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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

ACPERA — A Glass Half Full

Law360, New York (October 25, 2010) -- Congress enacted the Antitrust Criminal Penalty Enforcement and Reform Act in 2004 in part to provide increased incentives for cartel members to enter the U.S. Department of Justice's criminal leniency program.

ACPERA offers criminal leniency applicants the opportunity to limit their civil liability by cooperating with civil claimants in the inevitable treble damages litigation that follows any DOJ criminal investigation. Under ACPERA, leniency applicants that provide "satisfactory cooperation" to civil claimants receive relief from treble damages and joint-and-several liability under the Sherman Act.

Some have questioned the value of ACPERA, pointing out that the incentives offered by the act do little to change what was the standard practice before the act's passage: the DOJ leniency applicant normally was the first, or among the first, civil defendants to settle, and typically would settle for an amount approximating or below single damages in exchange for providing information and support to plaintiffs in their claims against the remaining defendants.

Although codifying standard practice might have enhanced incentives for self-reporting by increasing clarity and certainty, many believe ACPERA missed the opportunity to do so by failing to define clearly just what constitutes "satisfactory cooperation" or when and to whom that cooperation is owed.

Whether or not these criticisms are valid, they are unlikely to be addressed in the near term. Congress recently extended the act through 2020 without substantial revisions, and we expect that few antitrust defendants will be brave (or reckless) enough to test the law in the courts when the consequences of noncompliance are so severe.

Moreover, some of the perceived weaknesses of ACPERA on paper — such as its lack of clear contours for the extent and timing of cooperation — actually may strengthen the act in practice. We suggest below that ACPERA's lack of clear standards more often than not will serve to foster more efficient settlements than would a more clearly defined set of civil leniency rights and obligations.

ACPERA's ambiguity drives both the plaintiffs and the leniency applicant to the settlement table earlier, and gives them an opportunity to fashion a settlement that strikes the most efficient balance between compensation for the claim and cooperation from the applicant.

Background

Under the DOJ Leniency Program, a cartel participant that is "first in the door" to report a criminal Sherman Act Section 1 violation to the Antitrust Division can receive immunity from prosecution for the conduct reported.

In return for leniency, the reporting company must provide the Antitrust Division substantial cooperation in prosecuting the other cartel participants, including making involved employees available for interviews and testimony, and turning over incriminating documents. Leniency allows the company to avoid criminal prosecution — and the associated substantial corporate criminal fines and prison sentences.[1]

Of course, in the United States, the successful leniency applicant that has avoided criminal prosecution has solved only one problem (albeit a substantial one). It must still deal with its exposure to liability from follow-on civil suits, which includes treble damages, joint and several liability for the conduct of co-conspirators, and high legal bills. Although the Antitrust Division keeps leniency applicants' identities confidential, once a criminal investigation becomes public, civil suits are typically filed against all of the major players in the relevant industry, including the leniency applicant.

In 2004, Congress recognized that the threat of potentially massive civil liability was a disincentive to self-reporting of cartel activity, thus hampered the effectiveness of the civil leniency program. Congress enacted ACPERA in part to address this issue.[2]

ACPERA creates a kind of civil leniency process to parallel the criminal one; the leniency defendant that cooperates with civil plaintiffs is liable for only single damages, and only for its own sales. The applicant's co-conspirators remain subject to treble damages and joint and several liability (including for the applicant's sales), ensuring that the benefits of the statute do not come at the expense of cartel victims.

Congress originally enacted ACERPA for a five-year term that was set to expire in 2009; it has since extended ACERPA twice — in 2009 and 2010 — in the second case until 2020.[3]

ACPERA's Ambiguous Cooperation Requirement

In order to limit its liability, ACPERA requires the leniency applicant to provide "satisfactory cooperation" to claimants in prosecuting their case.[4]

ACPERA fails to explain, however, exactly what constitutes "satisfactory cooperation." The statute states only that satisfactory cooperation "shall include ... a full account to the claimant of all facts known to the applicant ... that are potentially relevant to the civil action," as well as "all documents or other items potentially relevant."[5]

In addition, the applicant must also make best efforts to make individual employees available for "interviews, depositions or testimony."[6] Under the 2010 amendments to ACPERA, the presiding court must now also consider the "timeliness" of the applicant's cooperation in determining whether the limits to civil liability shall apply.[7]

This language leaves considerable room for interpretation over what an applicant must do (or not do) to obtain ACPERA's benefits. Moreover, the statute directs that the district court presiding over the civil litigation determine whether the applicant's cooperation was satisfactory "after considering any appropriate pleadings for the claimant."[8] This potentially places the applicant in an awkward position.

First, it must cooperate with plaintiffs while the parties remain in a completely adversarial relationship — cooperation that presumably establishes the applicant's own civil liability.

Second, the applicant must then wait to learn whether that cooperation will be deemed "satisfactory" by the court until after the cooperation has been delivered (at which point the claimant may have no incentive to support the applicant's bid for protection from treble damages and joint and several liability).[9]

The wide range of interpretations that the broad language of ACPERA permits makes this "cooperate now and (maybe) receive protection later" a very risky proposition for leniency applicants. For example, under one reading, ACPERA's

direction that cooperation "shall include" providing relevant facts, documents, and witnesses for deposition imposes nothing beyond what the Federal Rules of Civil Procedure already prescribe for any defendant.

Rule 26, for instance, already authorizes claimants to discover "any nonprivileged matter that is relevant to any party's claim or defense" that is "reasonably calculated to lead to the discovery of admissible evidence" through document requests, interrogatories, and depositions.[10] Under this view, the words "shall include" are exclusive — the enumerated cooperation is both a floor and a ceiling for what the applicant must do.

At the other extreme, plaintiffs have argued that ACPERA demands substantially more from an applicant than the discovery contemplated under the federal rules, otherwise the applicant gives nothing in return for de-trebling. This view has far-reaching consequences.

The obligation to provide "all documents ... potentially relevant" and "a full account ... of all facts" is argued to require the applicant to produce attorney work product or even attorney-client privileged materials. And ACPERA under this view would require the applicant to turn over its materials before other defendants — likely before formal discovery in the case commences, and perhaps even irrespective of any stays of discovery that might be in place due to pending motions or grand jury proceedings.

Another question is whether the applicant can, consistent with its obligation to cooperate, engage in motions practice to try to limit or defeat the claims asserted against it.

On one hand, nothing in the statute expressly precludes the applicant from doing so or otherwise vigorously defending the action. On the other hand, a claimant might argue that this does not seem terribly cooperative — especially if the applicant withholds documents or interviews from the claimants while the motions are pending.

For example, may an applicant contesting subject matter jurisdiction with respect to some significant portion of an international cartel's activities limit its cooperation to only to conduct the applicant views as properly within the jurisdiction of the Sherman Act?

Or, does information relevant to a cartel's purely foreign conduct fall within an applicant's duty to provide a "full account of all facts ... potentially relevant," even if it clearly falls outside of the court's subject matter jurisdiction?

There is no question that the plaintiff and defense bars will hotly debate these issues.

From the applicant's perspective, cooperation is burdensome, expensive, and can be disruptive of regular business operations. All else being equal, it will prefer to do the least amount possible as late as possible, especially when its liability to the claimants is still at issue (i.e., absent a settlement).

Of course, if judgment is never entered against the applicant, then the extent of the applicant's cooperation will never be an issue. In some cases, where the chance of liability is remote, that may counsel against the applicant cooperating at all.

Resolving the Ambiguity

ACPERA's ambiguous path to limited liability makes gamesmanship by either side uncertain and therefore risky. On the one hand, the worst outcome for an applicant is to provide some, but not "satisfactory," cooperation — enough to strengthen the plaintiff's case and make its own liability more certain, but not enough trigger ACPERA's limits on that liability.

On the other hand, because the statute gives few specifics about how much cooperation how early is "satisfactory," claimants cannot be certain of what they are entitled to receive and when, and how likely the applicant is to be punished if it provides too little too late. And the claimant must still win on the merits before any punishment is meted out.

We believe, then, that the risks that ACPERA's uncertainty presents will often make early settlements more attractive to both the leniency applicant and the claimants. From the applicant's perspective, it can start the negotiation from the position of potentially de-trebled damages and no joint and several liability.

From the claimants' perspective, significant cooperation is expressly mandated. But, the fact that the statute is unclear regarding what constitutes "satisfactory" cooperation in timing or scope gives the parties flexibility to move away from rigid or extreme interpretations and to strike an efficient settlement agreement tailored to the specific needs and context of their case.

For example, ACPERA's lack of specifics allows the parties to trade cooperation for cash. Where the direct purchaser claimants in a particular case comprise a few, large multinational buyers with robust information about sales patterns and price trends over time, they might prefer a larger payment and reduced cooperation obligations. In these circumstances, they may need to rely less on the applicant to guide them through the industry, the cartel, and its likely effects.

On the other hand, where the claim rests with large class of end consumers — none of which have relevant industry knowledge — cooperation from the applicant at the earliest possible moment may be at a premium, and the amount of cash compensation from the applicant a distant, secondary consideration.

If ACPERA rigidly imposed unequivocal obligations — in essence dictated the bargain to be struck — it might actually encourage parties to resist settlement or cooperation under ACPERA, depending on the degree to which the enumerated requirements harmed or helped their position in a given case.

None of the alternatives to this kind of "self-help" — where the applicant and claimants use ACPERA as little more than a starting point to negotiate specific solutions for specific cases — seem likely or attractive. As noted above, this year's amendments to ACPERA, Congress did expressly make timing of the applicant's cooperation a factor in limiting liability. Further legislative action is of course a possibility.

But even if congressionally imposed solutions are not potentially damaging to the delicate balance that drives settlement, they may not offer much clarity. For example, the 2010 ACPERA amendments did not define "timely cooperation"; courts, claimants and applicants will continue to have to muddle their way to an answer themselves.

Moreover, though the last amendments direct the Government Accountability Office to study and report back on certain policy questions in 2011,[11] Congress has now extended ACPERA for 10 years.[12] This diminishes considerably any urgency to refocus on the statute in the near future.

Applicants and claimants could also seek clarity in the courts. But there is little evidence they have rushed to do so — as of this writing, only three reported decisions interpret or discuss ACPERA in any detail. And the courts in those cases were reticent to resolve any of the fundamental disputes over the statute's requirements.

- In In re TFT-LCD (Flat Panel) Antitrust Litigation,[13] the court denied an effort to compel a defendant, which plaintiffs claimed was the leniency applicant, to so identify itself and either cooperate with plaintiffs relatively early in the case, or be deemed ex ante ineligible to take advantage of de-trebling later.

The court held that ACPERA gave it no role in determining the sufficiency of cooperation until "the time of imposing judgment or otherwise determining liability and damages," though it would, at that time, take into consideration the timing of any cooperation provided in determining whether it was sufficient to warrant limiting the applicant's liability.[14]

- In In re Municipal Derivatives Antitrust Litigation, the leniency applicant and counsel for certain named plaintiffs entered an arrangement before a complaint was filed under which those plaintiffs agreed to seek only single damages from the applicant in return for its cooperation in the case. Other plaintiffs' counsel argued that the court should refuse to designate the agreeing firms as interim lead class counsel, attacking the agreement as improperly giving up triple damages.

The court disagreed, holding that the arrangement was nothing more than what ACPERA broadly contemplated.[15] The court did not address the fact that claims by the specific plaintiffs present in the Municipal Derivatives actions — largely state, county and municipal entities — are not covered by ACPERA's de-trebling provision.[16]

- The district court in In re Sulfuric Acid Antitrust Litigation is the only court to make a specific determination under ACPERA that cooperation by an applicant was sufficient for de-trebling purposes; but it did so in a minute order with no explanation of the factors the court thought important to its determination.[17]

Notably, however, plaintiffs joined applicants in seeking the certification based on a cooperation agreement the parties had negotiated in advance.[18] Later, when the court was called on to interpret what the cooperation agreement required in connection with a dispute over deposition scheduling, the court refused to use the agreement — which borrowed its cooperation requirements directly from ACPERA — against the applicant, holding that ACPERA did not put the applicant "at the plaintiffs' beck and call."[19]

Courts have mentioned ACPERA in the course of approving settlements in at least two other recent cases — In re Air Cargo Shipping Services Antitrust Litigation and In re Lawnmower Engine Horsepower Marketing and Sales Practices Litigation. Those courts noted that policies underlying ACPERA comported with the settlements in question in terms of their cash value, the value of a defendant's voluntary cooperation with claimants, or both.[20]

Finally, claimants could seek to have the Antitrust Division intervene on the side of claimants to force more or earlier cooperation by applicants.

Corporate leniency letters generally include a commitment by the applicant to make "all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured."[21] The division could threaten reopening criminal sanctions on applicants who demur. However, the division has tended to do the opposite; it has intervened to stay early discovery in civil price fixing cases to protect its own criminal investigations.

In In re TFT-LCD (Flat Panel) Antitrust Litigation, for example, the division intervened to oppose plaintiffs' motion to force the leniency applicant to immediately reveal itself and cooperate with plaintiffs on their timetable, or forgo ACPERA's liability limits.[22] Moreover, the division has only sought to revoke leniency once — and that case did not go well for the government.[23] The division is unlikely to take that step, or threaten to, lightly.

All this leads us to the conclusion that, although ACPERA's lack of clear standards may keep the statute from fully meeting its stated goal of increasing incentives for cartel participants to enter the DOJ's leniency program, ACPERA does encourage early and efficient civil settlements between applicants and claimants once the decision to enter the program has been taken.

Given that we are unlikely to see material improvements in the civil leniency statute for the foreseeable future, counsel will do well to help their clients — whether claimants or leniency applicants — take advantage of these benefits, rather than focus just on the statute's deficiencies.

--By Eric Mahr (pictured) and Perry A. Lange, WilmerHale

Eric Mahr (eric.mahr@wilmerhale.com) is a partner with WilmerHale in the firm's Washington, D.C., office. Perry Lange (perry.lange@wilmerhale.com) is a senior associate with the firm in the Washington office.

[1] An executive in a cartel participant recently received a four year sentence. Press Release, United States Department of Justice, Former Shipping Executive Sentenced To 48 Months In Jail For His Role In Antitrust Conspiracy, Jan. 30, 2009.

[2] See, e.g., 150 Cong. Rec. S3610 (daily ed. April 2, 2004) (statement of Sen. Kohl) (ACPERA's limits on civil liability will "result in more antitrust wrong doers coming forward to reveal antitrust conspiracies, and thus the detection and ending of more illegal cartels." It also substantially increased the penalties for criminal violations of the Sherman Act.

[3] 124 Stat. 1275, P.L. 111-190, § 1.

[4] P.L. 108-237 § 213(b); 15 USC § 1 note.

[5] Id.

[6] Id.

[7] P.L. 108-237 § 213(c); 15 USC § 1 note. In addition, the statute now provides that in civil cases where the Department of Justice intervenes to obtain a stay of discovery, the applicant must cooperate with claimants "without unreasonable delay" after the stay expires or is lifted. Id. at § 213(d). Prior to the 2010 amendments, the "timeliness" of the applicant's cooperation was only an issue where there was state compulsory process had issued or a civil action had been filed, prior to the leniency application being made.

[8] Id.

[9] See also In re TFT-LCD (Flat Panel) Antitrust Litigation, 618 F. Supp. 2d 1194, 1196 (N.D. Ca. 2009) (holding that ACPERA gives the court no role in determining the sufficiency of cooperation until "the time of imposing judgment or otherwise determining liability and damages").

[10] FRCP 26(1).

[11] 124 Stat. 1275, P.L. 111-190, § 5.

[12] Id. at § 1.

[13] 618 F. Supp. 2d 1194 (N.D. Ca. 2009).

[14] Id. at 1196.

[15] In re Municipal Derivates Antitrust Litigation, 252 F.R.D. 184 (S.D.N.Y. 2008).

[16] P.L. 108-237 § 212(4); 15 USC § 1 note.

[17] Minute Order (July 7, 2005) In re Sulfuric Acid Antitrust Litig., No. 03 C 4576 (N.D. Ill. July 7, 2005). See 1 ABA Section Of Antitrust Law, Antitrust Law Developments 758 (6th ed. 2007).

[18] In re Sulfuric Acid Antitrust Litigation, 231 F.R.D. 320, 329 (N.D. Ill 2005).

[19] Id.

[20] See, In re Air Cargo Shipping Services Antitrust Litigation, 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009); In re Lawnmower Engine Horsepower Marketing and Sales Practices Litigation, --- F.Supp.2d ----, 2010 WL 3310264, *9 n.8 (E.D.Wis. Aug 16, 2010) (approving a cooperation-only settlement).

[21] Model Corporate Conditional Leniency Letter, U.S. Department of Justice Antitrust Division, ¶ 2(g); available at www.justice.gov/atr/public/criminal/239524.htm.

[22] United States Opposition to Direct Purchaser Plaintiffs' Motion to Compel The Amnesty Applicant Defendant to Comply with ACPERA or Forfeit Any Right It May Have To Accept Reduced Civil Liability, filed May 1, 2009, Dkt. No. 695.

[23] See U.S. v. Stolt-Nielsen SA, 524 F. Supp. 2d 586 (E.D. Pa, 2007).