfactory.” While the study reported that plaintiffs’ counsel indicated that ACPERA’s cooperation provisions had: (1) “strengthened and streamlined cases,” (2) helped plaintiffs to overcome motions to dismiss, and (3) helped plaintiffs reach higher settlements with non-leniency defendants, the study also noted that

³⁹ See GAO Report at 19.

⁴⁰ *Id.*

⁴¹ *Id.* at 22.

⁴² *Id.* at 20.

⁴³ See GAO Report at 36.

ACPERA’s lack of clarity regarding “satisfactory cooperation” had created opposing views on timing and sufficiency.⁴⁴ It also stated that the timing amendment was too new to assess.⁴⁵

On timing, the study pointed out some of the understandable, conflicting views on when cooperation should begin and end. On the one hand, plaintiffs demand cooperation immediately and believe it should last through trial and appeal.⁴⁶ Defendants, on the other hand, may prefer to wait through motions to dismiss, especially if a plaintiff has alleged a conspiracy that is broader in time or scope than the conspiracy reported by the amnesty applicant. While one could argue that early cooperation by an amnesty applicant might narrow and frame the conspiracy such that plaintiffs will avoid alleging an overly broad conspiracy at the outset, it may be unlikely that a plaintiff’s lawyer will accept a conspiracy definition framed by the amnesty applicant.

The study also noted that the Antitrust Division may prefer a delay in the cooperation by the amnesty applicant – especially with respect to witness interviews – to protect the integrity of the Antitrust Division’s investigation.⁴⁷ As the study noted, the Division has obtained 15 stays in civil cases since ACPERA’s passage.⁴⁸ In determining whether to seek a stay, the Antitrust Division has taken into account factors such as “whether information provided in the civil case will jeopardize the criminal case or prematurely reveal information from the Antitrust Division’s

⁴⁴ *Id.* at 26-27.

⁴⁵ *Id.* at 33-34.

⁴⁶ *Id.* at 34.

⁴⁷ *See* GAO Report at 31-32.

⁴⁸ *Id.* at 32.

investigation, and the length of time that the Antitrust Division’s criminal investigation has been ongoing.”⁴⁹

Through interviews, the study also was able to report on some of the types of cooperation that amnesty applicants have rendered. Some amnesty applicants have started cooperating prior to the filing of the complaint – and some have cooperated as late as discovery.⁵⁰ The study also noted specifically that one amnesty applicant had given plaintiffs a chronology early on – but then did not provide the majority of the cooperation until discovery commenced. Another had not begun cooperation at all until discovery began.⁵¹ With the new timing amendment in ACPERA, one wonders if delaying cooperation until civil discovery, when the amnesty applicant already is subject to regular discovery anyway, will be deemed too late to satisfy the timing requirements of ACPERA.

Regardless, the study stated that “[t]he statute does not provide a definition of ‘satisfactory cooperation,’ nor does it provide specific guidance on the amount of cooperation required and exactly when ACPERA cooperation must begin and end.”⁵² Additionally, the study concluded that “differing views on the timing and amount of ACPERA cooperation have resulted in challenges, such as disputes about delayed cooperation.”⁵³ However, “one way attorneys have negotiated the challenges presented by differing views on exactly when ACPERA cooperation

⁴⁹ *Id.*

⁵⁰ *Id.* at 32-33.

⁵¹ *Id.* at 33.

⁵² *See* GAO Report at 30.

⁵³ *Id.* at 2.

should end and the amount of ACPERA cooperation a leniency applicant should provide is by developing detailed cooperation agreements.”⁵⁴

F. Conclusion

What is on the horizon for ACPERA and a definition of satisfactory cooperation? The GAO Report speculates that the lack of a clear definition may be advantageous because it encourages defendants to be even more cooperative than they might be under a clear definition in order to avoid losing the benefits of ACPERA.⁵⁵ Perhaps the GAO will be proven right – and the next eight years of ACPERA development until its potential expiration in 2020 will demonstrate that a “satisfactory” definition of “satisfactory cooperation” is best determined through private negotiations between plaintiffs and amnesty applicants.

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⁵⁴ *Id.* at 35.

⁵⁵ *Id.*