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SECTION DIRECTOR

Joanne Travis
Chicago, IL

Travisj@staff.abanet.org

March 4, 2010

VIA E-MAIL

Marni B. Karlin, Esquire
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Committee on the Judiciary, United States Senate
308 Hart Senate Office Building
Washington, DC 20510

Re: Extension of the Damages Limitations and Cooperation Enhancement Provisions
in the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)

Dear Ms. Karlin,

I am writing on behalf of the Section of Antitrust Law of the American Bar Association. Thank you for giving us the opportunity to comment on the pending reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).

The Section's position remains the same as that expressed in the Section's May 8, 2009 letter to Senators Leahy and Sessions, and Representatives Conyers and Smith, a copy of which is attached.

Since that letter was sent, there have been additional instances of amnesty applicants cooperating with civil plaintiffs under ACPERA. There also have been additional jurisdictions adopting or considering statutes to criminalize cartel conduct, and adding leniency programs of their own. These developments underscore the points made in our earlier letter, and nothing has changed in the intervening ten months that warrants a change in the Section's position.

Please note that these views are being presented only on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions or if the Section can provide anything further, please let me know.

Sincerely,



Ilene K. Gotts
Chair, Section of Antitrust Law

Attachment

AMERICAN BAR ASSOCIATION**Section of Antitrust Law**

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5550

FAX: (312) 988-5637

E-mail: antitrust@abanet.org

<http://www.abanet.org/antitrust>

**ASSOCIATION YEAR
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James A. Wilson
52 East Gay Street
Columbus, OH 43216

CHAIR ELECT

Ilene Knable Gotts
51 West 52nd Street
New York, NY 10019

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Allan Van Fleet
Suite 1800 Wells Fargo Plaza
1000 Louisiana Street
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Paulette Brown
Madison, NJ

YOUNG LAWYERS**DIVISION REPRESENTATIVE**

Andrea M. Agathoklis
Washington, DC

SECTION DIRECTOR

Joanne Travis
Chicago, IL
(312) 988-5575
(312) 988-5637
Travisj@staff.abanet.org

James A. Wilson

Direct Dial (614) 464-5606

Facsimile (614) 719-5039

E-Mail - jawilson@vorys.com

May 8, 2009

VIA E-MAIL

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Extension of the Damages Limitations and Cooperation Enhancement Provisions in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004

Chairmen and Ranking Members:

I am writing on behalf of the Section of Antitrust Law of the American Bar Association to urge that Congress adopt a five-year extension of the provisions of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) limiting civil liability for participants in the Antitrust Division's leniency program to the actual damages caused by that company in exchange for increased cooperation with civil claimants. For the reasons set forth below, the Section supports an extension of these provisions. The Section further suggests that Congress seek the input of the Antitrust Division of the US Department of Justice, as well as members of the plaintiff and defense bars, to evaluate the efficacy of these detrebling provisions prior to the sunset of such an extension.

The views expressed in these comments are those of the Section of Antitrust Law and they have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association nor should they be construed as representing the policy of the American Bar Association.

I. The Adoption and Rationale for ACPERA

The Antitrust Division of the Department of Justice has consistently made criminal cartel enforcement its top priority.¹ The Division's Corporate Leniency Policy is one of its most effective tools in carrying out its criminal enforcement mission. The "leniency" (or "amnesty") policy provides the possibility for complete immunity to the first corporation involved in an antitrust conspiracy that reports its conduct to the Division. Under the policy, both the corporation and its executives will not be criminally charged for the antitrust law violations reported, provided they fully cooperate with the investigation and comply with the other terms of the policy. Thus, a company disclosing illegal conduct and proffering cooperation through its knowledgeable employees can avoid prosecution for itself and its cooperating personnel, avoiding substantial fines and, in the case of individuals, possible incarceration. For over fifteen years, the Division has had enormous success with its amnesty policies. The leniency program has allowed the Division to uncover cartels affecting billions of dollars worth of commerce in the United States, which has led to prosecutions resulting in record fines and jail sentences. By successfully exposing cartel conduct, the leniency program also has helped the victims of that conduct identify losses they may have suffered, which they can seek to redress through civil litigation.

However, companies considering reporting cartel conduct prior to the 2004 passage of ACPERA confronted a very significant disincentive to cooperation in the form of the likely substantial costs of private civil lawsuits with statutorily enhanced damage remedies that would be filed against the company. Antitrust offenders are subject to private actions for treble damages and are jointly and severally liable for all damages caused by their conduct even when other wrongdoers were involved. Therefore, prior to the passage of ACPERA, an amnesty applicant faced potential liability in civil litigation for three times the total damages caused by the *entire conspiracy*. The costs posed by treble damages combined with joint and several liability presented a significant disincentive to reporting cartel conduct.²

¹ See, e.g., Remarks by Thomas O. Barnett Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice Before the Fall Forum of the Section of Antitrust Law American Bar Association Washington, DC November 19, 2004, available at: <http://www.usdoj.gov/atr/public/speeches/206455.wpd>; Remarks by Joel I. Klein Assistant Attorney General Antitrust Division U.S. Department of Justice Before the Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy New York, New York, October 14, 1999, available at <http://www.usdoj.gov/atr/public/speeches/3747.htm>.

² See, e.g., Phillip C. Zane, *The Price Fixer's Dilemma: Applying Game Theory to the Decision of Whether to Plead Guilty to Antitrust Crimes*, 48 Antitrust Bull. 1 (2003). (arguing that extremely high damage liability could discourage companies from seeking leniency). However, others believe there is no evidence to conclude that the limitations on damages in ACPERA have

By enacting ACPERA, Congress removed this disincentive to self-report and participate in the Antitrust Division's Corporate Leniency Policy by limiting in appropriate cases the recoverable damages in follow-on civil actions against corporate amnesty applicant to single rather than treble damages and to the actual damages caused only by that company.³ The legislation thus eliminated both the trebling provision and the joint and several liability doctrine for recipients of federal amnesty in both federal and state private actions.

In addition to limiting the liability of leniency applicants, ACPERA provides important benefits to the victims of antitrust offenses. First, by removing a disincentive from reporting conduct to the Antitrust Division, ACPERA makes it more likely that criminal violations will be reported and more antitrust offenses will be uncovered. Indeed, to the extent that ACPERA has enhanced the amnesty program, it has assisted in gaining additional guilty pleas and convictions, and with them a presumption of civil liability. In addition, the statute requires leniency applicants to cooperate with the victims of these offenses when they bring lawsuits seeking compensation for their losses. To qualify for the limitation on damages, a corporate leniency applicant, including its cooperating employees, must provide "satisfactory cooperation" to the civil claimant.⁴ Cooperation is defined in section 213(b) of ACPERA to include providing (1) "a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action," and (2) "all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant."

ACPERA's damages limitation is set to expire under a five-year sunset provision contained in the original legislation. Therefore, without congressional action, the provision will expire on June 23, 2009.⁵ The damages limitation in ACPERA received the Section's support when initially proposed. As we explain below, the Section recommends an extension of this key provision for an additional five years because there has been insufficient time to fully evaluate experience under ACPERA to determine if the benefits of the damages-limiting provision outweigh any costs it may impose.

improved the Antitrust Division's ability to uncover cartel conduct through the Division's Corporate Leniency Program sufficiently to outweigh the deterrent effect of treble damages. See Nathan H. Miller, *Strategic Leniency and Cartel Enforcement* (Sept. 2007) available at www.econ.berkeley.edu/users/webfac/gilbert/e221_f07/miller.pdf.

³ The ACPERA was passed as part of the Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, § 213, 118 Stat. 661-67 (2004) (codified at 15 U.S.C. § 1).

⁴ *Id.* § 213(b).

⁵ *Id.* § 211(a). An exception was legislated for "applicants who [have] entered into an antitrust leniency agreement on or before [June 23, 2009]," and they will remain eligible for this relief after the act sunsets. *Id.* § 211(b).

II. Extension of ACPERA's Damages Limitation Is Necessary

A. Debate Exists as to the Impact of the Actual Damages Provision

Congress originally passed the damages limitations in ACPERA to remove the disincentive to self-reporting posed by the prospect of joint-and-several treble damages liability.⁶ There can be no doubt that the public interest is served by uncovering and stopping cartel conduct, and the successful prosecution of cartels depends in the first instance upon detection. Much of the success of detection in recent years has been the result of companies voluntarily coming forward and participating in the leniency program. While the leniency program has been very successful, each company that is determining whether to report an offense must be mindful of its overall corporate obligations. That means carefully considering the potentially costly civil liability that flows from cooperation with the Antitrust Division in a cartel matter. Prior to the passage of ACPERA, the possibility of facing such liabilities doubtless chilled some cooperation and self-reporting, likely including some cartel agreements that would otherwise have gone undetected.

The ACPERA damages provision eliminated (1) trebling and (2) joint and several liability for sales other than the firms' own in both federal and state actions. This significant reduction in potential liability affected (1) direct purchaser class actions; (2) opt out direct purchaser cases; (3) foreign direct purchaser claims; and (4) state indirect purchaser actions. However, the damages limitation maintained consistency with the leniency applicant's obligation to pay restitution, since the legislation preserved liability for actual damages suffered by consumers as a result of the cooperating firm's sales.

Debate exists as to the effectiveness of the actual damages limitation in ACPERA. Those who favor detrebling point out that by reporting cartel conduct, the amnesty applicant is, in many cases, effectively ending an ongoing crime. Reporting the crime to the Antitrust Division in many cases ultimately has the effect of alerting the victims of the crime. Further, by tying the damages limitation to cooperation with the civil claimants, ACPERA makes it more likely that the victims of the crime will ultimately receive compensation for their losses. Early cooperation by the amnesty applicant with the civil plaintiffs makes it more likely that the claimants will be able to build strong cases against the other members of the conspiracy.

Those who support the actual damages provision thus assert that the rationale that existed for the detrebling provision when the ACPERA was passed in 2004 continues today. The provision removes a disincentive to reporting criminal conduct. Many view the provision as a useful means of increasing the incentive for firms to come forward and cooperate with the Department of Justice, while at the same time increasing the level of cooperation available to the civil claimants.

⁶ "This [detrebling] provision addresses this disincentive to self-reporting [created by the threat of treble damages]." 150 Cong. Rec. S3610, S3614 (remarks of Chairman Hatch). "The bill creates an additional incentive for corporations to disclose antitrust violations by limiting their liability in related civil claims to actual damages." 150 Cong. Rec. H3654, H3657 (remarks of Chairman Sensenbrenner).

Others, however, assert that the detrebling provision is unnecessary, and 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. Further, opponents assert that detrebling can only be said to play a role in the hypothetical amnesty applicant's cost-benefit analysis if one assumes that the corporation could avoid prosecution if it chose to stay silent, which they dispute.⁷ In addition, they argue that corporate amnesty applicants have routinely resolved civil cases in the United States in exchange for cooperation and relatively small settlement amounts, representing single damages or less on the volume of sales by the amnesty applicant, rather than total sales.

B. There Has Been Insufficient Time to Assess the Effectiveness of the Detrebling Provision

Five years has proven an insufficient amount of time to assess the effectiveness of the damages limitation. Since the passage of ACPERA, there have been a number of significant cartel cases uncovered by the Antitrust Division through its leniency program, including, for example, the air cargo investigation, which has so far yielded more than a billion dollars in criminal fines. However, it is difficult to gauge the effectiveness of the provision on the limited record so far – for example, there is no case law or academic study that addresses the effectiveness of the damages limitation in encouraging companies to report conduct to the Antitrust Division. Nor are there any reported cases discussing the implications of the leniency applicant's requirement to cooperate with the civil claimants.⁸ On the other hand, the Antitrust Division believes that the damages limitation has made its Corporate Leniency Program “even more effective” at detecting and prosecuting cartels.⁹

⁷ In this regard, those who doubt the need for or efficacy of detrebling point to the statement of one career DOJ official that once in-house counsel discover a violation, “[i]t is already too late to contain the leakage of information to the government. The boat is already sinking, and the only question is whether you are going to grab the life preserver.” Scott Hammond, Deputy Assistant Attorney General Antitrust Division, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?* (Mar. 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

⁸ In the ongoing LCD antitrust litigation, civil claimants recently filed a motion to compel discovery from the leniency applicant based on the cooperation provisions in ACPERA; the court has not yet ruled. *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, M:07-cv-01827 (N.D. Cal) (motion to compel filed April 17, 2009).

⁹ Remarks by Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division U.S. Department of Justice Before the ABA Section of Antitrust Law Spring Meeting, Washington, DC March 26, 2008, available at <http://www.usdoj.gov/atr/public/speeches/232716.htm>.

There have been at least two reported cases in which the damages limitations of ACPERA are mentioned.¹⁰ Both are civil cases in which an amnesty applicant and other members of a cartel have been sued for damages. In both cases, the amnesty applicant was able to rely on the damages limitation to reach agreements with the civil plaintiffs to limit the applicant's liability and to provide cooperation to the civil plaintiffs. Although neither case addresses the effectiveness of the detrebling provision in causing the companies to seek amnesty, both cases suggest that the provision should be evaluated to determine if it improves enforcement and is workable for civil plaintiffs.

C. There is No Reason to Believe the Benefits of the Damages Limitation Provision Are Outweighed by Any Costs

There do not appear to be significant costs to renewing the damages limitation in order for its impact to be further evaluated. The Act limits damages that are recoverable from a leniency applicant to actual damages suffered by a claimant and removes joint and several liability from the leniency applicant. However, the civil claimants are not limited in their ability to collect damages from other members of the cartel. All of the other members of the cartel who did not receive leniency from the government remain jointly and severally liable for treble the damages caused by the entire conspiracy. Thus, the damages limitations should not reduce the victims' total potential recovery,¹¹ even though actual recovery will depend upon the nature of any settlements reached versus the risk of going to trial to obtain the full potential recovery.

Moreover, to qualify for the reduction in damages, the leniency applicant must provide "satisfactory cooperation" with the civil claimants – a standard requiring affirmative assistance to plaintiffs that is not otherwise required by antitrust law and that is overseen by the court hearing the civil claims.¹² Therefore, not only does the provision maintain the total potential recovery available to the civil claimants, it improves their chances of obtaining that recovery by requiring the leniency applicant to cooperate with the civil claimants. Importantly, ACPERA mandates that a leniency applicant is eligible for the damages limitation only after the court hearing the civil action has affirmatively determined that the leniency applicant has provided satisfactory cooperation to the civil claimants. This provision ensures that in exchange for the damages limitation, the victims of the conduct will receive meaningful cooperation that will make them better able to obtain recovery from the other members of the conspiracy.

¹⁰ *In re Municipal Derivatives Antitrust Litig.*, 252 F.R.D. 184 (S.D.N.Y. 2008); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320 (N.D. Ill. 2005).

¹¹ *See, e.g.*, 150 Cong. Rec. H3654, H3657 (remarks of Chairman Sensenbrenner).

¹² Whether a clearer standard for the cooperation required under the statute ought to be added is an issue the Section urges be studied prior to the sunset of any extension of the detrebling provision.

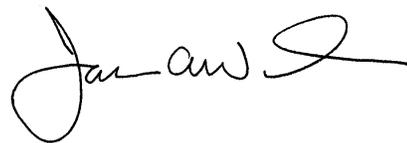
D. An Extension For Five Years Would Be Appropriate

While the Section is inclined to believe that the detrebling provision has made an important contribution to the overall effectiveness of the government's leniency program with no discernable ill effect on the deterrent and remedial objectives of enforcement, it also recognizes that legitimate questions have been raised by those who hold a differing view and we note that there has been insufficient time under the ACPERA regime to permit a full evaluation of the benefits and costs of the provision. Accordingly, we recommend that the provision should be given an additional five-year period of effectiveness, allowing time for the comprehensive study by the Antitrust Division that we believe is warranted.

The Section believes that an extension of five additional years is necessary to allow further study of the detrebling provision before a final decision is made to keep or abandon this incentive to amnesty application. To date, very few cases have been concluded in which the actual damages provision was applied. Given this limited record, the Section believes that Congress should consider renewing the legislation for a period of five years.

The Section believes that any extension of the detrebling provision should insure adequate time, and a process, for studying the efficacy of this measure. The time from discovery of an antitrust violation to conclusion of civil litigation can be lengthy for a variety of reasons, including stays pending completion of criminal prosecutions, wide-ranging discovery, and complex motion practices. Sufficient time should be allowed to provide a full opportunity for litigation to be resolved and the necessary issues to be identified and studied before a permanent decision is made as to whether to keep the actual damages provision. A five year extension should allow more data to be generated so that the underlying enforcement issues may generate academic evaluation. Congress' consideration of this important subject will greatly benefit from the development of additional case law and the emergence of further academic study and commentary.

Respectfully,



James A. Wilson
Chair

JAW/jw

cc: The Honorable Henry C. Johnson
The Honorable Howard Coble
Members, United States Senate Committee on the Judiciary
Members, United States House of Representatives Committee on the Judiciary
Christine Varney, Assistant Attorney General for Antitrust