New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 264—NO. 29
TUESDAY, AUGUST 11, 2020

ANTITRUST TRADE AND PRACTICE

To Catch a Conspiracy: Congress Renews ACPERA

By **Karen Hoffman Lent**

And **Kenneth Schwartz**

On June 25, 2020, Congress approved the renewal and permanent extension of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA or "the Act"), which limits the civil damages exposure of companies that cooperate with the Department of Justice (DOJ) in self-reporting their own anticompetitive conduct. In a press release issued the day after the legislation passed, Makan Delrahim, Assistant Attorney General of the DOJ's Antitrust Division, praised both Houses of Congress "for their bipartisan action and recognition of ACPERA's importance in the fight to safeguard our free markets and protect American consumers from collusion." DOJ Office of Public Affairs, *Department of Justice Applauds Congressional Passage of Reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act* (June 26, 2020). While his tone was celebratory, ACPERA is not universally popular. On the contrary, its design and implementation have long engendered controversy. This article contextualizes ACPERA as a tool in the DOJ's arsenal before examining its efficacy and potential reforms.

Legislative History

ACPERA was originally passed in 2004 to incentivize companies to cooperate with DOJ investigations into collusive conduct. It supplements the DOJ's Corporate Leniency program—which allows successful applicants to avoid criminal liability—by extending protections for cooperators. Specifically, ACPERA contains a detrebling provision that spares successful leniency applicants from joint-and-several liability and trebled damages in related civil litigation. While the driving force behind ACPERA's passage was a desire to facilitate the detection of cartels, consumer protection was also a priority, as reflected in the requirement of substantial cooperation by successful leniency applicants in order to "serve the public interest without compromising restitution to victims." American Bar Association, *Comments of the Antitrust Law Section of the American Bar Association Regarding the U.S. Justice Department Antitrust Division Roundtable Discussion of ACPERA* (Apr. 11, 2019).

Controversy over the bill, rooted in its lack of objective standards to determine the sufficiency of an applicant's cooperation, gave way to the insertion of a sunset provision that required Congress to consider in five years whether ACPERA was performing as intended. After extending ACPERA for a year in 2009, Congress reauthorized it for an additional 10 years in 2010 by a two-thirds vote in the House and unanimously in the Senate,

KAREN HOFFMAN LENT *and* KENNETH SCHWARTZ *are partners at Skadden, Arps, Slate, Meagher & Flom.*

ultimately setting the scene for its renewal this past June. 123 Stat. 1775 (2009).

Benefits and Overall Effectiveness

ACPERA'S detrebling provision is a compelling incentive because it leaves the applicant liable only for its own actual damages—i.e., damages proportional to the share of commerce affected by its own anti-competitive conduct as opposed to damages emanating from the wider conspiracy. By making this incentive available only to the first conspirator to self-report, regulators sought to breed mistrust among cartel members and create a "race to report." This begs the ultimate question, how many seek to enter this race? As it turns out, quite a few: corporations across a wide array of industries have sought protection under ACPERA in blowing the whistle on conspiracies affecting billions of dollars in commerce, including, most recently, Chicken of the Sea tuna producer Thai Food Group, as well as Samsung and Bank of America. Indeed, ACPERA continues to play a crucial role in current federal investigations into price-fixing conspiracies in the food industry.

In his February 2020 remarks at the 13th International Cartel Workshop, Deputy Assistant Attorney General (DAAG) Richard Powers called the Leniency Program the Division's "most important prosecutorial tool over the last 26 years." DOJ Office of Public Affairs, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (Feb. 19, 2020). DAAG Powers emphasized the superiority of immunity from prosecution over deferred prosecution agreements, highlighting ACPERA in his explanation: "Leniency's exclusive benefits include complete immunity from criminal prosecution for the company and its covered cooperating employees, as well as detrebling and other benefits available under [ACPERA]." *Id.*

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Notwithstanding these perceived benefits and the high-profile corporations that have sought protection under ACPERA, data indicates that ACPERA's effectiveness has been limited. In 2010, Congress commissioned a Government Accountability Office (GAO) study before reauthorizing ACPERA, which revealed little change in the number of leniency applications submitted in the six-year periods before its passage (78 applications) and after (81 applications). In recent years, the number of leniency applicants reporting large-scale domestic and international cartels has declined sharply. Likewise, so have the fines collected from leniency applicants, which previously constituted the vast majority of those collected by the Division. There are multiple theories as to what is driving these declines, including that potential leniency applicants are discouraged by the effort involved in seeking leniency across multiple jurisdictions or the possibility that they will still face civil class action litigation in Europe, the volume of which has increased in recent years. *Id.* at 19. Others have expressed doubts as to whether ACPERA adequately incentivizes self-reporting by corporations.

'Satisfactory Cooperation'

A frequent criticism of ACPERA is the lack of clarity in its central provisions, in particular the extent of cooperation necessary in order for an applicant to qualify for leniency. The statute requires that applicants provide a complete and truthful account of all relevant facts, furnish all potentially relevant documents and agree to be available for interviews, depositions or testimony. 118 Stat. 661 (2004). The subjectivity inherent in this standard leaves ambiguity as to how much cooperation is enough. Reform advocates across the legal spectrum have pushed for clarification as to what constitutes "satisfactory cooperation." Eric Mahr and Sarah Licht, *Making ACPERA Work*, Antitrust Magazine (2015). On one hand, the defense bar has argued that the requirement should

be deemed satisfied if the leniency applicant provides plaintiffs with the same information it provided to the Division. *Id.* The plaintiffs' bar, on the other hand, has argued for complete cooperation with each and every request they make of the applicant, even when plaintiffs' claims may be significantly broader than the Division's investigation. *Id*. One potential compromise proposed by panelists on the DOJ's ACPERA roundtable was a presumption of satisfactory cooperation if the company provides civil plaintiffs' counsel with all of the documents and information that the company provided to the Division, which could be rebutted upon a showing that the company failed to "(1) provid[e] a full account … of all facts known to the applicant … that are potentially relevant to the civil action; (2) furnish … all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant;" or (3) "us[e] its best efforts to secure and facilitate" evidence covered under the leniency agreement. 118 Stat. 661 (2004); DOJ Office of Public Affairs, *ACPERA Roundtable Executive Summary* (July 18, 2019).

'Timeliness' of Cooperation

Another key provision of ACPERA that has drawn criticism centers on timeliness—i.e., the period within which a leniency applicant must cooperate with plaintiffs. Faced with plaintiffs demanding immediate cooperation and the provision of documents on an expedited basis, leniency applicants must either comply or risk having their cooperation deemed untimely, thus forfeiting ACPERA's benefits. In addition, critics have also honed in on the statute's failure to instruct courts at what point in the ongoing litigation a judge must decide that the leniency applicant has satisfactorily fulfilled the requirements of the statute. *Id.* This leaves leniency applicants hanging in the balance with uncertainty as to when, if at all, they will realize the benefits of cooperation. With that said, earlier determinations for granting ACPERA's protections would help incentivize applications to the leniency program. Indeed, members of both the plaintiffs' and defense bar largely agreed that this determination should be made in the early stages of litigation, before trial. *Id.*

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Civil Damages

Critics have also argued that ACPERA's detrebling provision is not a sufficient incentive for potential cooperators. Given the ambiguity around the interpretation of key provisions, it is difficult to persuade companies that they will be better off in the resulting civil litigation after seeking leniency. A cooperative leniency applicant may escape treble damages, yet significantly raise the amount of single damages by enabling plaintiffs to uncover evidence they otherwise would not have discovered. In an extreme scenario, an applicant might inadvertently increase single damages beyond the initial treble damages exposure faced in the civil litigation. Indeed, some plaintiffs have used tactics in litigation and in settlement negotiations that violate the spirit of ACPERA and could leave an applicant in a worse position than co-conspirators after self-reporting. Scott Hammond, Takeaways from the DOJ's ACPERA Roundtable and Proposed Next Steps, Global Competition Review (Apr. 17, 2020).

Under ACPERA, plaintiffs hold disproportionate leverage over leniency recipients because the statute requires leniency recipients to provide satisfactory and timely cooperation to qualify for the statutory benefits without requiring plaintiffs to negotiate a resolution limited to actual damages: "Assured of the leniency recipient's unconditioned cooperation, some plaintiffs strategically offer the 'first-in mover discount' to a co-defendant whose cooperation is not assured, has shallow pockets or is otherwise deemed to be an attractive settlement candidate."

Id. Plaintiffs may even offer less favorable settlement terms to leniency recipients and deliberately ensnare them in civil litigation up until and beyond trial. In light of this possibility, ACPERA stands to benefit from enhanced protection from civil damages actions and increased certainty to entities considering leniency. *Id*.

Not only is it plausible that the single damages limit provides inadequate incentive for companies to self-report, but it is also unclear how that limit should be interpreted. For a leniency applicant who meets cooperation obligations, ACPERA mandates that the amount of damages recoverable in state or federal damages actions "not exceed that portion of the *actual damages* sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation." 118 Stat. 661 (2004) (emphasis added). Here, the absence of a definition of "actual damages" emerges as an issue again. Because the majority of antitrust cases reach a prejudgment settlement, judges rarely even consider ACPERA issues. While a few courts have examined ACPERA's application to specific facts and circumstances, only one has denied ACPERA's benefits to a leniency recipient for failure to provide satisfactory and timely cooperation. *See In re Aftermarket Automotive Lighting Products Antitrust Litigation* (C.D. Cal. Aug. 26, 2013); American Bar Association, *Comments of the Antitrust Law Section of the ABA Regarding the U.S. Justice Department Antitrust Division Roundtable Discussion of ACPERA* (Apr. 11, 2019).

The uncertainty regarding how courts will interpret ACPERA and define actual damages discourages companies from self-reporting. The DOJ could mitigate this uncertainty by explaining how it interprets "actual damages" in its leniency FAQs, publicly advocating for that view in speeches and amicus briefs, and urging Congress to clarify the definition of "actual damages." Scott Hammond, *Takeaways from the DOJ's ACPERA Roundtable and Proposed Next Steps*, Global Competition Review (Apr. 17, 2020). It could also adopt a policy of providing restitution estimates to courts, which would be labor-intensive at first, but would rarely be necessary in practice after being proven credible. *Id*. Plaintiffs who anticipate the DOJ's intervention as courts calculate "actual damages" will avoid "gaming ACPERA by taking a leniency recipient's cooperation with no intent of engaging in good faith settlement discussions tied to actual damages." *Id.* Absent judicial decisions applying meaning to ACPERA's vague cooperation requirements, and absent Congress bringing clarity to ACPERA's cooperation scheme through a statutory amendment, it is even more important for the DOJ to take the lead in providing guidance.

Conclusion

While it once held promise, ACPERA has not met its goal of functioning as a crucial incentive for companies determining whether to self-report. Participation in the DOJ's Corporate Leniency Program is at an all-time low. In February, DAAG Richard Powers spoke to the three cornerstones of an effective leniency program: (a) the threat of severe and significant sanctions; (b) a heightened fear of detection; and (c) transparent and predictable enforcement policies. DOJ Office of Public Affairs, *Department of Justice Applauds Congressional Passage Of Reauthorization of the ACPERA* (June 26, 2020). With debate around ACPERA clouding the impact of its renewal, the DOJ finds itself in a key position to restore ACPERA's strength by issuing public policy statements and strategically intervening as amicus curiae in follow-on litigation to clarify the requirements and principles to which both applicants and plaintiffs must adhere.