

November 2007

A Sour Carrot and a Big Stick: Reviving Antitrust Enforcement After Stolt-Nielsen

Iris Tilley

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Tilley, Iris (2007) "A Sour Carrot and a Big Stick: Reviving Antitrust Enforcement After Stolt-Nielsen," *Seattle Journal for Social Justice*: Vol. 6: Iss. 1, Article 37.
Available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol6/iss1/37>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized administrator of Seattle University School of Law Digital Commons.

A Sour Carrot and a Big Stick: Reviving Antitrust Enforcement After *Stolt-Nielsen*¹

Iris Tilley²

INTRODUCTION

The U.S. Supreme Court's October 2006 decision to, for the second time, deny certiorari of the Third Circuit Court of Appeals antitrust case *Stolt-Nielsen, S.A., et. al., v. United States*³ went largely unnoticed by most American consumers. All the major legal newspapers mentioned the incident, but outside of law firms, it sparked little water cooler discussion. It did not make the morning news, and a *Dateline* exposé is not likely to result. Despite this lukewarm response, the Court's decision was big news for businesses and consumers across America.

In *Stolt-Nielsen*, the Third Circuit Court of Appeals established that parties who enter into immunity agreements under the Department of Justice's (DOJ) Corporate Lenience Policy (CLP) are not entitled to a preindictment review if the DOJ alleges that the party has breached the terms of its immunity agreement.⁴ That is, if the DOJ believes that a party has breached the terms of its immunity agreement, the DOJ can file charges against the corporation or individual without first judicially establishing that the corporation or individual is actually in breach.⁵ This means that regardless of the terms of a party's immunity agreement and the incriminating information the party has already provided pursuant to the agreement's protection, in the Third Judicial Circuit—which includes Delaware (where over 50 percent of the United States' publicly-traded companies are incorporated)—the DOJ can unilaterally abrogate the terms of the immunity agreement and indict a party previously protected by the agreement's terms.⁶

The importance of the Third Circuit's holding and the Supreme Court's subsequent decision to deny certiorari of the appeal stems from two distinct and equally important factors. The first factor is the devastating impact anticompetitive behavior can have on both consumers and businesses, and the second factor is the inherent difficulty involved in discovering and prosecuting antitrust violators.

Anticompetitive behavior robs U.S. consumers of hundreds of millions of dollars annually.⁷ One way that companies accomplish this appropriation is by forming cartels with their competitors.⁸ Within these cartels, the member companies often agree to fix prices, rig bids, or allocate customers among the members.⁹ As a result, the companies within each cartel do not have to compete with one another, so they can increase prices to artificially high levels. Consequently, quality and innovation often fall to the wayside.¹⁰ This leaves law-abiding companies at a distinct disadvantage within the market because they are not privy to the manipulated market conditions enjoyed by cartel members. Ultimately, consumers pick up the bill through inflated market prices.¹¹

Antitrust laws are problematic to enforce because cartel activity is secretive and, as a result, is difficult to detect and prove.¹² As exemplified by the CLP, the DOJ has historically attempted to mitigate this difficulty by combining a carrot and a stick approach.¹³ While the sweetness of the carrot and the size of the stick have varied over time, the structure of the CLP has always been to provide some form of immunity to parties that come forward to disclose their own antitrust violations (the carrot), and some form of fines and criminal penalties for those parties that fail to disclose their activities at all or fail to disclose them in a timely manner (the stick).¹⁴ The DOJ's initial version of the CLP was not very effective, but in 1993, the department revamped the program by bolstering the immunity it offered self-reporting violators.¹⁵ Since the CLP was revamped, applications for immunity under the program have increased from one per year to two per month, and the DOJ has collected millions of dollars in fines

from the resulting prosecutions.¹⁶ However, the Third Circuit Court of Appeals' ruling in *Stolt-Nielsen* and the Supreme Court's denial of certiorari threaten to undermine the success of the CLP because they eliminate much of the incentive for a company to self-report anticompetitive behavior.¹⁷

The precedent left in *Stolt-Nielsen*'s wake undermines the purpose of the CLP because it is likely to discourage antitrust violators from self-reporting antitrust violations, and consumers and businesses are likely to suffer the consequences. Consequently, Congress should mitigate the impact of *Stolt-Nielsen* through an amendment to the Sherman Antitrust Act (Sherman Act) designed to reincentivize companies to self-report antitrust violations. However, unless and until such legislation is codified, the DOJ should, on its own initiative, preserve the CLP's effectiveness by seeking preindictment review of alleged breaches of immunity agreements.

Part I of this comment provides a brief overview of antitrust law and addresses the history of immunity, including discussions of statutory immunity, informal immunity, corporate cooperation agreements, and the interpretation of informal immunity agreements. Part II explains and analyzes the details of the Third Circuit's decision in *Stolt-Nielsen* and the precedent left in its wake. Lastly, Part III proposes a draft amendment to the Sherman Act designed to resurrect corporate immunity, discusses the reasoning and justification behind the amendment, and, recognizing the difficulties inherent in enacting a legislative solution, proposes steps the DOJ should take now to preserve the CLP's effectiveness.

I. ANTITRUST AND IMMUNITY

As a framework for the forthcoming discussion on the impact *Stolt-Nielsen* is likely to have on antitrust violators, this section provides an overview of federal antitrust laws; a summary of the function and types of immunity, including corporate cooperation agreements; and a discussion of how immunity agreements are generally interpreted by the courts.

A. Federal Antitrust Law

While most states maintain their own state-specific antitrust laws, there are three major federal antitrust laws: the Sherman Act, the Clayton Antitrust Act (Clayton Act), and the Federal Trade Commission Act.¹⁸ Most pertinent for this comment, the Sherman Act is the oldest of the federal antitrust laws and prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”¹⁹ The Sherman Act provides for criminal punishment of some antitrust violations as felonies.²⁰ Only the DOJ is empowered to bring criminal prosecutions under the Sherman Act.²¹ In contrast, the Clayton Act is a civil statute targeted at preventing mergers and acquisitions that are likely to lessen competition.²² In 1936, section 2 of the Clayton Act was amended through the addition of the Robinson-Patman Act.²³ The Robinson-Patman Act targets price discrimination by explicitly prohibiting any person engaged in commerce from discriminating in price between competing purchasers of commodities of like grade and quality where the effect may be to substantially lessen competition in any line of commerce.²⁴ Finally, the Federal Trade Commission Act prohibits some of the same behavior as the Sherman Act but carries no criminal penalties.²⁵ Significantly, the Federal Trade Commission Act is the enabling act for creation of the Federal Trade Commission, and through it, the Federal Trade Commission is vested with the authority to police violations of the Act.²⁶

As touched upon in the introduction, while anticompetitive activities are clearly illegal, they are secretive in nature, so they can be exceedingly difficult to identify and prosecute.²⁷ As a result, the DOJ has historically relied on consumers and businesses to report anticompetitive activity.²⁸ On the business side, it sought to further this goal through the use of corporate cooperation agreements through which companies that had participated in anticompetitive activity could receive some form of immunity from prosecution for cooperating with the DOJ.²⁹ In 1978, the DOJ launched its

first version of the CLP.³⁰ This initial version of the CLP saw little success. Until it was amended in 1993, on average, only one company came forward each year to report a violation.³¹

In August 1993, the DOJ addressed the deficiencies of the initial CLP by revising it to provide added protections for participating corporations.³² Specifically, the program was revamped to offer (1) immunity from prosecution for companies not yet under investigation that reported anticompetitive activity; (2) immunity options for corporations already under investigation that reported violations; and (3) protection for officers, directors, and employees who cooperated with investigations.³³

First, companies coming forward to report anticompetitive activity that were not already under investigation by the DOJ could receive automatic immunity if (1) upon discovering the unlawful activity, the company took prompt and effective action to terminate its part in the activity; (2) the company provided full, continuing, and complete cooperation to the DOJ throughout the investigation; (3) the confession was a corporate act, not an isolated confession of an individual executive or official; (4) the company made restitution to injured parties, when possible; (5) the company was not the leader or originator of the activity; and (6) the company did not coerce any other parties to join the illegal activity.³⁴

Second, companies already under investigation by the DOJ that came forward to report anticompetitive activity could receive immunity if they met seven distinct conditions: (1) the company must have been the first member of the cartel to come forward and qualify for leniency; (2) the DOJ must not already have evidence against the company likely to result in a substantial conviction; (3) the company, upon discovery of the illegal activity, must have taken prompt and effective action to terminate its part in the activity; (4) the company must have reported the illegal activity with candor and offered continuing and complete cooperation that advanced the DOJ's investigation; (5) the confession of illegal activity must have been a corporate act rather than isolated confessions of individual executives or

officials; (6) the company must have made restitution to injured parties if possible; and (7) considering the circumstances, the DOJ must determine that granting leniency would not be unfair to others.³⁵ Under the CLP, “leniency” is defined as freedom from prosecution.³⁶

Third, officers, directors, and employees could receive immunity for cooperating with investigators. This change expanded the CLP by allowing for immunity in two separate ways.³⁷ If a corporation qualified for immunity under the first prong of the CLP, all of its officers, directors, and employees who admitted their involvement as part of the corporate confession would receive automatic immunity.³⁸ Alternatively, if a corporation *did not* qualify for immunity under the first prong of the CLP, all of its officers, directors, and employees who initially came forward with the corporation would be considered for immunity under the same standards as if they had approached the DOJ individually.³⁹ (Please see Appendix A for the full text of the revised CLP.)

The DOJ and antitrust commentators have hailed the revised CLP as a decided success.⁴⁰ The DOJ has even gone so far as to call the CLP its “single greatest investigative tool,”⁴¹ and others have called it the DOJ’s Antitrust Division’s “primary weapon” in criminal antitrust prosecution.⁴² The DOJ has specifically credited the CLP with greatly increasing corporate sanctions.⁴³ The CLP has been so successful that it has motivated other countries to adopt nearly identical programs throughout the world.⁴⁴ Those countries include Canada, the European Union (EU), Australia, Brazil, Belgium, Cyprus, Czech Republic, and Estonia.⁴⁵ Of particular note is the corporate leniency program established by the European Commission.⁴⁶ Inspired by the success of the DOJ’s CLP in the United States, the European Commission launched its own corporate leniency program in 1996.⁴⁷ The program led to a significant increase in the number of cartels that the EU uncovered and punished, and in 2001, the EU’s total annual fines even surpassed the highest annual fines ever imposed by the United States.⁴⁸

Following the DOJ's revisions to the CLP, it strengthened the stick of antitrust fines and criminal penalties in two distinct ways. First, in 1994, it succeeded in getting the International Antitrust Enforcement Act passed by Congress.⁴⁹ The Act allows the United States to enter into agreements with foreign antitrust agencies to exchange investigative information.⁵⁰ After the Act, the DOJ could increase the reach of its enforcement arm by using the information obtained by other countries to prosecute anticompetitive behavior in the United States and encourage other countries to prosecute international violators by sharing its investigative materials.⁵¹ Thus, a company facing prosecution in the United States for antitrust crimes could face prosecution in multiple other countries.

Second, in 2004, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act (ACPER) of 2004.⁵² Under the ACPER, fines under the Sherman Act were increased to \$100,000,000 for corporations and \$1,000,000 for individuals, and prison sentences were increased to ten years.⁵³

B. Immunity

While corporate cooperation agreements, like those fostered under the CLP and similar international programs, are clearly the most relevant form of immunity from an antitrust prospective, an overview of immunity in general is necessary to clearly understand the importance of immunity as a tool for criminal prosecutors.⁵⁴

Immunity is, in the most fundamental sense, a tool to assist prosecutors with obtaining the information necessary to prosecute crimes.⁵⁵ Specifically, it offers prosecutors a way to obtain information that a witness is not inclined to provide without violating the witness's Fifth Amendment privilege against self-incrimination.⁵⁶ Immunity takes two main forms: statutory and informal immunity.

Statutory immunity comes into play when a witness refuses, on the basis of his or her Fifth Amendment privilege against self-incrimination, to testify

or provide other information in a proceeding “before or ancillary to—(1) a court or a grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House.”⁵⁷ Statutory immunity allows the person presiding over the proceeding to compel the witness to testify through a court order.⁵⁸ Witnesses compelled to testify pursuant to statutory immunity must testify; however, with limited exceptions, prosecutors are prohibited from using any information thus compelled in a subsequent criminal prosecution of that witness.⁵⁹ The idea is that immunity displaces the witness’s fear of prosecution, thus eliminating the need for Fifth Amendment protections.⁶⁰ While not of significant relevance to this comment, state law also often provides for statutory immunity for cases heard in state court.⁶¹

Statutory immunity is well-defined. The Supreme Court has held that a witness compelled to testify must receive at least *use plus derivative use immunity*.⁶² Use plus derivative use immunity, first adopted in 1972 by the Court in *Kastiger v. United States*,⁶³ prohibits prosecutors from using compelled testimony directly against the witness in the trial at hand or in future trials.⁶⁴ Before the Court adopted the standard of use plus derivative use immunity, the Court enforced the use of *transactional immunity*, a much broader form of immunity.⁶⁵ Unlike use plus derivative use immunity, transactional immunity protects witnesses from ever facing prosecution based on issues arising from the immunized testimony.⁶⁶ Today, prosecutors may grant transactional immunity, but they are only required to grant use plus derivative use immunity.⁶⁷

Unlike statutory immunity, which arises because a witness is compelled to testify, informal immunity is the result of a contractual agreement between the government and a witness.⁶⁸ As a result, informal immunity differs from statutory immunity in a number of significant respects. First, from a procedural perspective, informal immunity does not require a court order.⁶⁹ Second, because informal immunity is based on contract law, the

parties are free to bargain for and agree to any form of immunity.⁷⁰ The parties must simply agree to the terms of the particular agreement.⁷¹ As a result, informal immunity may ultimately offer a witness more or less protection than statutory immunity.⁷² Despite this uncertainty, the validity of informal immunity agreements has frequently been upheld.⁷³ Third, because informal immunity agreements are based on contracts, they can be voided for material breach.⁷⁴ Consequently, a witness testifying under an informal immunity agreement can choose to breach the agreement at any time by asserting a Fifth Amendment privilege on the witness stand.⁷⁵ A witness who elects to assert this privilege, however, will lose the benefits bargained for in his or her informal immunity agreement.⁷⁶ Furthermore, a prosecutor is only permitted to ask questions within the scope of the immunity agreement.⁷⁷

C. Interpreting Informal Immunity Agreements

In areas like antitrust law, where the underlying activity is difficult to identify without proactive measures on the part of the violators, informal immunity agreements such as the conditional leniency agreement entered into by Stolt-Nielsen play a significant role in prosecution. However, with their significant role often comes difficult interpretation problems.

Informal immunity agreements are contractual in nature and, as such, are interpreted according to general principals of contract law.⁷⁸ In the simplest terms, if the disclosing party performs his or her end of the bargain, the government is bound to perform its promise and the terms of the immunity agreement will be enforced.⁷⁹ However, if the disclosing party materially breaches his or her commitments under the immunity agreement, the government can be released from its reciprocal obligations.⁸⁰ This analysis is slightly complicated by due process concerns, which require the government to prove, by a preponderance of the evidence, both that the defendant breached the agreement and that the breach was significantly material to warrant rescission.⁸¹ Additionally, any ambiguity must be

resolved in favor of the witness.⁸² The idea behind this concept is that the witness gave up his or her constitutional right to remain silent by providing the government with incriminating evidence, therefore the government should not be able to abrogate the witness's immunity agreement without significant reason.⁸³

The Fifth Circuit Court of Appeals reinforced the importance of immunity agreements in *United States v. Castaneda*⁸⁴ when it reversed the defendant's conviction because the government had improperly revoked the defendant's immunity agreement.⁸⁵ However, in addition to reinforcing the importance of immunity agreements, *Castaneda* highlighted the difficulty inherent in determining whether or not a defendant has actually breached an immunity agreement.⁸⁶ In *Castaneda*, the defendant was convicted of involvement in a Racketeer Influenced and Corrupt Organization Act (RICO) conspiracy.⁸⁷ From 1990 to 1994, the defendant, who owned an auto repair shop and towing service, conspired with a county attorney to solicit bribes from individuals accused of driving while intoxicated in exchange for getting their charges dismissed or their sentences reduced.⁸⁸

When the Federal Bureau of Investigation began to investigate the County Attorney's Office, it sought Castaneda's cooperation.⁸⁹ Accordingly, Castaneda entered into a written immunity agreement and a verbal transactional immunity agreement with the government.⁹⁰ The verbal transactional immunity agreement provided that Castaneda was required to "tell everything that he knew" about the county attorney's criminal activity.⁹¹

In reliance on these immunity agreements, Castaneda acknowledged his role in the criminal activity and identified a number of additional individuals who either had knowledge of the scheme or had been involved in the scheme.⁹² Nearly a year after Castaneda acknowledged his role in the scheme, the government advised him that "because he had 'failed to provide . . . relevant and material information concerning criminal activities of which he was well aware,' he had violated the transactional immunity

agreement, so the government was revoking its promise not to prosecute.”⁹³ The following day, a grand jury returned a seven-count indictment against Castaneda.⁹⁴ Castaneda was convicted, but the Fifth Circuit Court of Appeals reversed his conviction, holding that the government breached its immunity agreement by prosecuting Castaneda.⁹⁵

Noting that no clear Fifth Circuit law addressed what constituted “material breach” of a non-prosecution agreement, the court applied the definition used in general contract law.⁹⁶ Under this interpretation, a breach is not material unless the non-breaching party is deprived of the benefit of the bargain.⁹⁷ The court noted that “[t]he less the non-breaching party is deprived of the expected benefits, the less material the breach.”⁹⁸ As a further clarification of the concept, the *Castaneda* court noted that other courts within the circuit had clarified the concept of material breach by comparing it to the concept of substantial performance.⁹⁹ Under this approach, if a party’s “nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by the party’s performance, the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission.”¹⁰⁰ The court noted that this approach was just as applicable to determining the materiality of breach of non-prosecution agreements.¹⁰¹ No other circuits have explicitly disagreed.

In *Castaneda*, the court reasoned that the defendant’s relatively insignificant omissions “pale[d]” in comparison to the information he had provided.¹⁰² Specifically, the court noted that Castaneda had provided the court with substantial detailed accounts of bribery involving the other defendant and seven other individuals.¹⁰³ The court reasoned that in light of these significant disclosures, Castaneda’s omission regarding his own involvement in two of the dismissed charges did not constitute material breach.¹⁰⁴ The court noted that “[i]n the absence of proof of substantial or intentional omissions by Castaneda constituting prejudice to the government, the district court erred in permitting the government to revoke

the non-prosecution agreement with Castaneda and prosecute him in this case.”¹⁰⁵

In contrast, other Fifth Circuit Court of Appeals decisions have declared that a defendant’s breach was sufficient to warrant rescission when the defendant’s conduct had a substantial impact on collection of relevant information. For example, in *United States v. Ballis*, the court allowed rescission of the defendant’s plea agreement because he had withheld information, offered untruthful testimony, and induced the plea agreement through fraud.¹⁰⁶ In *Hentz v. Hargett*, the court held that the defendant’s statement to the prosecutor that he intended to change his testimony was enough to amount to anticipatory repudiation, which justified a revocation of the agreement.¹⁰⁷ A witness’s failure to cooperate by refusing to meet with governmental representatives and testify before a grand jury has also been interpreted as sufficient to constitute material breach.¹⁰⁸ Additionally, in *United States v. Donahey*, the court held that a defendant who provided evasive, misleading, and unverifiable answers had breached the terms of his immunity agreement.¹⁰⁹

In *United States v. Crawford*, the Eighth Circuit Court of Appeals adopted a test partly defined in the Restatement (Second) of Contracts, holding that the factors important for determining whether a breach is material are:

- (1) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (2) the likelihood that the party failing to perform will cure his failure; and (3) the extent to which the behavior of the party failing to perform comports with the standards of due process and fair dealing.¹¹⁰

In addition to those factors applied by the *Crawford* court, the Restatement also considers the extent to which the injured party can be adequately compensated for the part of the benefit of which he was deprived and the extent to which the party failing to perform or offering to perform will suffer forfeiture.¹¹¹ Where discovery of particular information is not a

condition precedent to the immunity agreement, the government cannot repudiate the agreement for failure to get that information from a particular witness.¹¹²

The Sixth Circuit has adopted a more rigorous standard, holding that the government must prove “bad faith, intention, and [a] substantial omission” on the part of the defendant before it can be released from its obligation.¹¹³ Much like the Fifth Circuit, the Third Circuit has adopted the concept of substantial performance.¹¹⁴

While courts have generally construed informal immunity agreements by using the interpretative concepts of contract law, the issue of whether *preindictment review* of an alleged breach of an immunity agreement—the issue in *Stolt-Nielsen*—has rarely arisen.¹¹⁵ Prior to *Stolt-Nielsen*, this issue had only arisen in two cases: *United States v. Verrusio*¹¹⁶ and *United States v. Meyer*.¹¹⁷ In *Verrusio*, a Seventh Circuit case, the court recognized that when the government suspects breach of a plea agreement, the best procedure for the government to take might be to begin with a motion to release it from its obligations under the agreement, but it held that preindictment review of whether a defendant breached a plea agreement is only required if exigent circumstances exist.¹¹⁸ Similarly, in *Meyers*, the court failed to establish a strict rule. Rather, in *dicta*, the *Meyers* court stated that “the preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment.”¹¹⁹

II. SUMMARY AND ANALYSIS OF *STOLT-NIELSEN*

The story of Stolt-Nielsen, S.A., and its subsidiary, Stolt-Nielsen Transportation Group Ltd. (collectively “Stolt-Nielsen”), a leading supplier of parcel tanker shipping services, began in March 2002 when Stolt-Nielsen’s general counsel, Paul O’Brian, resigned.¹²⁰ In a complaint filed in the Connecticut Superior Court in November 2002 and in a subsequent article in the Wall Street Journal, O’Brian claimed that he resigned after he

told his superiors about collusive trading practices between Stolt-Nielsen and two of its competitors, and the company failed to take responsive action.¹²¹ After O'Brian filed the complaint, Stolt-Nielsen hired John Nannes, a former deputy assistant attorney general with the Antitrust Division at the DOJ, to conduct an internal investigation to determine whether Stolt-Nielsen had violated any antitrust laws and to advise it regarding any criminal liability.¹²² As part of his investigation, Nannes met with the chairman of Stolt-Nielsen's tanker division, Samuel Cooperman.¹²³ At the meeting, Cooperman told Nannes that O'Brian had raised some antitrust concerns and, in response to those concerns, the company had revised its antitrust compliance policy and distributed the new policy to employees and competitors.¹²⁴ Additionally, Cooperman told Nannes that he thought an internal investigation would demonstrate that the company was in violation of federal antitrust laws, and he asked Nannes about the possibility of leniency from the DOJ.¹²⁵

Following this conversation and with Cooperman's permission, Nannes spoke with an officer in the DOJ's Antitrust Division to inquire about Stolt-Nielsen's immunity options if the company admitted violations.¹²⁶ The officer informed Nannes that based on the DOJ's prior suspicions that Stolt-Nielsen had been colluding with its competitors, the DOJ had already begun to investigate its behavior.¹²⁷ Consequently, Stolt-Nielsen was limited to immunity under the second prong of the CLP, which offers immunity options for corporations reporting violations already under investigation.¹²⁸

Stolt-Nielsen's ensuing investigation revealed that between 1998 and 2001, one of the company's executives exchanged customer lists with two of its competitors.¹²⁹ The purported purpose of this exchange was to apportion customers among the companies and restrain competition.¹³⁰ The lists proved that Stolt-Nielsen had indeed engaged in anticompetitive behavior, and the company promptly turned them over to the DOJ.¹³¹

On January 15, 2003, the DOJ entered into a conditional leniency agreement with Stolt-Neilson under the CLP.¹³² Pursuant to this agreement,

the DOJ agreed “not to bring any criminal prosecution against [Stolt-Nielsen] for any act or offense it might have committed prior to the date of [the agreement] in connection with the anticompetitive activity being reported.”¹³³ The agreement also provided that the DOJ would not prosecute officers and directors of Stolt-Nielsen who “admit[ted] their knowledge of, or participation in, and fully and truthfully cooperate[d] with the Antitrust Division in its investigation of the anticompetitive activity being reported.”¹³⁴ The DOJ’s promise was, of course, conditioned upon Stolt-Nielsen’s strict compliance with the terms of the Conditional Leniency Agreement.¹³⁵ Specifically, the DOJ could revoke the agreement if, at any time, it determined that Stolt-Nielsen had violated the leniency agreement’s terms.¹³⁶ Additionally, the agreement noted that in the event of breach by Stolt-Nielsen, the DOJ could use any evidence provided by Stolt-Nielsen against it in any ensuing prosecution.¹³⁷ That is, if Stolt-Nielsen breached the agreement, it could not rely on any form of *transactional immunity* for protection.¹³⁸

The cooperation agreement specifically required that Stolt-Nielsen: produce all documents and records requested by the DOJ; (2) remain available for interviews with the DOJ; (3) provide full and truthful responses to all inquiries by the DOJ “without falsely implicating any person or intentionally withholding any information”;¹³⁹ (4) voluntarily provide any information or materials not requested by the DOJ that were nonetheless relevant to the investigation; and (5) testify under oath when asked by the DOJ.¹⁴⁰ Based on the information provided by Stolt-Nielsen and its executives, the government was able to secure guilty pleas from Stolt-Nielsen’s co-conspirators, resulting in prison sentences for individual executives at those companies and fines totaling \$62 million.¹⁴¹

Things did not conclude as quickly for Stolt-Nielsen. The government’s investigation revealed that Stolt-Nielsen had continued to participate in anticompetitive behavior for several months after O’Brian initially raised concerns to Cooperman.¹⁴² Despite the fact that Stolt-Nielsen had ceased

all anticompetitive activity before the agreement was signed (the terms of the agreement provided for immunity for any violations that took place *before* the agreement was signed), the DOJ reasoned that Stolt-Nielsen had breached the terms of its agreement because, after discovering anticompetitive activity, Stolt-Nielsen had not taken “prompt and effective action to terminate its part in the anticompetitive activity.”¹⁴³ As a result, on April 8, 2003, the DOJ informed Stolt-Nielsen that it was suspending the company’s obligations under the agreement and considering withdrawal of its grant of conditional leniency.¹⁴⁴

On March 2, 2004, the Government withdrew its grant of conditional leniency to Stolt-Nielsen and announced that it intended to indict the company and one of its executives for violations of the Sherman Act.¹⁴⁵ In response, Stolt-Nielsen sued the DOJ for enforcement of the immunity agreement and sought an injunction against indictment.¹⁴⁶ The district court responded by granting Stolt-Nielsen’s injunction and holding that, in order to protect due process rights, it was essential to decide *prior to the indictment* whether Stolt-Nielsen had breached its immunity agreement.¹⁴⁷

On appeal, the Third Circuit Court of Appeals reversed, holding that separation of powers precluded the court from interfering with the executive branch’s “absolute discretion to decide whether to prosecute a case.”¹⁴⁸ The court recognized that an exception exists to the constitutional bar from enjoining an indictment: when a criminal prosecution would violate constitutional rights and the violation would result in a chilling effect on the constitutional rights of others, or where the “mere threat of prosecution would inhibit the exercise of constitutional freedoms,”¹⁴⁹ an injunction is appropriate. Pointing out that no federal court had ruled that preindictment review is constitutionally required, the court held that, absent a chilling effect on constitutional rights, the mere existence of an immunity agreement did not provide it with the authority to enjoin the filing of an indictment.¹⁵⁰ The court concluded that postconviction review is sufficient.¹⁵¹

Stolt-Nielsen appealed the decision to the Supreme Court. The Court initially denied certiorari on August 21, 2006,¹⁵² but this decision drew such a strong response (six amicus curiae briefs were filed¹⁵³) that the court agreed to distribute the case for conference on October 27, 2006.¹⁵⁴ On October 30, 2006, the Court again denied certiorari, letting the Third Circuit's holding stand.¹⁵⁵

A. A Strange Result

Since its 1993 revision, the CLP has been successful, at least in part, because it attacks the very trust that must underlie a successful cartel.¹⁵⁶ In doing so, it creates a "prisoner's dilemma" for cartel members.¹⁵⁷ Each cartel member is aware of the substantial benefits available to the first company to come forward under the CLP and disclose the cartel's anticompetitive activities, and each is aware of the substantial risks associated with not coming forward at all.¹⁵⁸ Cartel members are thus left constantly wondering when one of the other members will leave the cartel and expose the remaining cartel members to significant liability.¹⁵⁹ Consequently, cartel members find themselves in a race of sorts to reach the DOJ first and receive immunity.¹⁶⁰ This phenomenon has resulted in increases in both the total number of cartels reported and the total value of fines collected under the new CLP.¹⁶¹ In addition, the DOJ has credited the revised CLP with preventing cartels from forming in the first place by dissuading would-be members with a significant risk of exposure.¹⁶²

Under the revised CLP, the risks associated with cartel involvement are so substantial that expected profits after seeking CLP leniency are actually greater than those associated with staying in a cartel.¹⁶³ Consequently, under the CLP, it makes more economic sense to cease antitrust activity than to remain part of a cartel.¹⁶⁴ However, *Stolt-Nielsen* has changed the equation for would-be self-reporters by significantly increasing the risks associated with self-reporting. That is, after *Stolt-Nielsen*, companies comparing the benefits of cartel activity with those of self-disclosure must

consider a new risk: despite having formed an immunity agreement with the DOJ, without the benefit of a preindictment judicial review of the agreement, the secured immunity will not necessarily preclude indictment and prosecution for an alleged breach of the agreement. Suddenly, the rewards for self-disclosure appear far less substantial.

1. The Deterrence Effect

By increasing the risk associated with disclosing anticompetitive behavior under the CLP, the DOJ and the Third Circuit have, in essence, removed one of the primary incentives the CLP offers companies participating in anticompetitive behavior: the incentive of safety from indictment and prosecution.¹⁶⁵ Elimination of this safety component is of paramount concern to companies for three main reasons.

First, cartel activity has many benefits for its members. Depending on the type of activity associated with a cartel, it can artificially raise prices leading to higher profits for member companies; it can eliminate competition and, consequently, the need for member companies to innovate (thereby saving research and development costs); and, through customer allocation, it can help member companies establish a strong customer base.¹⁶⁶ While these results are not good for consumers or non-colluding businesses, they are good for the companies involved in cartels and provide a significant incentive to remain part of a cartel.¹⁶⁷ Before *Stolt-Nielsen*, the safety of reporting anticompetitive activity under the CLP served as a significant deterrent for many would-be and existing cartel members because they feared that they would be reported by those former cartel members seeking immunity.¹⁶⁸ However, the carrot has changed from safe, reliable immunity from prosecution to immunity from conviction (CLP participants now can seek only *postindictment* review of their immunity agreements). As a result, the economic benefits of reporting cartel activity have decreased significantly because, as further discussed below, indictment and prosecution can come at a significant cost to a company's

reputation.¹⁶⁹ With the carrot now sour and the stick now mightier, increased cartel activity may result.

Second, the impact an indictment can have on a corporation bolsters the concern that the court's decision in *Stolt-Nielsen* will likely lead to an increase in cartel activity. Contrary to the court's reasoning in *Stolt-Nielsen*, indictment is more than a "painful obligation of citizenship" for a corporation or executive.¹⁷⁰ Indictment can, quite literally, prove fatal to a corporation—regardless of whether the corporation is actually ever convicted of any wrongdoing.¹⁷¹ As noted in the U.S. Chamber of Commerce's amicus brief in support of *Stolt-Nielsen's* petition for certiorari:

[i]t is hardly news that the indictment of a corporation, coupled with adverse publicity, potential loss of various licenses and rights, disaffection of suppliers, customers, and financing institutions that might otherwise arrange loans, and possible suspension from government contracts, can be catastrophic, no matter how the criminal process ultimately concludes.¹⁷²

One amicus curiae illustrated this argument by reference to the fall of Arthur Andersen LLP.¹⁷³ Once a major accounting firm, Andersen was indicted in 2002 in connection with the Enron scandal.¹⁷⁴ Andersen was eventually cleared of all charges, but the damage had already been done, and the company was left largely in shambles.¹⁷⁵ The amice further illustrated this point by referencing the story of the law firm Milberg Weiss.¹⁷⁶ Once one of the nation's wealthiest and most powerful law firms, Milberg Weiss had two partners indicted on fraud charges in May 2006.¹⁷⁷ According to the charges, Milberg Weiss had been paying some of its class action plaintiffs to sue.¹⁷⁸ The charges against Milberg Weiss' partners have yet to be settled, but the indictment's impact on the firm was swift.¹⁷⁹ Following the indictment, a number of clients left Milberg Weiss, and the firm still struggles to survive.¹⁸⁰ Similar to Arthur Andersen, Milberg Weiss suffered the damage of potential criminal involvement at indictment,

not conviction.¹⁸¹ Consequently, the court's decision in *Stolt-Nielsen* is likely to dissuade companies from entering into immunity agreements with the DOJ because they will fear the possibility of criminal indictment (and the financial harm that will result) if the DOJ suspects that they breached the terms of their agreement.

Finally, when a company comes forward to report anticompetitive activity and forms an immunity agreement under the CLP, the company is required to fully participate with the DOJ's investigation.¹⁸² In addition to information related to the other cartel members, this cooperation involves a complete confession of the immunized company's involvement in anticompetitive activities.¹⁸³ As a result, any company indicted after participating in a CLP immunity agreement is in a far worse position than a newly discovered defendant because a CLP defendant will have already provided the government with all the information necessary to secure an indictment.¹⁸⁴ Consequently, would-be self-reporters are likely to be dissuaded by the unavailability of preindictment judicial review after *Stolt-Nielsen*.

2. Harm to Customers and Businesses

Anticompetitive activity is harmful to consumers and businesses alike.¹⁸⁵ Cartel activity in particular can lead to an increase in the prices consumers pay for a good or service by more than 10 percent.¹⁸⁶ In addition, because participating companies do not need to compete with one another, their incentives to invest in innovation are greatly decreased, leaving consumers with less choice within the market.¹⁸⁷ Cartel activity also hurts reputable businesses by putting them at a disadvantage in the marketplace because it forces them to compete with the significantly inflated market power enjoyed by a cartel.¹⁸⁸ Furthermore, because it is by its very nature secret, cartel activity is difficult to identify and prosecute.¹⁸⁹ Consequently, the advent of a workable incentive to encourage businesses and individuals to

come forward and disclose antitrust activity was, in many ways, an ideal solution.

Following the 1993 amendments to the CLP, some argued that the revisions would hurt customers by limiting damages for the parties injured by antitrust violations; however, the results have been entirely inconsistent with this fear.¹⁹⁰ Since the CLP was revamped, criminal antitrust fines have increased from an average of \$29 million per year to well in excess of \$100 million per year.¹⁹¹ In addition, commentators argue that the revised CLP has led to a decrease in cartel activity (although the secret nature of cartel activity makes it impossible to state numbers with specificity).¹⁹² The revised CLP has thus offered significant benefits to both consumers and lawful businesses.

However, *Stolt-Nielsen* has changed the equation for would-be self-reporters by significantly increasing the risks associated with self-reporting. This increase in risk is likely to discourage violators from disclosing antitrust activity under the CLP, which in turn could lead to an increase in cartel activity, thereby harming innocent businesses and consumers.¹⁹³

III. RESURRECTING THE CLP

Resurrecting the CLP in light of *Stolt-Nielsen* is not a simple task; however, its complexity does not arise solely from the terms of the court's holding. The complexity is also due to the difficulties inherent in providing a balanced corporate immunity policy. That is, while corporate immunity—at least in the antitrust context—has been shown to be advantageous to consumers, allowing corporate immunity too wide a breadth could lead to insufficient punishment for culpable parties and inadequate compensation for injured parties.¹⁹⁴ In addition, separation of powers must, of course, be maintained.¹⁹⁵ Therefore, Congress should respond to the problems *Stolt-Nielsen* created by amending the Sherman Act to encourage self-disclosure of antitrust violations. Below is proposed legislation I have drafted to serve this purpose. Following the legislation, I explain how it would resurrect

antitrust enforcement in *Stolt-Nielsen*'s wake. While I argue that legislation offers the best remedy, as an alternative approach, unless and until such legislation is codified, the DOJ should—on its own initiative—preserve the CLP's effectiveness by seeking preindictment review of alleged breaches of immunity agreements.

A. Proposed Legislation

The Informal Immunity Act

Material Breach shall be defined as a substantial breach of the agreement. Material breach shall only constitute breach when it deprives one party of the benefit of the bargain. For example, failures by the witness to disclose material that would have made a conviction possible is material breach. In the case of contractual immunity agreements between the federal or state government and individuals or corporations:

1. Once agreed to by both parties, such agreements are not subject to revocation absent material breach by one or both of the parties to the agreement.
2. If one party believes the other party has materially breached the agreement, such party shall bring the alleged breach to the other party's attention and attempt to resolve the issue amicably.
3. If an amicable resolution is not possible, the party alleging breach shall bring the issue before a district court in the appropriate region for a judicial determination of breach.
4. Any indictment under the Sherman Antitrust Act shall not take place until the district court judge has issued a ruling on whether or not the non-moving party materially breached the terms of the agreement.
5. If the district court holds that the agreement has been materially breached, the non-breaching party may take remedial action; however, the information disclosed pursuant to the immunity agreement must

remain protected based on *use plus derivative use immunity*, and any evidence used in the prosecution of the previously immunized party must arise from a demonstrated independent source.

6. If the district court holds that the agreement has not been breached, the parties are bound by this decision and must continue to abide by the terms of the agreement.

1. The Proposed Legislation Clarifies the Concept of Breach

Of significant concern after *Stolt-Nielsen* is the possibility that the DOJ will elect to terminate an immunity agreement formed under the CLP *after* the immunized company has provided incriminating information. The proposed legislation addresses this concern in two ways. First, the legislation clearly defines breach, and an example is provided to clarify the otherwise vague language.¹⁹⁶ This specifically addresses the concern because it provides a clear measure by which the immunized company can gauge its behavior so that it can avoid conduct that constitutes a breach. This is a particularly important element because, as previously discussed, courts have not consistently defined the elements of a material breach. Second, the legislation provides for a secondary form of immunity in the event of breach. This secondary form of immunity is *use plus derivative use immunity*, so that even if a party breaches its immunity agreement, the prosecutor cannot use the testimony obtained pursuant to the agreement to convict the corporation or individual. The prosecutor must obtain the evidence independently.

2. The Proposed Legislation Clarifies the Procedures for Managing Allegations of Breach

Another component of the additional risks associated with post-*Stolt-Nielsen* CLP immunity is the risk that the DOJ will unilaterally abrogate the terms of an immunity agreement, and the defendant will not have the

chance to defend him or herself. This is a risk because regardless of how the parties define the terms or whether the company actually breached the immunity agreement, the law, after *Stolt-Nielsen*, does not clearly define the procedures and processes available to a company accused of breaching its immunity agreement. Thus, a company considering whether or not it should self-disclose anticompetitive behavior cannot be certain what will happen if the DOJ believes it has breached its immunity agreement.

The proposed legislation eliminates this risk because it requires the DOJ to bring the matter before a district court judge before it revokes a company's immunity agreement and indicts the company for potential antitrust violations. By clearly defining the process the DOJ must use to claim breach and companies' options for defending such claims, the proposed legislation would allow companies to again enter into agreements under the CLP without fear of what will happen if the DOJ has reason to allege that they have breached their agreements.

3. The Proposed Legislation Provides for Preindictment Determination of Breach

As previously discussed, regardless of actual guilt, an indictment can lead to severe, if not fatal consequences for a corporation. Consequently, the holding in *Stolt-Nielsen*—that preindictment judicial review is not required—is likely of significant concern to companies considering coming forward under the CLP.

The proposed legislation is designed to remedy this issue by granting a preindictment hearing in which a district court judge would determine whether the company has actually materially breached the terms of its agreement. The inclusion of a preindictment hearing is helpful because it allows for both parties to state their cases in a court of law, but it does so before the allegedly breaching party has suffered the financial harm of an indictment.

This proposed legislation also addresses the separation of powers issue raised by the court in *Stolt-Nielsen*. The court in *Stolt-Nielsen* reasoned that the district court could not enjoin the prosecutor from indicting the company because to do so would constitute judicial interference into exclusively executive decisions, such as whom to indict.¹⁹⁷ This legislation eliminates this concern by taking the decision out of the hands of the court. Despite the fact that this legislation limits the DOJ's power to bring an indictment under certain circumstances, new separation of powers issues are not raised because the president would need to sign any legislation, and, like the DOJ, the president is part of the executive branch.

4. The Proposed Legislation Furthers the Policy Goals of the CLP

Three main policy goals underlie this proposed legislation. First, it seeks to buttress the objectives of the CLP by encouraging self-disclosure of anticompetitive behavior. Second, it seeks to reduce judicial waste by only allowing for the indictment and trial of those who have actually breached the terms of an immunity agreement. Third, it seeks to ensure that victims of corporate crime are properly compensated for their losses.

First, this proposed legislation seeks to enhance the policy goals of the CLP by encouraging companies to self-disclose antitrust violations. The stated purposes of the CLP are to increase punishment and deterrence of anticompetitive behavior.¹⁹⁸ This proposed legislation achieves this policy goal by clearly defining the processes by which a corporate immunity agreement can be challenged by the government and the defenses available to an immunized corporation. By clearly defining these goals and ensuring that corporations have a just opportunity to defend against attempts by the DOJ to rescind immunity agreements, this legislation could encourage renewed corporate cooperation in the CLP and, in turn, could lead to increased punishment and deterrence of anticompetitive behavior.

Second, the proposed legislation seeks to reduce judicial waste by preventing indictments when immunity agreements have not actually been

breached. Under *Stolt-Nielsen*, regardless of the merits of an alleged breach, the DOJ can indict the allegedly breaching company. Under the proposed legislation, before indictment occurs, the government would be required to argue its case in a preindictment hearing, and the company would have the opportunity to defend its actions. While this defense would take place in a hearing, the judicial resources required for a short hearing are much less than those required for a full trial. The proposed legislation, therefore, would further the policy goal of judicial efficiency.

Finally, the proposed legislation seeks to ensure that the victims of anticompetitive activity are fully compensated for losses resulting from the activity. It does this by mitigating the risks *Stolt-Nielsen* created for self-disclosing companies, thus encouraging companies to come forward under the CLP. This would necessarily lead to more discoveries of unlawful behavior, more restitution for consumers, and a decrease in anticompetitive activity.

B. DOJ Should Seek Preindictment Review

A legislative solution to this problem would be ideal because it offers a clear and reliable way to communicate to businesses that the CLP still offers safe and effective immunity for companies coming forward to self-disclose anticompetitive activity. However, the realities of the situation must be recognized. Specifically, the legislation proposed in this comment would limit executive power by preventing the DOJ from indicting companies that it believed had breached agreements formed under the CLP until it had established the breach through a preindictment hearing. Realistically, the president, as a member of the executive branch, is not likely to sign legislation that would limit the power of the executive. Therefore, in order to preserve the CLP's effectiveness, the DOJ should develop a policy of affirmatively seeking preindictment review of any potential breaches of immunity agreements formed under the CLP, and it should promote this policy through speeches, press releases, and interviews.

While the DOJ may argue that a policy of conducting preindictment reviews is unduly burdensome, the benefits of such a policy far outweigh the costs. The CLP represents one of the DOJ's most valuable antitrust investigation tools, but its effectiveness has been undermined by *Stolt-Nielsen*. The policy would not be unduly burdensome for the DOJ to enact because, as noted by the Seventh Circuit in *Meyers*, the DOJ already has to obtain a judicial determination of a defendant's breach after indictment but prior to trial.¹⁹⁹ Thus, shifting the time at which this determination occurs is a "de minimis inconvenience for the DOJ to protect what it has described as its "single greatest investigative tool."²⁰⁰

A change in policy, however, is of little use if companies are not aware of it. Therefore, in conjunction with this policy change, the DOJ should undertake significant marketing efforts to educate companies about the new policy and its implications.

Following the DOJ's 1993 launch of the revamped CLP, the DOJ took significant steps to ensure that companies were informed of the program's amendments.²⁰¹ Specifically, it announced its revisions at an American Bar Association conference and followed up the announcement with several press releases.²⁰² In the years since 1993, the DOJ has made a concerted effort to promote the program through speeches and press releases designed to communicate the program's success.²⁰³ The DOJ's promotional work has been supplemented by articles in mainstream media such as *Forbes* and the *Financial Times*, which have broadcast the CLP's protections to businesses around the world.²⁰⁴ The record settlements secured under the CLP have also led to significant press coverage.²⁰⁵ Some companies have added to the media coverage by issuing their own press releases announcing their cooperation agreements with the DOJ.²⁰⁶

This coverage has been credited with increasing the number of companies coming forward under the CLP.²⁰⁷ However, many of the positive messages communicated by the DOJ and the many news sources that encouraged companies to come forward under the revised CLP were

undermined by the significant news coverage of *Stolt-Nielsen*. Thus, in order to encourage businesses to again come forward under the revised CLP, the DOJ should engage in significant marketing efforts to promote its new policy.

Specifically, the DOJ should announce its policy in a public forum such as a national conference. In this announcement, the DOJ should acknowledge the concerns many companies are likely experiencing after *Stolt-Nielsen* and assure them that it has instituted a national policy of refraining from indictment before proving that a company has indeed breached the terms of its leniency agreement. Following this announcement, the DOJ should issue press releases to each of the main news outlets and post the releases on its own Web site. As a final step in its promotional plan, the DOJ should encourage its deputy assistant attorney general for criminal enforcement of the Antitrust Division to seek interviews with mainstream media like the *Wall Street Journal*, *Forbes*, and *The New York Times* to publicize the DOJ's revised policies to businesses that might not be adept at researching legal developments through other avenues.

Thus, while a legislative solution would be ideal, unless and until such a solution is codified, the DOJ should, on its own initiative, modify its policies to prohibit indictment without first seeking a determination of breach, and it should aggressively promote the modification in order to restore the force of the CLP.

IV. CONCLUSION

While the Third Circuit's decision in *Stolt-Nielsen* and the Supreme Court's subsequent decision to deny review made little impact in the eyes of most American consumers, the courts' decisions have the potential to significantly affect American consumers and lawful businesses. This impact stems from the two distinct and equally important factors: (1) the

harm caused by antitrust violations, and (2) the difficulty inherent in discovering and prosecuting antitrust violators.

The Third Circuit's decision in *Stolt-Nielsen* exacerbated these factors by undermining what had been a very successful program for encouraging self-disclosure of anticompetitive behavior, the DOJ's CLP. After *Stolt-Nielsen*, the CLP is a far riskier proposition than it once was. Companies now are likely to think carefully before reporting antitrust activity under its terms, and customers and lawful businesses are likely to suffer the consequences.

However, it is not too late to reinvigorate the CLP and encourage companies to come forward under its terms. Congress should mitigate the impact of *Stolt-Nielsen* through an amendment to the Sherman Act designed to reincentivize companies to self-report antitrust violations. Should such legislation not be enacted, the DOJ should—on its own initiative—institute and promote a policy of seeking preindictment review of alleged breaches of immunity agreements in order to preserve effectiveness of its own program, the CLP.

APPENDIX A

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. “Leniency” means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A (above), all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A (above), the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it

to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.²⁰⁸

¹ The author recognizes that M. Ryan Williams's article, *The Devil They Know: The DOJ's Flawed Leniency Program and its Curious Pursuit of Stolt-Nielsen*, Recent Development, 85 N.C. L. REV. 974 (2007), was recently published and would like to note that this comment was written prior to its publication, and that the conclusions and opinions expressed herein are independent of those expressed by M. Ryan Williams.

² JD candidate, Seattle University School of Law, May 2008. The author would like to thank her husband, Ryan Tilley, for his endless encouragement, patience, and understanding; her mother, Rachel Goodman, for her love, support, and infinite willingness to proofread; Leah Harris, Jessica Levin, KoKo Huang, and Chris Maryatt for their ever helpful comments and contributions, their time, and their continuous support; and Kelly Kunsch for his incredible patience and assistance.

³ *Stolt-Nielsen v. United States*, 442 F.3d 177 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006).

⁴ *Stolt-Nielsen*, 442 F.3d at 184.

⁵ *See id.*

⁶ *See id.*; State of Delaware, Division of Corporations, <http://corp.delaware.gov/> (last visited Oct 13, 2007).

⁷ Glenn Harrison & Matthew Bell, *Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 HOUS. BUS. AND TAX L.J. 207, 211 (2006).

⁸ U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER 3-4, available at http://www.usdoj.gov/atr/public/div_stats/211491.pdf (last visited Nov. 18, 2007).

⁹ *Id.* at 2.

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² *See id.* at 3-4 (describing how cartels function).

¹³ *See generally* J. Anthony Chavez, *The Carrot and the Stick Approach to Antitrust Enforcement*, in 47TH ANNUAL ANTITRUST LAW INSTITUTE, at 519 (PLI Corporate Law & Practice, Course Handbook Series No. 8736, 2006), available at Westlaw, 1542 PLI/Corp 519.

¹⁴ *See id.* at 527.

¹⁵ *Id.* at 551.

¹⁶ *Id.* at 545.

¹⁷ See generally *Stolt-Nielsen v. United States*, 442 F.3d 177 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006).

¹⁸ U.S. DEP'T OF JUSTICE, *supra* note 8, at 2–3.

¹⁹ Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

²⁰ U.S. DEP'T OF JUSTICE, *supra* note 8, at 2.

²¹ *Id.*

²² The Clayton Act, 15 U.S.C. §§ 12, 13, 14–19, 20, 21–27 (2002).

²³ Robinson-Patman Act, 15 U.S.C. § 13 (1936).

²⁴ *Id.*

²⁵ U.S. DEP'T OF JUSTICE, *supra* note 8, at 2–3.

²⁶ Federal Trade Commission Act, 15 U.S.C. § 45 (2006).

²⁷ U.S. DEP'T OF JUSTICE, *supra* note 8, at 4.

²⁸ *See id.*

²⁹ See R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, International Anti-Cartel Enforcement, Presentation Before the 2004 International Competition Network (ICN) Cartels Workshop (Nov. 21, 2004) (transcript available at <http://www.justice.gov/atr/public/speeches/206428.htm>).

³⁰ *Id.*

³¹ U.S. DEP'T OF JUSTICE, STATUS REPORT: CORPORATE LENIENCY PROGRAM 1–2, available at <http://www.usdoj.gov/atr/public/criminal/9938.pdf> (last visited Nov. 18, 2007).

³² *Id.*

³³ *Id.*

³⁴ U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY 1–2 (1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.pdf> (last visited Nov. 18, 2007).

³⁵ *Id.* at 2–3.

³⁶ *Id.* at 1.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Detecting and Deterring Cartel Activity Through an Effective Leniency Program, Presentation Before the International Workshop on Cartels (Nov. 21, 2000) (transcript available at <http://www.usdoj.gov/atr/public/speeches/9928.htm>).

⁴¹ *Id.*

⁴² Sheryl A. Brown, *Antitrust Violations*, 43 AM. CRIM. L. REV. 217, 245 (2006).

⁴³ Scott D. Hammond, Acting Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Presentation Before the American Bar Association Midwinter Leadership Meeting (Jan. 10, 2005) (transcript available at <http://www.usdoj.gov/atr/public/speeches/207226.htm>) (asserting that the fines obtained by the division in fiscal year 2004 totaled over \$350 million, the second largest in Antitrust Division history, including six fines of \$10 million or more). In addition, from 1992 to 1993, fines nearly doubled. Chavez, *supra* note 13, at 545.

⁴⁴ Chavez, *supra* note 13, at 557–61.

⁴⁵ *Id.* at 560.

⁴⁶ *Id.* at 557.

⁴⁷ *Id.*

⁴⁸ *Id.* at 545–47.

⁴⁹ Press Release, U.S. Dep’t of Justice, Attorney General’s Statement upon Passage of the Antitrust Enforcement Assistance Act of 1994 (Oct. 8, 1994), *available at* http://www.usdoj.gov/atr/public/press_releases/1994/211928.htm; 58 U.S.C. §§ 6201–6205 (2004).

⁵⁰ Press Release, *supra* note 49.

⁵¹ *See id.*

⁵² 15 U.S.C. § 1 (2004).

⁵³ *Id.*

⁵⁴ *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thomas Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1163–64 (2006).

⁵⁵ *Young v. State*, 871 S.W.2d 373, 373 (Ark. 1994).

⁵⁶ *Id.*

⁵⁷ 18 U.S.C. § 6002 (1970).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Ullmann v. United States*, 350 U.S. 422 (1956).

⁶¹ *See United States v. Stein*, 233 F.3d 6, 15 n.4 (1st Cir. 2000), *cert. denied*, 532 U.S. 943 (2001).

⁶² *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁵ *Brown v. Walker*, 161 U.S. 591, 646 (1896).

⁶⁶ BLACK’S LAW DICTIONARY 754 (7th ed. 1999).

⁶⁷ *See Kastigar v. United States*, 406 U.S. 441, 453 (1972).

⁶⁸ *United States v. Hembree*, 754 F.2d 314, 317 (10th Cir. 1985); 18 U.S.C. § 6002 (1970).

⁶⁹ *Hembree*, 757 F.2d at 317.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *See United States v. Williams*, 809 F.2d 1072, 1082 (5th Cir. 1987).

⁷³ *United States v. Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981) (overruled on other grounds); *United States v. Skalsky*, 857 F.2d 172, 175 (3d Cir. 1988); *United States v. Butler*, 297 F.3d 505, 512 (6th Cir. 2002); *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir. 1976); *United States v. Anderson*, 778 F.2d 602, 606 (10th Cir. 1985); *United States v. Kilpatrick*, 821 F.2d 1456, 1470 (10th Cir. 1987).

⁷⁴ *United States v. Girdner*, 773 F.2d 257, 259 (10th Cir. 1985).

⁷⁵ *Taylor v. Singletary*, 148 F.3d 1276, 1279 (11th Cir. 1998).

⁷⁶ *Id.*

⁷⁷ *Burse v. United States*, 466 F.2d 1059, 1075 (9th Cir. 1972).

⁷⁸ *United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998); *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986). *But see* *United States v. Aleman*, 286 F.3d 86, 89 (2d Cir. 2002) (holding that terms of government's immunity agreement with defendant govern both conditions constituting breach or performance and remedies available in the event of breach); *United States v. Fitch*, 964 F.2d 571, 574 (6th Cir. 1992) (holding that conditions which will constitute breach of immunity agreement are governed by the agreement itself).

⁷⁹ *Castaneda*, 162 F.3d at 835–36; *United States v. Tilley*, 964 F.2d 66, 70 (1st Cir. 1992).

⁸⁰ *Castaneda*, 162 F.3d at 836; *Tilley*, 964 F.2d at 70; *United States v. Crawford*, 20 F.3d 933, 935 (8th Cir. 1994).

⁸¹ Barry Tarlow, *Fifth Circuit Sets Standard for Determining Breach of Non-Prosecution Agreement*, 20 CHAMPION 60, 62 (1999) (citing *United States v. Price*, 95 F.3d 346, 357 (5th Cir. 1996); *United States v. Wittie*, 25 F.3d 250, 263 (5th Cir. 1994), *judgment aff'd*, 515 U.S. 389, 115 (1995)).

⁸² *See* *United States v. Jones*, 590 F. Supp. 233 (N.D. Ga. 1984); *United States v. Cooke*, 650 F. Supp. 991 (D. Md. 1987).

⁸³ *Taylor v. Singletary*, 148 F.3d 1276, 1283 (11th Cir. 1998).

⁸⁴ *Castaneda*, 162 F.3d at 838.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 835. The Racketeer Influenced and Corrupt Organizations Act (RICO) is Title IX of the Organized Crime Control Act of 1970. 18 U.S.C. §§ 1961–1968. It is designed to attack organized criminal activity and preserve marketplace integrity by investigating, controlling, and prosecuting individuals who participate or conspire to participate in racketeering. BLACK'S LAW DICTIONARY, *supra* note 66, at 1286. "Racketeering is a system of organized crime traditionally involving the extortion of money from businesses by intimidation, violence, or other illegal methods." *Id.* Racketeering is also defined by Black's Law Dictionary as: "[a] pattern of illegal activity (such as bribery, extortion, fraud, and murder) carried out as part of an enterprise (such as a crime syndicate) that is owned or controlled by those engaged in the illegal activity." *Id.* at 1287.

⁸⁸ *Castaneda*, 162 F.3d at 834.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 835.

⁹⁴ *Id.*

⁹⁵ *Id.* at 835, 840.

⁹⁶ *Id.* at 837.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 837–38.

¹⁰⁰ *Id.* at 838.

¹⁰¹ *Id.*

- ¹⁰² *Id.*
¹⁰³ *Id.*
¹⁰⁴ *Id.*
¹⁰⁵ *Id.* at 839.
¹⁰⁶ *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994).
¹⁰⁷ *Hentz v. Hargett*, 71 F.3d 1169, 1172–75 (5th Cir. 1996).
¹⁰⁸ *United States v. Tarrant*, 730 F. Supp. 30, 32–33 (N.D. Tex. 1990).
¹⁰⁹ *United States v. Donahey*, 529 F.2d 831, 832 (5th Cir. 1976).
¹¹⁰ *United States v. Crawford*, 20 F.3d 933, 935 (8th Cir. 1994).
¹¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).
¹¹² *United States v. McBride*, 571 F. Supp. 596, 608 (S.D. Tex. 1983) (holding that regardless of the fact that the defendant did not assist the government in locating the bombs, the government could not repudiate the immunity agreement because the immunity agreement was not predicated on assistance finding the bombs).
¹¹³ *United States v. Fitch*, 965 F.2d 571, 574 (6th Cir. 1992).
¹¹⁴ *United States v. Castaneda*, 162 F.3d 832, 837–38 (5th Cir. 1998).
¹¹⁵ *Harrison & Bell*, *supra* note 7, at 231. *Stolt-Nielsen* is the first case in which the Department of Justice has sought to remove a company from the CLP. *Id.*
¹¹⁶ *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986).
¹¹⁷ *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998).
¹¹⁸ *Verrusio*, 803 F.2d at 888–89.
¹¹⁹ *Meyer*, 157 F.3d at 1077.
¹²⁰ James Bandler, *Ship Mates: How Seagoing Chemical Haulers May Have Tried to Divide the Market – Stolt and Odfjell Discussed Both Routes and Rates, Documents Seem to Show—Who’ll Carry ‘Lubes’ to Peru?*, WALL STREET J., Feb. 20, 2003, at A1.
¹²¹ *Stolt-Nielsen v. United States*, 442 F.3d 177, 179 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006); Bandler, *supra* note 120.
¹²² *Stolt-Nielsen*, 442 F.3d at 179.
¹²³ *Id.*
¹²⁴ *Id.*
¹²⁵ *Id.*
¹²⁶ *Id.*
¹²⁷ *Id.*
¹²⁸ *Id.*
¹²⁹ *Id.* at 180.
¹³⁰ *Id.*
¹³¹ *Id.*
¹³² *Id.*
¹³³ *Id.* (internal quotations omitted).
¹³⁴ *Id.* (internal quotations omitted).
¹³⁵ *Id.*
¹³⁶ *Id.*
¹³⁷ *Id.*
¹³⁸ *See id.*
¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 180–81.

¹⁴³ *See id.* at 181.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 184. The Court initially limited this exception to First Amendment rights, but the Court amended the decision on May 16, 2006, to apply the exception to all constitutional rights. *Id.* at 177.

¹⁵¹ *Id.* at 184.

¹⁵² *See* U.S. Supreme Court Docket for 06-97, <http://www.supremecourtus.gov/docket/06-97.htm>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Stolt-Nielsen v. United States*, 442 F.3d 177 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006).

¹⁵⁶ *Harrison & Bell*, *supra* note 7, at 216.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.*

¹⁶¹ *Id.* Prior to 1997, the Antitrust Division collected, on average, \$29 million in fines each year, but from 1997 to 1998, the Antitrust Division collected more than \$200 million in fines respectively. In 1999, the number increased to \$1.1 billion. In total, since 1997, it is estimated that the CLP has brought in more than \$2 billion in criminal fines. *Id.*

¹⁶² *Id.* at 217; Daniel J. Fletcher, *The Lure of Leniency: Maximizing Cartel Deterrence in Light of La Roche v. Empagran and the Antitrust Criminal Penalty Enhancement Reform Act of 2004*, 15 *TRANSNAT'L L. & CONTEMP. PROBS.* 341, 349 (2004).

¹⁶³ Fletcher, *supra* note 162, at 347.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ U.S. DEP'T OF JUSTICE, *supra* note 8, at 2–3.

¹⁶⁷ *Id.*

¹⁶⁸ *See* *Harrison & Bell*, *supra* note 7, at 217; *see* Fletcher, *supra* note 162, at 349.

¹⁶⁹ *See* *Harrison & Bell*, *supra* note 7, at 216.

¹⁷⁰ *See* *Stolt-Nielsen v. United States*, 442 F.3d 177, 184 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006).

¹⁷¹ Alison Smith, *A Blow to the Amnesty Program*, 53 *BROWARD DAILY BUS. REV.* 6, 8 (2006) (noting that despite the fact that the Supreme Court overturned the case and

Andersen was acquitted of all wrongdoing, the company still suffered significant consequences at the time of indictment).

¹⁷² Brief for Chamber of Commerce of the U.S.A. et al. as Amici Curiae Supporting Petitioners, *Stolt-Nielsen v. United States*, 127 S. Ct. 494 (2006) (No. 06-97), 2006 WL 2725965, at *7 [hereinafter Brief for Chamber of Commerce] (quoting KURT EICHENWALD, *CONSPIRACY OF FOOLS: A TRUE STORY* 667 (2005)).

¹⁷³ *Id.*

¹⁷⁴ Lynnley Browning, *Senator Calls for an Easing of Corporate-Wrongdoing Rules*, N.Y. TIMES, Dec. 8, 2006, at C3, available at <http://www.nytimes.com/2006/12/08/business/08memos.html>.

¹⁷⁵ Brief for Chamber of Commerce, *supra* note 172.

¹⁷⁶ *Id.* at *8.

¹⁷⁷ E. Scott Reckard & Josh Friedman, *Class-Action Law Firm Indicted in Fraud Case; Powerful Miberg Weiss Is Accused of Paying Plaintiffs to Sue. Charges May Hurt Investor Suits*, L.A. TIMES, May 19, 2006, at 1.

¹⁷⁸ *Id.*

¹⁷⁹ Brief for Chamber of Commerce, *supra* note 172, at *8.

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

¹⁸² U.S. DEP'T OF JUSTICE, *supra* note 34, at 1–2.

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ U.S. DEP'T OF JUSTICE, *supra* note 8, at 3.

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Id.* at 2–3.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See generally* Jaynie Randall, *Does De-Trebling Sacrifice Recoverability of Antitrust Awards?*, 23 YALE J. ON REG. 311 (2006); Harrison & Bell, *supra* note 7, at 216.

¹⁹¹ *See* Harrison & Bell, *supra* note 7, at 213.

¹⁹² *Id.* at 217; Fletcher, *supra* note 162, at 349.

¹⁹³ *See* Chavez, *supra* note 13, at 527.

¹⁹⁴ *See generally* Randall, *supra* note 190.

¹⁹⁵ The separation of powers issue has only been touched on because it is outside the scope of this comment, but it deserves mention in relation to the proposed legislation.

¹⁹⁶ “Breach” is necessarily vague because it can mean very different things in different circumstances.

¹⁹⁷ *Stolt-Nielsen v. United States*, 442 F.3d 177, 181 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 494 (2006).

¹⁹⁸ *See* Harrison & Bell, *supra* note 7, at 213.

¹⁹⁹ *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998).

²⁰⁰ *Id.*

²⁰¹ Chavez, *supra* note 13, at 553.

²⁰² *Id.*; *see, e.g.*, Press Release, U.S. Dep't of Justice, Antitrust Chief Announces Two Policy Changes at American Bar Association Conference (Aug. 10, 1993), *available at* http://www.usdoj.gov/atr/public/press_releases/1993/211653.htm.

²⁰³ *See, e.g.*, Scott D. Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cracking Cartels with Leniency Programs, Presentation Before the Organisation for Economic Co-operation and Development (OECD) Competition Committee, Working Party No. 3 Prosecutors Program (Oct. 18, 2005), *available at* <http://www.usdoj.gov/atr/public/speeches/212269.htm>.

²⁰⁴ Chavez, *supra* note 13, at 553.

²⁰⁵ *Id.* at 552.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ U.S. DEP'T OF JUSTICE, *supra* note 34, at 1-5.