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It Ain't Funny How Time Slips Away: Amnesty Recipient Cooperation in Civil Antitrust Litigation

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I. INTRODUCTION

Five years ago, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”),² part of which offers reduced civil damage exposure to a cartel participant who receives amnesty under the Department of Justice Antitrust Division’s (“DOJ”) Corporate Leniency Program.³ Under § 213(a) of ACPERA, the amnesty recipient can limit its civil liability to “the actual damages” sustained by civil plaintiffs which are “attributable to the [the amnesty recipient’s] commerce . . . in the goods or services affected by the violation.”⁴ Thus, this admitted cartel participant avoids not only criminal responsibility, but also both treble damages and joint and several liability in civil litigation.

ACPERA’s benefits do not flow simply from the DOJ’s amnesty grant. The amnesty recipient must earn them by cooperating with the civil plaintiffs, thus helping develop the damages case against the other cartel members more efficiently. In effect, the statute offers a statutorily-created “first-in discount,” available only to the amnesty recipient, not unlike that which plaintiffs’ counsel often offer a defendant voluntarily in order to reach an early settlement that includes cooperation against non-settlers.

Congress authorized this reduction in damage exposure in response to the Antitrust Division’s concern that treble damages can deter cartel participants from ratting out their co-conspirators, thereby rendering the DOJ’s leniency program less effective than it otherwise might be.⁵ Although empirical data supporting this assertion

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² Pub. L. No. 108-237, 118 Stat. 661 (2004). See generally Glenn Harrison & Matthew Bell, *Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 HOUSTON BUS. & TAX L. J. 207, 218-20, 222-30 (2006).

³ See generally 118 Stat. 665-68, Title II, Subtitle A, of ACPERA; U.S. Department of Justice, Antitrust Division Leniency Program available at <http://www.usdoj.gov/atr/public/criminal/leniency.htm>.

⁴ ACPERA § 213(b). Although both corporations and individuals are eligible to seek amnesty, typically, the recipient is a corporation or other form of business entity, and the DOJ grant will cover the company’s cooperating officers and employees. Those individuals who fail to cooperate can be expressly excluded from amnesty, as happens from time to time. See generally Scott D. Hammond & Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters*, at 2, 17-18, 20-22 (Nov. 19, 2008) (“Leniency FAQ’s”), available at <http://www.usdoj.gov/atr/public/criminal/239583.pdf>. While ACPERA’s damage reduction provision does not distinguish between company and individual amnesty recipients, because civil litigation tends to involve companies rather than individuals as defendants, they are the ones most interested in the statute.

⁵ See, e.g., 149 Cong. Rec. S13520 (Oct. 29, 2003) (remarks of Sen. Kohl: the damage limitation “will remove a significant disincentive to those who would be likely to seek criminal amnesty”); 150 Cong. Rec. S3614 (Apr. 2, 2004) (remarks of Sen.

was non-existent, DOJ's position could not be dismissed as fanciful either. Reducing the amnesty recipient's civil damage exposure was, therefore, a means both to promote the DOJ's leniency program and to increase compensation to cartel victims through cooperation that would assist in proving the civil case, as well as in reducing costs in the civil litigation.⁶

As enacted in 2004, ACPERA had a five-year sunset provision, with June 22, 2009 as the end date.⁷ Although some have questioned the impact of ACPERA's civil damage relief provision,⁸ the DOJ and Congress are of the view that the law "bolstered" the leniency program.⁹ Congress therefore recently extended the law,¹⁰ albeit only for one year, in order to buy time to "consider potential changes to make it more effective."¹¹ Accordingly, this is an opportune point to review the law, with particular attention to the timing of the cooperation required to trigger the statute's civil damage relief.

At the outset, a word on terminology is warranted. First, ACPERA refers to its beneficiary as an "antitrust leniency applicant"—a person who has "entered into" a DOJ "antitrust leniency agreement . . . , whether conditional or final"¹² But the term

Hatch: treble damage exposure is "a major disincentive to self-reporting"); Makan Delrahim, Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications, at 16-17 (Nov. 18, 2003) (the then-pending bill "addresses a major disincentive that currently confronts companies who are contemplating exposing cartel activity to the Division—the threat of treble damage lawsuits with joint and several liability"), available at <http://www.usdoj.gov/atr/public/speeches/201509.pdf>; R. Hewitt Pate, International Anti-Cartel Enforcement (Nov. 21, 2004) (the DOJ "frequently heard that applicants did not apply for amnesty because of the prospect of U.S. treble damage litigation"), available at http://searchjustice.usdoj.gov/search?q=cache:7eIdtJSiDDUJ:www.usdoj.gov/atr/public/speeches/206428.wpd+leniency+de-trebling+%28site%3Awww.usdoj.gov%2Fatr+%29&site=atr_collection&client=atr&access=p&ie=iso-8859-1&output=xml_no_dtd&proxystylesheet=atr&oe=UTF-8.

⁶ See 150 Cong. Rec. S3614 (Apr. 2, 2004) (remarks of Sen. Hatch: cooperation will increase "the total compensation to victims of antitrust conspiracies"); Scott D. Hammond, An Update of the Antitrust Division's Criminal Enforcement Program, at 12-13 (Nov. 16, 2005), available at <http://www.usdoj.gov/atr/public/speeches/213247.pdf>.

⁷ ACPERA § 211(a). Amnesty recipients as the sunset date were grandfathered into the statute. *Id.* § 211(b).

⁸ See, e.g., Richard J. Leveridge & James R. Martin, *The End of "De-Trebling?,"* Competition Law 360 (May 22, 2009) (since ACPERA was enacted there is no "evidence that de-trebling has incentivized companies to seek amnesty"), available at http://www.law360.com/print_article/102844; Nathan H. Miller, Strategic Leniency and Cartel Enforcement, at 23 (Sept. 2007) (concluding, on the basis of empirical data and economic modeling, that "ACPERA may have little substantial impact on [cartel] detection capabilities"), available at http://www.econ.berkeley.edu/users/webfac/gilbert/e221_f07/miller.pdf.

⁹ 155 Cong. Rec. S6741 (June 17, 2009) (remarks of Sen. Leahy). See also Scott D. Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, at 15 (Mar. 26, 2008) (ACPERA has made the leniency program "even more effective at detecting and prosecuting cartels"), available at <http://www.usdoj.gov/atr/public/speeches/232716.pdf>; 155 Cong. Rec. H6329 (June 9, 2009) (remarks of Rep. Johnson: "[t]he positive impact of this law cannot be overstated"); 155 Cong. Rec. S6382 (June 9, 2009) (remarks of Sen. Kohl).

¹⁰ Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act, Pub. L. No. 111-30 (June 19, 2009), enacting S.1219, 111th Cong., 1st Sess. (June 9, 2009) and H.R.2675, 111th Cong., 1st Sess. (June 3, 2009).

¹¹ 155 Cong. Rec. S6382 (June 9, 2009) (remarks of Sen. Kohl). See also *id.* at S6741 (June 17, 2009) (remarks of Sen. Leahy); H6330 (June 9, 2009) (remarks of Rep. Issa). The ABA's Antitrust Section supported extension, recommending another five-year period to evaluate the law's impact. See letter from James A. Wilson to the Chairs and Ranking Minority Members of the Senate and House Committees on the Judiciary, dated May 8, 2009, available at http://www.abanet.org/antitrust/at-comments/2009/05-09/ACPERA_comments_050809.pdf.

¹² ACPERA §§ 212(2) & (3).

“applicant” here is something of a misnomer. The DOJ enters a leniency agreement only after the cartel participant has admitted its criminal antitrust violation and disclosed significant information regarding the cartel’s illegal activity. The leniency grant is conditioned on, among other things, the recipient’s continued cooperation in the criminal investigation and in any ensuing criminal prosecutions.¹³ Because the DOJ has sought to revoke a conditional grant only once, ACPERA’s beneficiary may fairly be thought of as a leniency “recipient,” albeit conditionally so, to reflect the practical reality.¹⁴

Second, the term “leniency,” to describe what DOJ grants, is just lawyer-speak for giving the admitted criminal “perp a pass.” I use the term “amnesty” to avoid lingo that sounds more like how we might treat the occasional high-school truant than it does one who has admitted committing a federal felony that inflicts widespread economic injury on American consumers—and, not infrequently, on their counterparts worldwide.

II. ACPERA’S COOPERATION PROVISION

ACPERA’s civil damage relief from treble damages and joint and several liability is conditioned on the amnesty recipient “provid[ing] satisfactory cooperation” to civil plaintiffs.¹⁵ More specifically, the required cooperation “shall include”:

- “providing a full account to the claimant [i.e., the civil plaintiff] of all facts known to the applicant . . . that are potentially relevant to the civil action;
- 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 . . . ;”¹⁶
- “us[ing] its best efforts to secure and facilitate” cooperation from its current or former directors, officers, and employees by:
 - making them available for such “interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require;” and
 - [their] 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,

¹³ See generally Leniency FAQ’s at 2-4, 6, 16, 23-25.

¹⁴ See *United States v. Stolt-Nielsen, S.A.*, 524 F. Supp. 2d 586 (findings of fact and conclusions of law) & 609 (memorandum and order) (E.D. Pa. 2007); Scott Hammond on *Stolt-Nielsen* (May 1, 2008), available at <http://www.usdoj.gov/atr/public/speeches/234840.pdf>.

¹⁵ ACPERA § 213(b).

¹⁶ *Id.* § 213(b)(1).

depositions, trials, or any other court proceedings in connection with the civil action”¹⁷

In these cooperation provisions, Congress sought “to preclude a parsimonious view of the facts or documents to which [the civil plaintiff] is entitled.”¹⁸ As Senator Leahy emphasized, the amnesty recipient must provide “substantial cooperation not only in any criminal case brought against the other cartel members, but also in any civil case brought by private parties that is based on the same unlawful conduct.”¹⁹ Accordingly, the amnesty recipient must cooperate with the civil plaintiffs in substantially the same way that the DOJ requires it to cooperate in the criminal investigation and any ensuing trials. The very specificity of ACPERA’s cooperation provisions demonstrate that Congress intended to afford the civil plaintiffs meaningful assistance pursuing their case, not a fleeting shadow to be forever chased.

III. TIMELINESS OF COOPERATION

We all know the adage that “justice delayed is justice denied.” The expression reflects what experienced attorneys understand: lawsuits have a shelf-life. Memories fade. Witnesses become unavailable. Records disappear. Human interest itself wanes. Whatever the confluence of factors, unlike wine, the justice feature of a lawsuit rarely improves with age. So (at the risk of over-generalization), plaintiffs push, while defendants delay.

Into this pot, we need also stir the ingredients of a complex antitrust investigation. The DOJ grand jury investigations and criminal cases that amnesty recipients produce often target significant cartels that beget large private treble damage cases—typically class actions, and frequently lots of them. The civil damage relief available to the amnesty recipient in these cases has substantial value.

At the same time, these cases tend to be not only complex, but also time-consuming and expensive for both sides, and for the court as well. The defendant cartel members’ damage control strategy regularly entails litigating many non-merits issues. These are presented in motions directed to the overarching “consolidated amended complaint,” as well as in discovery proceedings and, of course, at trial should the case proceed that far. Despite Sherman Act felony violations, often admitted in the DOJ’s criminal proceedings, in the civil litigation the plaintiffs must overcome a thousand tacks in the road to prove liability and secure a damage recovery.

In consequence, the cooperation that ACPERA holds out can greatly assist civil plaintiffs in pursuing the case—something that the DOJ itself has confirmed by its

¹⁷ *Id.* § 213(b)(3)(A).

¹⁸ 150 Cong. Rec. H3658 (June 2, 2004) (remarks of Rep. Sensenbrenner).

¹⁹ 150 Cong. Rec. S3615 (Apr. 2, 2004) (remarks of Sen. Leahy). *See* also *id.* at S3613 & 3614 (Apr. 2, 2004) (remarks of Sen. Hatch); *id.* at H3659 (June 2, 2004) (remarks of Rep. Scott).

continued enthusiasm for its own leniency program as a cartel-buster. The earlier that cooperation is forthcoming, the better.

By contrast, the amnesty recipient has no particular interest in helping to prove the civil case against either itself or its co-defendants. While the amnesty recipient wants the damage relief that Congress has offered, if it can put off or minimize the required cooperation and still cut its exposure, all the better. To be sure, there is a risk to this strategy, for if a co-defendant decides to leapfrog the amnesty recipient by offering cooperation in a discounted settlement, the value of the amnesty recipient's information may decline significantly—conceivably to the point where subsequent cooperation is redundant, and hence tantamount to no cooperation at all. Still, there are considerable incentives that can drive the amnesty recipient to cooperate later, rather than sooner. That, plainly, is not what Congress intended.

For cooperation under ACPERA to serve its intended purpose, it needs to be timely. Senator Hatch, for example, emphasized that ACPERA's "limitation on damages is only available to corporations and their executives if they provide adequate and timely cooperation" to both the DOJ and to "any subsequent private plaintiff bringing a civil suit based on covered criminal conduct."²⁰ Full cooperation is required as the plaintiffs "prepare and pursue their civil lawsuit."²¹ On this score, however, we currently venture into mostly uncharted territory. The only decision to address the timeliness of cooperation—a recent ruling in *In re TFT-LCD (Flat Panel) Antitrust Litigation* ("LCD")²²—is not much of a compass.

IV. THE LCD RULING

The facts in *LCD* are not atypical. Briefly, before even empaneling a grand jury and issuing subpoenas, the DOJ granted conditional leniency to a cartel member.²³ The criminal investigation itself began in 2006, with the civil litigation following after the press reported issuance of the grand jury subpoenas.²⁴ Civil discovery was stayed, in whole or in part, for roughly 15 months in deference to the DOJ's criminal investigation—an increasingly common occurrence in antitrust litigation.²⁵ By the spring of 2009, there were a number of corporate and individual guilty pleas. Yet the

²⁰ 150 Cong. Rec. S3614 (Apr. 2, 2004).

²¹ *Id.* See also 150 Cong. Rec. H3659 (June 2, 2004) (remarks of Rep. Scott: an amnesty recipient's damages will be limited only "if the company provides adequate and timely cooperation") & H3660 (remarks of Rep. Conyers).

²² No. M 07-1827 SI, 2009-1 Trade Cas. (CCH) ¶76,626 (N.D. Cal. May 19, 2009) ("LCD Ruling").

²³ 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 Claim Reduced Civil Liability, at 3, dated May 1, 2009, filed in LCD ("DOJ LCD Opp.").

²⁴ *Id.* at 3, 4.

²⁵ *Id.* See generally Bradley S. Liu, Eugene Illovsky & Jacqueline Bos, Increased DOJ Intervention to Stay Discovery in Civil Antitrust Litigation, 8 Antitrust Litigator 1 (No. 1, Spring 2009), available at http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=lt&url=/litigation/mo/premium-lt/newsletters/antitrust/antitrust_spring2009.pdf.

investigation, according to the DOJ, was “far from complete.”²⁶ The civil litigation was on the verge of what likely would be a very substantial discovery phase. The existence of an amnesty recipient was known, but the company had not identified itself.²⁷ Plaintiffs moved for an order directing the amnesty recipient to disclose its identity and to provide the cooperation that ACPERA contemplates.²⁸

The DOJ and Samsung (the presumed amnesty recipient) opposed the motion.²⁹ They argued, among other things, that “a leniency applicant determines for itself when it comes forward and cooperates with the plaintiff,” and that the Court should become involved “only after a leniency applicant seeks a limitation of civil liability based on cooperation”³⁰ At that juncture, they argued, the Court had to evaluate the adequacy of cooperation.³¹

The Court addressed the issues presented in one brief paragraph. First, the Court noted the absence of any provision in ACPERA, or any case law, authorizing the relief sought. Indeed, the Court said, the statute “suggests that the Court’s assessment of an applicant’s cooperation occurs at the time of imposing judgment or otherwise determining liability and damages.”³² While the Court was mindful that “the value of an applicant’s cooperation diminishes with time,” this was a matter to be considered “if and when” the amnesty recipient sought ACPERA’s benefits.³³ Finding no authority “to compel an amnesty applicant to identify itself and cooperate with plaintiffs,” the Court denied the motion.³⁴

The core purpose of ACPERA’s cooperation provisions ought to include mitigating both the protracted delay occasioned by the DOJ’s motion to stay and the forthcoming litigation burdens that *LCD* illustrates. While the *LCD* court did not see it that way, the issues presented are likely to recur. Therefore, let us look down the road, towards a more extensive and nuanced analysis than that which the *LCD* court offered.

V. MOVING FORWARD

First of all, an amnesty recipient can of course decide whether or not to avail itself of the civil damage relief that ACPERA offers. But that does not disable the district

²⁶ DOJ LCD Opp. at 4.

²⁷ Direct Purchaser Plaintiffs’ Notice of Motion and Motion to Compel the Amnesty Applicant Defendant to Comply with ACPERA or Forfeit Any Right It May Have to Claim Reduced Civil Liability; Memorandum of Points and Authorities in Support Thereof, at 2-3, dated Apr. 17, 2009, filed in LCD (“LCD PI’s Motion”).

²⁸ *Id.*

²⁹ DOJ LCD Opp.; Samsung Defendants’ Memorandum of Points and Authorities in Opposition to Direct Purchaser Plaintiffs’ Motion to Compel the Amnesty Applicant Defendant to Comply with ACPERA or Forfeit Any Right It May Have to Claim Reduced Civil Liability, dated May 1, 2009 (“Samsung LCD Opp.”).

³⁰ LCD Ruling at 3. *See, e.g.*, DOJ Opp. at 5, 8; Samsung Opp. at 1, 3.

³¹ LCD Ruling at 3. *See, e.g.*, DOJ Opp. at 1, 5, 7; Samsung Opp. at 5-6, 9.

³² LCD Ruling at 3.

³³ *Id.*

³⁴ *Id.*

court from insisting that the amnesty recipient make the decision at a timely point in the civil litigation. The amnesty recipient's cooperation—or lack of it—will have a significant impact on the pace and efficiency of the civil litigation, as well as on the terms of its resolution, whether consensually or after trial. These matters are within the district court's power to shape in exercising its inherent authority to control its docket. As Justice Cardozo once wrote in discussing the court's authority to stay proceedings:³⁵

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

The court's authority to manage a case in a way that speeds up its resolution is just the flip-side of its authority to stay the case altogether where the prior resolution of issues in another case may simplify the eventual resolution of the stayed action.

Equally important, ACPERA itself expressly requires the district court to "determine[]" that the amnesty recipient "has provided satisfactory cooperation"³⁶ Thus, the statute contemplates that the district court will decide "whether the necessary cooperation has occurred."³⁷ This express authority should also include the ancillary power to establish a point in the litigation by which the amnesty recipient must decide whether or not to cooperate. The federal courts have well-recognized authority to direct disclosure of even grand jury testimony upon a showing of particularized need.³⁸ A district court's authority to facilitate cooperation from an amnesty recipient should not be more circumscribed, especially when ACPERA itself seeks to encourage extensive disclosure to civil plaintiffs. Finally, although nothing more is needed here, the All Writs Act is yet another source of district court authority.³⁹

ACPERA gives the amnesty recipient a choice: either cooperate in the civil case in exchange for a significant reduction in damage exposure, or decline the opportunity and remain jointly and severally liable for three times the damages caused by the conspiracy. The district court's authority to manage a litigation that implicates ACPERA should include discretion to require the amnesty recipient to make the necessary choice as of a particular point in time—to direct that the amnesty recipient either "Speak Now," begin cooperating, or else forego ACPERA's damage limitation. In deciding whether to exercise this discretion, the court may be informed by such factors as:

³⁵ *North American Co. v. Landis*, 299 U.S. 248, 254-55 (1936).

³⁶ ACPERA § 213(b).

³⁷ 150 Cong. Rec. H3658 (June 2, 2004) (remarks of Rep. Sensenbrenner).

³⁸ *See, e.g., Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).

³⁹ 28 U.S.C. § 1651 ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

- The time period during which the DOJ criminal investigation and the civil litigation have been pending.
- The stage of the DOJ criminal proceeding, particularly the extent to which the DOJ has filed criminal charges and secured guilty pleas disclosing aspects of the conspiracy.
- The extent to which continued secrecy in the criminal investigation is reasonably necessary, and even if it is, whether that interest could be secured by restrictions on disclosing information provided by the amnesty recipient.
- The stage of the civil litigation, recognizing that case efficiency is best served by encouraging early cooperation.
- The extent of publicly available information, or information already adduced in civil discovery, concerning the conspiracy.
- Whether the amnesty recipient is a joint defense participant, has entered a judgment-sharing agreement, or is otherwise part of an arrangement with other defendants, which tends to dilute its incentive to cooperate with the civil plaintiffs.

These factors are only illustrative. Additions and refinements will no doubt develop as attorneys, judges, and perhaps even legislators address the issues raised.

VI. SECRECY CONSIDERATIONS

The consideration of continued secrecy in the criminal investigation in particular bears further discussion. In *LCD*, both the DOJ and Samsung argued that amnesty recipient confidentiality was a paramount consideration in making the Antitrust Division's leniency program work. The DOJ, for example, asserted that it sought "to prevent premature and forced public disclosure of the identity of leniency applicants."⁴⁰ Likewise, Samsung—playing the fox guarding the hen-house—argued that "[p]rotecting the identities of amnesty applicants plays a vital role in the amnesty program by encouraging cartel members to come forward and cooperate fully with government investigations."⁴¹ Compelled disclosure, Samsung maintained, would "frustrate the policies underlying ACPERA and DOJ's amnesty program by potentially chilling future leniency applications."⁴²

But the choice here is not between secrecy and "forced public disclosure." The district court has ample power to direct the civil plaintiffs' attorneys to preserve the

⁴⁰ DOJ LCD Opp. at 1. See also *id.* at 2, 5, 9. While emphasizing the need for confidentiality, the DOJ, however, also maintained that the amnesty recipient itself could decide whether and when to disclose its identity. *Id.* at 8. Thus, what the DOJ apparently meant was only that it needed to be able to assure amnesty recipient confidentiality in order to induce cartel members to self-report.

⁴¹ Samsung LCD Opp. at 10.

⁴² *Id.* at 11.

amnesty recipient's confidentiality as ACPERA's cooperation process unfolds.⁴³ Protective order restrictions, backed up by the court's contempt power, can be presumed sufficient to command the attention of plaintiffs' counsel to assure compliance.

As a threshold matter, in deciding whether continued secrecy provisions are warranted, the court should determine whether the amnesty recipient's identity is, in fact, unknown to those interested in the proceeding. Amnesty recipient anonymity is not so easily preserved from other participants in a lengthy DOJ antitrust investigation. If these participants (who are invariably among the defendants in the civil litigation) are well aware of whom the DOJ has anointed, then continued secrecy as to their identity seems unlikely to serve any significant purpose, and likewise, in those circumstances where the amnesty recipient itself publicly discloses its arrangement with the DOJ.⁴⁴

On the other hand, where the amnesty recipient's identity is in fact still confidential from other defendants and the public at large, assuring continued secrecy may be appropriate. The DOJ commonly makes in camera filings on motions to stay civil antitrust proceedings during the pendency of an on-going criminal investigation.⁴⁵ Comparable procedures should be available here, although the district court could well probe whether there really is any need to keep the amnesty recipient's own filing secret from the civil plaintiffs. The court could similarly determine whether the non-amnesty defendants should receive notice of and an opportunity to be heard in the Speak Now proceeding. These defendants would not seem to have a legally cognizable interest in impairing the amnesty recipient's choice whether to cooperate or, in turn, the district court's discretion to direct that the choice be made.

Non-amnesty recipient defendants might argue that that it would be unfair—indeed, maybe even unconstitutional—to exclude them from the Speak Now proceeding. But that contention does not seem persuasive. If, in response to a Speak Now Order, the amnesty recipient chooses to cooperate, the resulting assistance to the civil plaintiffs would be analogous to that which results: (1) if an amnesty recipient acts without any court order at all; (2) if a non-defendant settles at a first-in discount in exchange for cooperation; or (3) if a knowledgeable cartel participant chooses, for

⁴³ See Direct Purchaser Plaintiffs' Reply Memorandum of Points and Authorities in Support of Motion to Compel the Amnesty Applicant Defendant to Comply with ACPERA or Forfeit Any Right It May Have to Claim Reduced Civil Liability, at 8-9, dated May 8, 2009, filed in LCD.

⁴⁴ See, e.g., Tecumseh Products Co. Form 8-K (Feb. 23, 2009), available at <http://www.sec.gov/Archives/edgar/data/96831/000095015209001660/k47489e8vk.htm>, and accompanying memorandum to employees (Feb. 23, 2009), Exhibit 99.1, available at <http://www.sec.gov/Archives/edgar/data/96831/000095015209001660/k47489exv99w1.htm>; Micron Technology, Inc. Form 8-K (Nov. 12, 2004), available at http://www.sec.gov/Archives/edgar/data/723125/000110465904035549/a04-13517_18k.htm, and accompanying press release (Nov. 11, 2004), Exhibit 99.1, available at http://www.sec.gov/Archives/edgar/data/723125/000110465904035549/a04-13517_1ex99d1.htm.

⁴⁵ See, e.g., Order Granting United States' Motion to Stay Discovery, at 1-2, dated September 25, 2007, in LCD.

whatever reason, to cooperate with civil plaintiffs as a confidential informant.⁴⁶ These situations can, and regularly do, arise without input from other cartel participants—with plaintiffs’ counsel agreeing to preserve informant confidentiality. A Speak Now proceeding involving the district court would not be materially different. Further, depending on the facts, excluding non-amnesty recipient defendants might be the only feasible means to preserve the amnesty recipient’s confidentiality.

On balance, structuring proceedings to avoid disclosure to the non-amnesty defendants should be preferable to shutting off the civil plaintiffs from the opportunity to receive a valuable flow of information from the amnesty recipient. ACPERA’s cooperation provisions are intended to benefit plaintiffs, not to erect protection for cartel members who both violate the law and fail to self-report.

Nor does it seem likely that such an approach would impair the DOJ’s corporate leniency program. The DOJ has repeatedly argued that the opportunity to avoid treble damages and joint and several liability creates a significant additional incentive for cartel participants to seek amnesty. If that is so—and at this point it is largely an unproven assumption—the incentive is unlikely to decline just because the district court may direct the amnesty recipient to make a confidential disclosure to the civil plaintiffs should the recipient itself not begin cooperating early enough. Furthermore, a regime in which the district court stands ready to prevent an amnesty recipient from gaming the system ought to be preferable to one in which the amnesty recipient alone is permitted to time cooperation to suit its own self-interest.

Accordingly, if continued secrecy is necessary, the district court has means to accomplish that. And, at bottom, nothing in ACPERA changes the calculus, one way or the other, if the DOJ applies to stay proceedings during its criminal investigation.⁴⁷

Once continued secrecy is put aside, the position for ACPERA cooperation sooner, rather than later, seems compelling. Other factors, identified earlier, may militate for or against cooperation at a particular point in time. Cooperation is particularly important when the litigation is the subject of Twombly-inspired motions⁴⁸—as virtually all major antitrust cases these days are—which challenge the “plausibility” of a

⁴⁶ See Marsulex, Inc and Chemtrade Logistics (U.S.), Inc.’s Memorandum of Law in Support of Their Agreed Motion for Finding of “Satisfactory Cooperation” and Limitation of Damages Pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, at 6, dated June 30, 2005, filed in *In re Sulfuric Acid Antitrust Litigation*, MDL Docket No. 1536, Case No. 03 C 4576 (N.D. Ill.) (detailing the amnesty recipient’s voluntary cooperation with the civil plaintiffs). The Court granted the motion. Order, dated July 7, 2005, in *Sulfuric Acid*.

⁴⁷ ACPERA § 214(1). See generally *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980).

⁴⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

conspiracy admitted by not only the amnesty recipient, but often by other cartel participants as well in criminal plea agreements and guilty pleas.⁴⁹

VII. OTHER OBJECTIONS TO A JUDICIAL ROLE

In *LCD*, Samsung also argued that an order directing cooperation “would involve the Court in a series of ongoing disputes regarding whether a particular response by the applicant did or did not amount to ‘satisfactory cooperation.’”⁵⁰ But this argument is strained. First, as we saw earlier, the statute itself sets out the contours of the required cooperation, thus providing guideposts for both the civil plaintiffs’ requests and the court’s resolution of a dispute over cooperation.

Second, experience under ACPERA does not bear out Samsung’s parade of horrors. Despite voluntary cooperation by some amnesty recipients during ACPERA’s five-year life to date, issues of satisfactory cooperation are the subject of only one reported decision, *In re Sulfuric Acid Antitrust Litigation*.⁵¹ The district court denied a motion to compel depositions of two of the amnesty recipient’s employees essentially because plaintiffs had known of the witnesses for months, but noticed their depositions only at the very end of discovery, and then on terms that were not reasonable.

As *Sulfuric Acid* reflects, even though ACPERA’s policy favoring cooperation delivers a demand dispute in a different wrapper, the package’s contents are similar to the discovery problems that district courts routinely resolve. Thus, besides being exaggerated, the concern over demands for excessive cooperation is, in all events, susceptible of judicial oversight to prevent abuse.

Finally, there is a modest statutory construction issue here.⁵² ACPERA § 213(c) expressly calls on the court to determine timeliness of cooperation when a cartel participant contacts the DOJ after either a State or State subdivision has issued compulsory process, or a private civil antitrust case has begun. This provision carves out circumstances where something other than mere self-reporting drives the cartel participant to seek criminal amnesty, thus calling into question as well the timeliness of any subsequent cooperation with the civil plaintiff. The statutory carve-out recognizes that belated or redundant cooperation may be ineffective for ACPERA’s damage

⁴⁹ See, e.g., *In re Air Cargo Shipping Services Antitrust Litigation*, 06-MD-1775 (JG) (VVP) (E.D.N.Y.), where—despite guilty pleas to Sherman Act violations by 15 major airlines admitting fixing shipping rates for air cargo services—the complaint is before the district court on objections to a magistrate judge’s report and recommendation of dismissal. See Plaintiffs’ Preliminary Statement Pursuant to Local Rule 56.1 and accompanying Schedule 1 (detailing defendant criminal case admissions and guilty pleas), enclosed with letter of Hollis L. Salzman et al. to the Court, dated June 12, 2009.

⁵⁰ Samsung LCD Opp. at 2. See *id.* at 7-9. Samsung’s argument echoes one that captivated the ABA’s Antitrust Section in 2004, even before ACPERA’s enactment. See Comments of the ABA Section of Antitrust Law on H.R. 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunney Act Amendment, at 27-30 (Jan. 2004), available at <http://www.abanet.org/antitrust/at-comments/2004/01-04/increasedcriminalpenalties.pdf>.

⁵¹ 231 F.R.D. 320 (N.D. Ill. 2005).

⁵² See DOJ LCD Opp. at 6-7; Samsung Opp. at 4-5.

reduction purposes. It should not, however, be construed to straightjacket the district court's case management authority in other circumstances where no cooperation whatsoever has been forthcoming.

VIII. CONCLUSION

The argument, made in *LCD*, that the amnesty recipient is entitled to decide for itself not only whether, but also when, to cooperate with the civil plaintiffs flies in the face of ACPERA's policy to promote assistance in civil antitrust litigation. The DOJ, quite properly, would never accept the notion that an amnesty recipient may decide for himself the timing of its cooperation in the criminal investigation. The DOJ's leniency program would quickly evaporate under such a regime.

Likewise on the civil side: Although Congress afforded the amnesty recipient an option to exchange antitrust damage relief for cooperation, the recipient's decision whether to exercise the option can affect the civil litigation in substantial respects. Simply put, cooperation is too important to be left solely to the would-be cooperator.

If disclosure of the amnesty recipient's identity and the timing of cooperation cannot be resolved by the civil plaintiffs and the amnesty recipient, these matters are properly within the sound discretion of the district court. Protective provisions, including sealing relevant court papers and limiting participation in Speak Now proceedings, can both protect the DOJ's criminal proceedings and preserve the amnesty recipient's confidentiality where these are, in fact, relevant considerations.

Resort to the district court is necessary to avoid making ACPERA's cooperation provision a litigation equivalent to "vaporware"—a potentially attractive opportunity for efficient prosecution of treble damage litigation that nonetheless fails to materialize.⁵³ Experienced federal judges, well-versed in managing complex litigations, have the tools needed to assure that ACPERA's cooperation objective is realized.

⁵³ See "Vaporware," Wikipedia, The Free Encyclopedia (the term "describe[s] a product, usually software, that has been announced by a developer during or before its development and, therefore, may never actually be released The term implies unwarranted optimism"), available at <http://en.wikipedia.org/wiki/Vaporware> (accessed June 18, 2009).