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BLOG

A Report from the Trenches on the Litigation Hazards of ACPERA

FEBRUARY 26, 2021

ACPERA is the federal statute meant to incentivize cartel amnesty applications to the Antitrust Division of the Department of Justice (DOJ) by providing the first-in leniency applicant with reduced civil damages exposure compared to its co-conspirators (separate from and in addition to the amnesty a first-in applicant receives on the criminal side).[1] From anecdotal evidence, the statute may not be as effective of an incentive to self-reporting as intended – due, perhaps in part, to the significant uncertainty about whether the reduced exposure promised by ACPERA can actually be realized in a straightforward and predictable manner, *i.e.*, without protracted and costly litigation over ACPERA-related issues.

For instance, to receive the benefits of the statute (a cap on the amnesty company's civil damages exposure to its own single damages), an ACPERA-eligible company is supposed to provide "satisfactory" and "timely" cooperation to civil claimants. But, there is a lack of judicial and statutory guidance explaining what "satisfactory" and "timely" mean. This creates the very real risk of plaintiffs using the threat of expensive litigation over the sufficiency of cooperation as settlement leverage against the amnesty company.

Making matters worse, this burden of threatened and actual ACPERA litigation persists for the duration of the entire civil action. Most major antitrust litigations go on for years, so the burdens of cooperation are long-term and expensive – under the statute, final judicial confirmation of ACPERA benefits does not happen until after a verdict at trial. And, most major antitrust litigations do not get to trial, and antitrust defendants without ACPERA benefits generally do not settle pre-trial on the basis of joint and several liability or trebled damages anyway (in other words, defendants typically settle pre-trial for a fraction of their single damages), potentially making ACPERA's reduced-exposure cap only marginally beneficial.

Given this, even assuming the decision to pursue criminal amnesty has been made already, ACPERA-eligible companies should separately consider whether the potential benefit of cooperating with private civil plaintiffs is worth the litigation risks that are baked into the current ACPERA structure. As a reference point in making such decisions, this piece presents an overview of some of the ACPERA-related disputes that have been litigated in the various relevant cases to date (which are few and far between) to highlight the potential for expensive ACPERA controversies that may diminish its appeal to companies that otherwise should be eligible for the benefits.

I. Statutory Language and Interpretation

Under the federal Sherman Act, price-fixing cartels are subject to criminal sanctions. The DOJ's leniency program allows a company to self-report to the DOJ to obtain complete criminal amnesty, or a lesser form of leniency if the amnesty spot is already taken. The Clayton Act allows private civil suits for treble damages and joint and several liability for violations of the Sherman Act, and typically, class actions and individual private actions are filed after the existence of a criminal case becomes public.

As an extra incentive to encourage conspirators to self-report to the government, Congress created ACPERA to allow amnesty companies (those "first-in") to limit their civil exposure to their own single damages (as opposed to joint and several trebled damages) by cooperating with claimants.

Specifically, a company that obtains the benefits of ACPERA has its civil exposure reduced to only the "actual damages sustained by [the claimant] which is attributable to the commerce done by the [ACPERA company] in the goods or services affected by the violation" so long as the trial court determines that its cooperation has been "timely" and "satisfactory" in:

1. "providing a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action,"
2. providing all documents or other items potentially relevant to the action that are in the possession of the applicant; and
3. using its "best efforts to secure and facilitate" the participation of "cooperating individuals covered by the agreement" for interviews, depositions, or trial.

ACPERA § 213(b).

Prior to ACPERA, there was no such protection "against the treble damages imposed upon a finding of antitrust civil liability, which Congress found chilled participation" in the DOJ's leniency program.[2] ACPERA should be interpreted with this understanding, *i.e.*, that "it was enacted to incentivize stakeholders to report any anticompetitive behavior, and intended to prioritize criminal investigations and limit civil antitrust liability."[3]

No court has had occasion to interpret the language "actual damages" or "attributable to commerce done" by the ACPERA company, or to determine the scope of "potentially relevant" information. There is, however, some guidance—albeit scant—on the standard of "satisfactory cooperation," from the few courts that have ruled on the limited ACPERA disputes that plaintiffs have raised in some cases:

- ACPERA requires more than "compliance with discovery obligations under the federal rules,"[4] but does not require the applicant to be at plaintiffs' "beck and call."[5] With respect to witnesses, ACPERA simply requires the applicant to use best efforts to secure and facilitate the participation of individual witnesses as the claimant "may reasonably require."[6]
- Cooperation is "satisfactory" where the applicant produces the documents it provided to the Antitrust Division before any formal discovery is served, produces accounting records, and provides interviews and deposition testimony regarding the alleged conspiracy.[7]
- Cooperation is not satisfactory where the applicant withholds the conspiracy start date from civil plaintiffs, despite providing it to the DOJ, and where doing so prejudices the plaintiffs' ability to pursue a civil case covering the conspiracy period.[8]

II. Undecided Issues That May Undermine The Effectiveness of ACPERA's Incentives

With that backdrop in mind, we consider a number of litigable ACPERA issues. They fall into two main categories: cooperation-related disputes and disputes about the meaning of "actual damages" based on commerce done by the amnesty applicant only.

The authors have represented the ACPERA company in some of the disputes discussed in this article, but the commentary and opinions presented are the authors' personal views.

A. Cooperation-Related Disputes

1. The Assertion of Legitimate Defenses

Some plaintiffs have argued that the amnesty company's vigorous defense of itself on the private side, or its assertion of particular defenses, is inconsistent with its obligation to cooperate under ACPERA, for example:

- Plaintiffs have argued that it was inconsistent with ACPERA for the amnesty applicant to take a lead role among the defendants in discovery and the process for opposing class certification—despite the absence of anything in the statute precluding an amnesty company from mounting a strong defense unrelated to its requirement to disclose the known facts of the underlying cartel conduct and make witnesses available.[9]
- Plaintiffs have argued that ACPERA precludes an amnesty defendant from taking the position that the scope of the admitted agreement was not "global" or was not as broad as the conspiracy that each plaintiff chose to allege—even if that position is fully consistent with the facts known to the amnesty company and with the relevant witness testimony.[10]
- Plaintiffs have argued that ACPERA prohibits the amnesty company from arguing that the admitted conspiracy did not harm a particular plaintiff, or did not harm a particular putative class of plaintiffs on a widespread basis—even though the statute does not require the amnesty company to admit to having injured specific claimants, which makes no sense in the event that the known evidence is to the contrary.[11]

2. The Challenges with Witnesses

Plaintiffs have also argued that cooperation is insufficient where the deposition testimony of a witness was supposedly contradicted by information contained in the investigation report publicly issued by a foreign antitrust enforcement agency.[12]

All ACPERA says in this regard is that the amnesty applicant must use best efforts to make witnesses available. Beyond instructing witnesses to tell the truth and making a good faith effort to refresh their recollection, a company has no control over the substance of actual testimony or when new facts are remembered. Nor could ACPERA require that a witness's personal recollections conform to the substance of materials obtained by a plaintiff from other sources, and it should be obvious that memory is not perfect—details get forgotten or new things come to mind in response to new or different questions and documents.

Relatedly, an APCERA company and its cooperating employees are likely to be subject to strict confidentiality requirements imposed by the DOJ and foreign enforcers. Thus, it is necessary and appropriate for the ACPERA company to keep confidential from civil plaintiffs its communications with enforcers—as distinct from the actual underlying facts, which the ACPERA company would provide to plaintiffs—and to prohibit its witnesses from testifying about their communications with enforcers. However, disputes in this area are possible as plaintiffs seek to discover as much as they can about the investigative process.

3. Which Court Decides Whether Cooperation is Satisfactory?

There is added uncertainty in the MDL context due to the unresolved question of whether the MDL judge makes interim rulings regarding what constitutes "satisfactory" and "timely" cooperation where individual cases will be remanded back to their original courts for trial after pretrial proceedings are completed. On this subject, the statute merely says that the trial judge has authority to decide after trial whether the ACPERA company's cooperation was satisfactory.

Notably, in *In re Capacitors*, the MDL judge was asked to make *preliminary* rulings on whether ACPERA cooperation had been satisfied to date, and the judge indicated he would do so. While those rulings were never made, the question remains what, if any, effect they would have had post-remand, and whether the same issues would have to be re-litigated again in the trial court – creating extra layers of uncertainty and expensive litigation for an amnesty company to contend with. For example, in the *In re TFT-LCD* case, the remand court granted a motion for reconsideration of the MDL court's denial of a motion to dismiss, and then granted the renewed motion to dismiss,

despite the fact that all pre-trial proceedings, including discovery and summary judgment, had been completed at great expense prior to remand.[13]

4. Who is Entitled to Cooperation?

There is also a threshold cooperation issue: who qualifies as a "claimant" for purposes of the statute and is thus owed cooperation. In other words, is cooperation owed to any person or entity that self-identifies as a victim? Cooperation is not cheap, nor is it desirable to provide substantive cooperation to an entity claiming harm based merely on its own (perhaps erroneous) assessment that it was affected by the alleged conspiratorial conduct. This is another required judgment call—and a potential litigation risk taken by any amnesty applicant that declines to provide timely cooperation to everyone who happens to request it.

B. Disputes About the "Actual Damages" Attributable to Commerce Done by the Amnesty Applicant

ACPERA's de-trebling provision limits the amnesty applicant's civil exposure only to the "actual damages" attributable to its own commerce. However, there has not yet been a judicial determination confirming that "actual damages" means damages net of pass-through.

In an antitrust price-fixing case, the measure of civil damages normally is the overcharge that the purchaser of the price-fixed product paid over what would have been the competitive price. Companies that directly purchase from a co-conspirator often resell the price-fixed products, and pass along the overcharge to indirect purchasers—thus avoiding incurring any actual economic damages. However, under the Supreme Court's decision in the *Hanover Shoe* case, pass-through of overcharges is generally not a defense to Sherman Act claims—so even if a direct purchaser plaintiff passes on all of the conspiracy overcharges it may have incurred, it still could recover those overcharges from the defendants that are found liable for the conspiracy.

Although it has never been litigated, the natural reading of the "actual damages" language of ACPERA suggests an abrogation of *Hanover Shoe* for the ACPERA company. Such an interpretation would further Congress's intent to incentivize self-reporting and by extension, incentivize cooperation with civil plaintiffs.

But, as it stands, the contours of the "actual damages" limitation have never been determined by a court, making this another ACPERA-related litigation uncertainty. Closely related to this are potential controversies about how economists calculate damages based on the "commerce done by" the amnesty applicant only, which are also subject to litigation.

C. A Note About Settlement Offsets

Finally, we note that the settlement offset doctrine applies in antitrust cases to allow defendants to receive an offset of the damages awarded at trial in the amounts that previously were paid to plaintiffs through settlements entered by other defendants. For example, in *In re TFT-LCD Antitrust Litigation*, at trial the plaintiffs obtained a special verdict damages award against Toshiba of $87 million, trebled to $261 million. Toshiba moved for an amended judgment, seeking an offset of more than $400 million in co-defendant settlements. The court indicated that "it was likely to grant the set-off motion, which would leave the class with no damages recovery from Toshiba." The case resulted in a settlement before resolution of Toshiba's motion.[14]

There's an argument that the offset doctrine would apply the same way in favor of a company with ACPERA benefits —the maximum amount the ACPERA company would be liable for is its own single damages offset by co-defendants' settlements. But, plaintiffs surely would argue that the outcome depends, at least in part, on the extent to which they are otherwise able to fully recover all joint and several damages trebled. Because no APCERA company has ever gone to trial, the question of how a judge would rule regarding the offset doctrine in the context of ACPERA remains open.

Conclusion

There is a swath of litigable issues under the current ACPERA system, which risk deterring criminal amnesty applications, cooperation with civil plaintiffs, or both. Even for a company that decides that criminal amnesty is its

best course, ACPERA cooperation is not required – nor should it be a foregone conclusion. As with all decisions surrounding the amnesty decision-making process, it may be a very close call.

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[1] Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA), Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004).

[2] *Morning Star Packing Co. v. S.K. Foods, L.P.*, No. 2:09-cv-00208-KJM-KJN, 2015 WL 3797774, at *5 (E.D. Cal. June 18, 2015).

[3] *Id.* at *6.

[4] *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09-MDL 2007-GW(PJWx), 2013 WL 4536569, at *4 (C.D. Cal. Aug. 26, 2013).

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

[6] *Id.* at 329, n.13 (involving a cooperation agreement that the court noted tracked the language of ACPERA § 213(b)).

[7] *IL Fornaio (Am.) Corp. v. Lazzari Fuel Co., LLC*, Case No. C 13-05197 WHA, 2014 WL 6985127, at *3, n.* (N.D. Cal. Dec. 10, 2014).

[8] *In re Aftermarket*, 2013 WL 4536569, at *4-5.

[9] Panasonic's Motion for Determination that the Panasonic Defendants Have Satisfied ACPERA to Date, at 6-7, *In re Capacitors Antitrust Litigation*, No. 3:17-md-02801-JD (N.D. Cal.), ECF No. 643; Direct Purchaser Pls.' Response and Statement of Non-Opposition and Non-Joinder to AASI and Benchmark Pls.' Mot. to Deny Panasonic the Benefits of Civil Liability Under the Antitrust Criminal Penalty and Reform Act, at 8, *In re Capacitors Antitrust Litigation*, No. 3:17-md-02801-JD (N.D. Cal.), ECF No. 465.

[10] Pls.' Reply in Supp. of Their Mot. to Deny Panasonic the Benefits of Limited Civil Liability Under the Antitrust Criminal Penalty Enhancement and Reform Act, at 6-9, *In re Capacitors Antitrust Litigation*, No. 3:17-md-02801-JD (N.D. Cal.), ECF. No. 479.

[11] Panasonic's Reply in Support of Motion for Determination that the Panasonic Defendants Have Satisfied ACPERA to Date, at 3-5, *In re Capacitors Antitrust Litigation*, No. 3:17-md-02801-JD (N.D. Cal.), ECF No. 849.

[12] Pls.' Notice of Mot., Mot., and Mem. in Supp. of Mot. to Deny Panasonic the Benefits of Limited Civil Liability Under the Antitrust Criminal Penalty Enhancement and Reform Act, at 8-9, *In re Capacitors Antitrust Litigation*, No. 3:17-md-02801-JD (N.D. Cal.), ECF No. 407.

[13] *Motorola Mobility, Inc. v. AU Optronics Corp.*, No. 09 C 6610, 2014 WL 258154 (N.D. Ill. Jan. 23, 2014).

[14] *See In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2012 WL 12369590, at *4 (N.D. Cal. Oct. 15, 2012).

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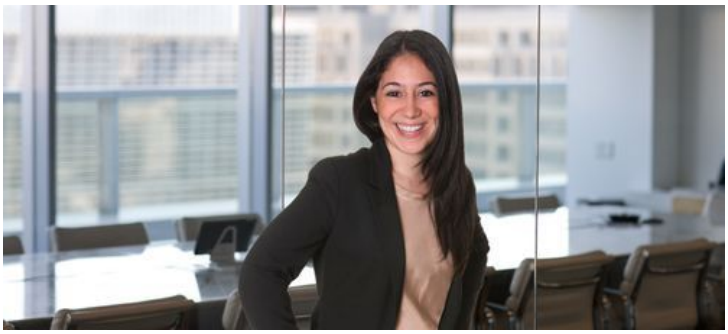

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