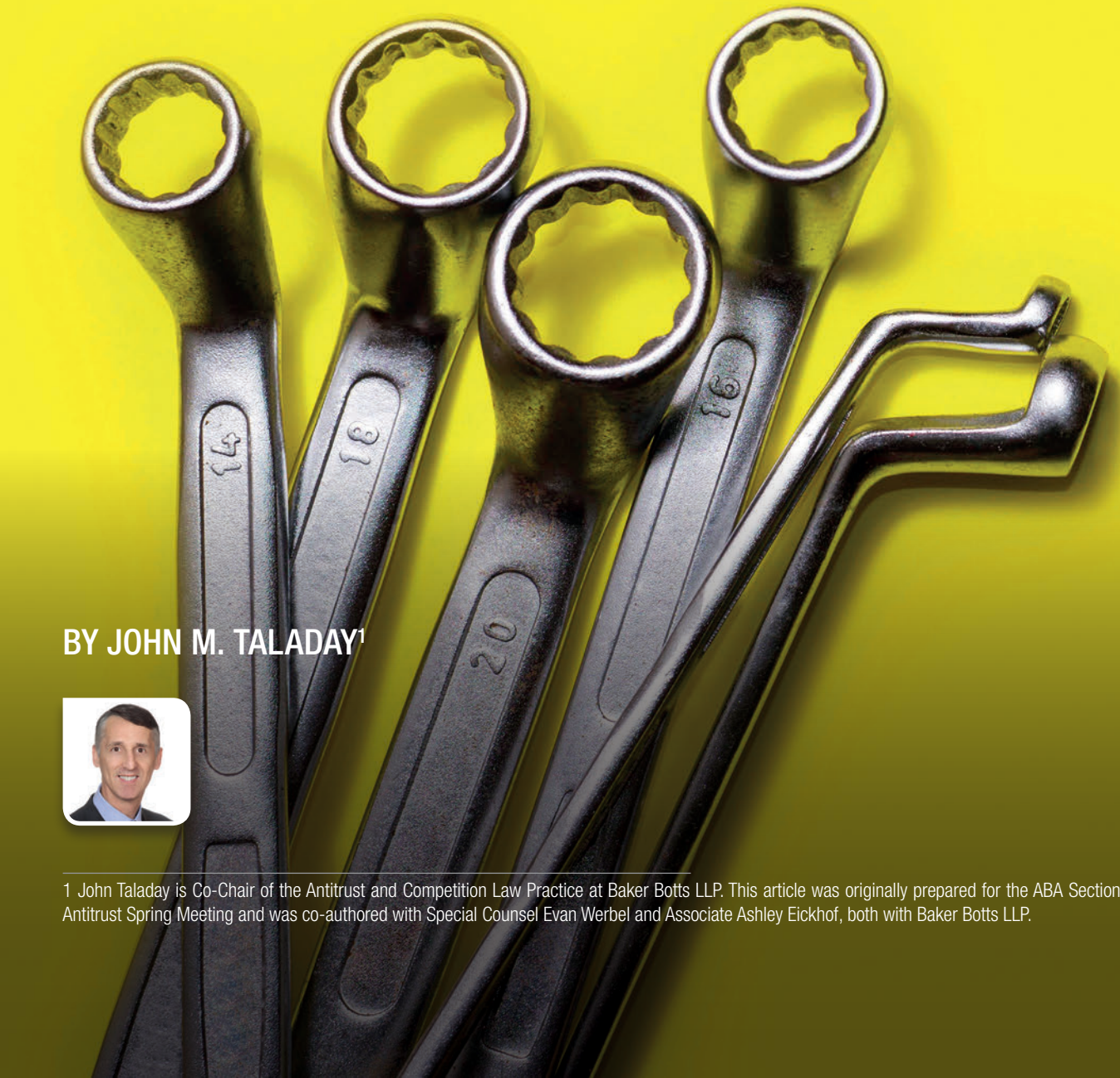
WHY ACPERA ISN'T WORKING AND HOW TO FIX IT



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I. INTRODUCTION

The Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"),[2] which limits civil penalties for antitrust leniency applicants that cooperate with civil plaintiffs, was intended to encourage corporations and individuals to report antitrust violations under the Department of Justice's ("DOJ") leniency program. Prior to its enactment in 2004, leniency applicants, though relieved of criminal fines and potential incarceration, still faced the possibility of exorbitant civil exposure based on the threat of treble damages and joint and several liability for all harm caused by all conspirators. Congress sought to address this potential disincentive to seeking leniency by enacting ACPERA.

The statute as currently drafted and implemented, however, is not serving this purpose. Because a leniency applicant has no indication of whether it will qualify for ACPERA benefits until *after* the liability and damages stages of a trial have been completed — a stage that is rarely reached in civil antitrust litigation today — ACPERA applicants often are not benefitting from the statute. Indeed, civil plaintiffs routinely disregard ACPERA status and attempt to create uncertainty about ACPERA benefits in order to undermine a leniency applicant's ability to negotiate settlements against the backdrop of ACPERA. As this tactic has become more apparent, it has become a growing disincentive to seeking leniency. But there is a solution.

To make ACPERA benefits valuable and to encourage corporations and individuals to continue to apply for leniency, the statute could be amended in a way that would aid a company's incentives to seek leniency while maintaining the benefits that flow to plaintiffs from an ACPERA applicant's cooperation. A rebuttable presumption should be introduced that provides an ACPERA applicant with an early indication that it has satisfied its initial ACPERA obligations. This rebuttable presumption would offer some degree of assurance to an ACPERA applicant regarding its ACPERA status and allow the ACPERA status to play a more prominent role in civil antitrust outcomes (i.e. settlement discussions), as originally intended by the statute.

2 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Tit. II, 118 Stat. 661 (June 22, 2004).

II. BACKGROUND ON LENIENCY AND ACPERA

In 1993, the Antitrust Division of the U.S. DOJ created its current version of the leniency policy.[3] The policy is designed to encourage corporations and individuals involved in antitrust crimes to self-report.[4] After full cooperation with the government, the amnesty applicant receives amnesty from the DOJ, avoiding prosecution by the DOJ, and potential criminal fines and incarceration for individuals.[5] The certainty provided by the DOJ's leniency program made it one of the most successful initiatives in the history of the Antitrust Division.

The leniency policy itself, however, does not provide any protection from the civil ramifications for the same conduct. The Sherman Act provides for civil plaintiffs to recover treble damages, and defendants are also jointly and severally liable for the harm the conspiracy caused.[6] As civil damage actions became more prevalent and more costly — perhaps a natural consequence of the success of the leniency program itself — the threat of significant exposure to civil penalties was viewed as a discouragement to potential leniency applicants from reporting criminal conduct to the DOJ.

Congress decided to address this potential disincentive with the passage of ACPERA in 2004. The statute limits the leniency applicant's damages on the civil side. If leniency applicants meet the obligations under the statute, they are not liable for treble damages, nor are they jointly and severally liable.[7]

The legislative history is clear that ACPERA was passed to "address[] this disincentive to self-reporting" for "corporations and their executives if they provide adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct."[8] When the statute was reauthorized in 2009, Congress again reiterated its intent to "address this shortcoming in the criminal leniency program by also limiting the cooperating party's exposure to liability with respect to civil litigation."[9]

3 U.S. Dep't of Justice, Antitrust Div., Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters 1, n.1 (Jan. 26, 2017), available at www.justice.gov/atr/page/file/926521/download [hereinafter FAQs] ("The Division first implemented a leniency program in 1978. It issued its Corporate Leniency Policy in 1993, which substantially revised the program, and a Leniency Policy for Individuals in 1994. The Division's Corporate Leniency Policy and Leniency Policy for Individuals are available at www.justice.gov/atr/leniency-program.").

4 *Id.* at 1.

5 *Id.*

6 15 U.S.C. § 15.

7 A defendant must provide "satisfactory cooperation" to the plaintiff. The judge presiding over the matter determines whether "satisfactory cooperation" has been provided after considering "any appropriate pleading from the [Plaintiff]." ACPERA § 213(b). A defendant must (1) provide a "full account . . . of all facts known to the applicant . . . that are potentially relevant to the civil action;" (2) furnish "all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant;" and (3) use "its best efforts to secure and facilitate" interviews, depositions, and trial testimony of individuals covered under the leniency agreement. *Id.*

8 150 Cong. Rec. S3610-02, S3614 (Apr. 2, 2004) (statement of Sen. Hatch).

9 155 Cong. Rec. H.R. 2675 (June 9, 2009) (statement of Rep. Johnson).

III. IS ACPERA WORKING?

In practice, ACPERA is not working as the legislature intended. Leniency applicants are not always receiving the promised benefits of ACPERA, despite cooperation with plaintiffs, and continue to face the threat of treble damages and joint and several liability. Any potential leniency applicant must weigh this threat when it considers reporting conduct to the DOJ, and certainly some potential leniency applicants choose not to report to the DOJ given this risk. As potential leniency applicants see that ACPERA may not be as helpful as Congress intended, corporations may ultimately decide that the risks of reporting criminal antitrust violations are too great given the potential civil exposure.

Although Makan Delrahim, Assistant Attorney General of the Antitrust Division, recently hailed the leniency program as the DOJ's "most important prosecutorial tool"[10] and the DOJ has long touted the program as a great success,[11] the number of corporations charged by the DOJ with criminal antitrust violations has decreased significantly in recent years.[12] Also, the total dollar value of the fines imposed on corporations by the DOJ has decreased.[13] It is impossible to know whether this reduction in the DOJ cases and fines is tied to ACPERA's failure to provide certainty to potential leniency applicants regarding civil penalties. Regardless, ensuring that the intentions of ACPERA are satisfied should be a priority of Congress.

Currently, ACPERA provides little guidance to plaintiffs, defendants, or courts about its implementation and scope of required cooperation. For example, leniency applicants and plaintiffs often disagree over the scope of the ACPERA requirement to provide "a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action."[14] This debate has also led to great uncertainty for potential leniency applicants as to how ACPERA will limit actual civil exposure, if at all.

This uncertainty is exacerbated further by the very nature of class action antitrust litigation. Plaintiffs' claims in antitrust civil litigation often far exceed the scope of the DOJ's criminal investigation. When the DOJ announces an investigation into a certain industry, civil lawsuits immediately follow. These lawsuits, based only on the DOJ's non-specific announcement, often will allege antitrust violations impacting every major participant in the industry, every conceivable geography, every potential product and variation, and a time frame that is as long as the statute of limitations could possibly allow. The actual scope of the offense being investigated by the DOJ, based on a full accounting of the facts by the leniency applicant, might be a narrow conspiracy involving one or two competitors, limited products, and a short time span.[15] Indeed, the current auto parts cases are a textbook example of this situation. Under these circumstances, plaintiffs will often take the position that an ACPERA applicant has failed to meet its cooperation obligations because it has not provided information on every allegation in its complaint or because an ACPERA applicant challenges the scope of plaintiffs' claims through a motion to dismiss, an opposition to class certification, or a summary judgment motion.[16] Nothing in ACPERA requires a defendant to provide information to plaintiffs on facts that are *not* "known to the claimant," nor does ACPERA limit a leniency applicant's right to challenge the scope or legal underpinnings of the plaintiffs' case. There must be a distinction between cooperation and the right to defend against overbroad allegations or exaggerated claims for damages. Nonetheless, in practice, a leniency applicant may face risk that its ACPERA status may be imperiled by exercising its basic rights of defense.

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10 Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Div., Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels, Address Before the College of Europe 4 (Feb. 21, 2018), available at www.justice.gov/opa/speech/file/1036626/download.

11 James M. Griffin, Former Dep. Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The Modern Leniency Program After Ten Years, Address Before the ABA Section of Antitrust Law Annual Meeting 7 (Aug. 12, 2003), available at www.justice.gov/atr/file/518851/download ("the Leniency Program is the Division's most effective generator of international cartel cases").

12 In 2015 and 2016, fifteen and fourteen corporations were charged, respectively. In the two years prior, 2013 and 2014, twenty-four and twenty-five corporations were charged, respectively. See U.S. Dep't of Justice Antitrust Div., Antitrust Division Workload Statistics FY2007–2016 11 (2018), available at www.justice.gov/atr/file/788426/download.

13 In 2015, $985,706,000 in fines were imposed on corporations. In 2016, $452,935,000 in fines were imposed on corporations. Compare these to 2014, where $1,904,714,000 in fines were imposed. *Id.*

14 ACPERA § 213(b)(1).

15 Plaintiffs will often note, correctly, that because their burden of proof in a civil case is lower than the DOJ's burden in a criminal case, they may be able to prove a broader conspiracy. This would not necessarily be evident, however, at the initial pleading stage.

16 Indirect Purchaser Pl.'s Opp'n to Def. Tecumseh Corp. Mot. to Dismiss at 1, n.2, *In re* Refrigerant Compressors Antitrust Litig., MDL No. 2:09-02042, (E.D. Mich. Oct. 29, 2010) Dkt. No. 187 (Plaintiffs claimed that the filing of a motion to dismiss by the ACPERA applicant was inconsistent with the cooperation provisions of ACPERA).

The very limited caselaw interpreting ACPERA further adds to the uncertainty surrounding the statute. In the fourteen years since the passage of ACPERA, fewer than twenty-five cases have dealt with the statute directly. The cases that have addressed ACPERA provide little guidance on how a court will determine if an ACPERA applicant has satisfied its cooperation obligations. In fact, no court has been required to determine whether an ACPERA applicant has satisfied its ACPERA obligations after a trial because all known antitrust matters involving a leniency applicant — and there are a lot of them — have settled before that time.

Caselaw does, however, provide some guidance. First, several courts have reconfirmed that the Congressional intent of the statute was to encourage corporations and individuals to seek leniency.[17] This underlying goal of ACPERA must factor into the way ACPERA is implemented.

For example, *Morning Star Packing* confirms that ACPERA must be interpreted to encourage parties to report to the DOJ by limiting civil exposure to leniency applicants.[18] In *Morning Star Packing*, the court reached the novel question of whether the benefits of ACPERA extended beyond Sherman Act claims.[19] The court held that ACPERA's protections applied not only to plaintiffs' Sherman Act claims but also to RICO and other antitrust claims that stemmed from the same conduct as the Sherman Act claims.[20] In reaching this conclusion, the court looked to the statute itself and found it "significant that lawmakers did not limit their statements in favor of limiting liability to Sherman Act actions, but used the more expansive language of 'civil action,' 'civil suit,' and 'civil liability'."[21] The court next looked to the legislative history and concluded "ACPERA should be read with the understanding it was enacted to incentivize stakeholders to report any anticompetitive behavior, and intended to prioritize criminal investigations and limit civil antitrust liability."[22] The court also noted that the DOJ has taken the same position regarding criminal matters in order to protect the leniency program.[23] The DOJ has affirmed that it will not prosecute a leniency applicant for other crimes involving the "acts or offenses integral" to the antitrust violation, such as mail fraud or wire fraud.[24]

Second, courts have reiterated that the cooperation requirement of ACPERA is not limitless. In *In re Sulfuric Acid Antitrust Litigation*, plaintiffs sought to compel discovery from the ACPERA applicant that had entered into a cooperation agreement with plaintiffs that incorporated ACPERA cooperation, but defendants argued that the requests were unreasonable and untimely.[25] Plaintiffs countered by arguing that ACPERA required that the motion to compel be granted. The court disagreed, finding "the [Cooperation] Agreement does not impose on the defendants obligations that preclude them from claiming that the notices of deposition were untimely and unreasonable. In short, the Cooperation Agreement [and implicitly ACPERA] did not require [defendants] to be at the plaintiffs' beck and call."[26]

Finally, courts have found that under the current language of ACPERA an ACPERA applicant is not entitled to a judicial determination that it has met its cooperation obligations until ***after*** a trial. ACPERA applicants have tried to assert their ACPERA status pre-trial to no avail.[27] So, as ACPERA applicants enter into settlement discussions at an early stage, they are left without a determination of their entitlement to ACPERA benefits. Because a substantial majority of cases never make it to trial, this delay can render the ACPERA benefits meaningless.

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17 *Morning Star Packing Co. v. S.K. Foods, L.P.*, 2015 WL 3797774 (E.D. Cal. 2015); *In re* Sulfuric Acid Antitrust Litig., 231 F.R.D. 320 (N.D. Ill. 2005); *Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128 (N.D. Cal. 2011).

18 *Morning Star Packing*, 2015 WL 3797774, at *6.

19 *Id.* at *1.

20 *Id.* at *7.

21 *Id.* at *5.

22 *Id.* at *6.

23 *Id.* at *7.

24 FAQs, *supra* note 3, at 7.

25 *In re* Sulfuric Acid Antitrust Litig., 231 F.R.D. 320.

26 *Id.* at 329.

27 See e.g. *Oracle Am.*, 817 F. Supp. 2d at 1133 (noting "[t]he court is thus required to make the substantive determination whether the amnesty applicant has satisfied the requirements of the civil leniency provisions near the end of the litigation, not at the outset."); *see also In re* Polyurethane Foam Antitrust Litig., 2014 WL 6461355, at *69 (N.D. Ohio 2014)(finding "definitive determination of ACPERA eligibility cannot, and should not, be made at [class certification] stage of the proceedings").

The earliest time in litigation that a court has opined on ACPERA status was in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*.[28] Here, the court was not being asked to confirm that the ACPERA applicant had met its cooperation benefits, rather the plaintiffs sought determination prior to summary judgment motions that defendants had ***not*** met their obligations. The court found that defendants had not provided satisfactory cooperation to the plaintiffs largely based on defendants' failure to provide plaintiffs with the same information they had provided to the DOJ on a timely basis.[29] The court thus issued a pretrial ruling that defendants were not entitled to ACPERA's damages limitations.[30]

Thus, what these cases tell us is that while an ACPERA applicant has no certainty that it ***has*** qualified for ACPERA benefits until after trial, it faces constant risk that it will be found ***not*** to have qualified for ACPERA benefits. That degree of uncertainty seems at odds with the underlying purpose of giving comfort to parties ***at the time they are considering seeking leniency*** with the DOJ. ACPERA is not meeting its intended goal as potential leniency applicants may choose not to report criminal conduct to the DOJ given this uncertainty over civil exposure.

IV. HOW CAN ACPERA BE AMENDED TO ADDRESS THIS PROBLEM?

To encourage continued cooperation in the leniency program, ACPERA should be amended to carry out the statute's original intent. Without some reasonable degree of certainty that a leniency applicant will gain ACPERA benefits, and some ability of the leniency applicant to control its own fate in the outcome of the analysis, a rational actor could conclude that ACPERA does not provide sufficient protection against civil damages to justify a leniency application.

To solve this problem, we propose creating a pretrial presumption of satisfactory cooperation if an ACPERA applicant meets certain specific requirements. Under the presumption, an ACPERA applicant would be presumed to have met its ACPERA obligations if it: (1) provides a timely proffer to plaintiffs that reflects all information provided to the DOJ; and (2) promptly produces all documents to the claimant(s) that were provided to the DOJ in the course of the investigation. In that case, the ACPERA applicant would be presumed to have qualified for ACPERA; however, this presumption would be subject to an important qualification. The presumption could be successfully rebutted if the ACPERA applicant failed to meet any of the other current obligations under the statute, including: "(1) providing a full account . . . of all facts known to the applicant . . . 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;" and (3) "using its best efforts to secure and facilitate" interviews, depositions, and trial testimony of individuals covered under the leniency agreement.[31] A court would then determine, as mandated by the statute, whether a defendant has provided satisfactory cooperation.[32]

The presumption would not change the level of cooperation that defendants must provide to plaintiffs. It would simply provide defendants with some assurance that they will receive the benefits intended by Congress when it enacted ACPERA. The legislative history of ACPERA makes clear that a leniency applicant was meant to be protected under ACPERA regardless of whether it proceeds to trial or settles the case pre-trial.[33] Without this presumption, however, defendants cannot have confidence that they will receive the full benefit of ACPERA status during settlement negotiations because courts have declined to reach the issue of whether a defendant has fully complied before trial. The presumption would strengthen the ACPERA applicant's claim for a reduction in potential civil penalties during settlement negotiations, which is where it is most important as so few cases go to trial. Moreover, because joint and several liability exists as to other defendants, it would not limit the plaintiff's potential recovery. At most, it would shift some of the pre-trial risk from the leniency applicant to the other defendants, which is ***exactly*** what ACPERA intended. More importantly, it would encourage more disclosures to the DOJ by providing assurance to potential leniency applicants that ACPERA will work as anticipated.

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28 *In re* Aftermarket Auto. Lighting Prod. Antitrust Litig., 2013 WL 4536569 (C.D. Cal. 2013).

29 *Id.* at *4.

30 *Id.* at *5.

31 ACPERA § 213(b).

32 *Id.*

33 ACPERA was created 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." 150 Cong. Rec. S3610-02, S3614 (Apr. 2, 2004) (statement of Sen. Hatch).

There should be no reason for concern that relevant information would be withheld from plaintiffs for two primary reasons. First, leniency applicants have strong incentives to disclose the full scope of potentially illegal conduct to the DOJ in the course of an investigation in order to receive complete leniency protection. The DOJ frequently reminds leniency applicants that any gaps could expose them to prosecution.[34] Second, ACPERA specifically requires, and will continue to require, defendants to provide a "full account . . . of all facts known to the applicant," to turn over "all documents or other items potentially relevant to the civil action," and to make witnesses available.[35] The presumption would not alter these cooperation requirements.

In addition, the broad scope of U.S. civil discovery requires much of this to be provided regardless of ACPERA, and any failure to produce relevant information would risk the loss of the favorable presumption. Finally, any settlement agreements that are reached at an early stage can incorporate cooperation requirements as broad as ACPERA, or even broader. Creating a pre-trial presumption leaves the scope of ACPERA cooperation unaltered, while encouraging potential leniency applicants to self-report to the DOJ.

V. CONCLUSION

ACPERA isn't working, and it shows. The uncertainty surrounding ACPERA's benefits have limited its impact. The statute is ineffective before trial, when the vast majority of antitrust civil matters are resolved. If the leniency program and ACPERA are to continue to be effective tools in cartel enforcement, an amendment to the ACPERA statute is necessary.

The statute is set to expire in June 2020.[36] Reauthorization provides Congress with the opportunity to ensure that ACPERA succeeds in strengthening the DOJ's leniency program by encouraging more disclosures of cartels. Creating a rebuttable presumption of cooperation would correct the current ambiguities in the statute that have reduced its potential impact. Both plaintiffs and ACPERA applicants would benefit — plaintiffs will continue to receive full cooperation and ACPERA applicants will receive the reduction in civil penalties anticipated by the statute. Most importantly, more cartel activity will likely be reported to the DOJ, which is the priority of both the leniency program and ACPERA.

34 FAQs, *supra* note 3, at 23 (requiring leniency applicants to "report[] the wrongdoing with candor and completeness and provide[] full, continuing, and complete cooperation to the Division throughout the investigation").

35 ACPERA § 213(b).

36 Pub. L. No. 111-190, § 3, 124 Stat. 1275 (June 9, 2010).

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