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ACPERA — Lasting Limits Or Fleeting Experiment?

Law360, New York (March 27, 2009) -- Nearly five years ago, on June 22, 2004, President George W. Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA").[1] Enacted amidst much fanfare, ACPERA introduced two significant changes to the law of antitrust enforcement.

First, ACPERA greatly increased the maximum fines and jail sentences for antitrust violations — $100 million for corporations, $1 million for individuals, and 10 years imprisonment.

Second, based upon a showing of satisfactory cooperation to the private claimant, ACPERA limited the civil liability of a leniency applicant in the U.S. Department of Justice ("DOJ") Antitrust Division's Corporate Leniency Program to the actual damages attributable to the entity's conduct rather than the usual joint and several and trebled damages faced by antitrust defendants.

Currently, however, the lifespan of ACPERA's limitation on civil damages is constrained by a provision that sunsets the statute five years after its enactment — or on June 22, 2009, to be exact.[2]

As of this writing, we are not aware of any proposed or pending legislation that would extend ACPERA beyond this date. Nor has the new administration or DOJ taken a public position on ACPERA's future.

At the March 10, 2009 Senate Committee on the Judiciary hearing for Christine Varney, President Obama's nominee to be Assistant Attorney General for Antitrust, there was no mention of ACPERA or its status.[3]

Thus, absent congressional action in the next three months, ACPERA's elimination of joint and several liability and trebled damages for a civil antitrust defendant may become a mere historical footnote in the canons of antitrust law.

ACPERA's Origins and Intent

When it was enacted nearly five years ago, R. Hewitt Pate, then Assistant Attorney General for Antitrust at the DOJ, lauded ACPERA, announcing: "This law will greatly enhance one of the division's core missions, its anti-cartel enforcement program."[4]

In the DOJ's view, the risk of civil lawsuits and the accompanying exposure to damages awards operated

as a disincentive to companies deciding whether to participate in the Corporate Leniency Program and act as whistleblowers.[5]

By eliminating treble damages and joint and several liability for leniency applicants, the DOJ believed it was removing this disincentive, clearing the way for greater participation in the amnesty program and making the program "even more effective."[6]

Whether ACPERA has resulted in greater participation in the Corporate Leniency Program is difficult to gauge. By all accounts, the DOJ's Corporate Leniency Program, and antitrust criminal enforcement in general, appear to be alive and well.

In 2008, the criminal fines from DOJ's price-fixing investigations into the air transportation and LCD panel industries alone totaled almost $1.2 billion, nearly doubling the $630 million in criminal fines obtained in 2007.

And DOJ representatives have stated publicly that both investigations are ongoing, as evidenced by the recent announcement that Hitachi Displays Ltd. has agreed to pay a $31 million fine as part of the LCD panel investigation.

As for jail sentences, in 2007, 87 percent of individuals charged by the Antitrust Division were sentenced to jail, totaling more than 86 years.

But even before ACPERA, and notwithstanding the DOJ's recent success in garnering substantial criminal fines and jail sentences, the DOJ's Corporate Leniency Program had proven itself to be a robust enforcement mechanism.

Following revisions to the Corporate Leniency Program in 1993, the DOJ touted it as the Antitrust Division's "most effective investigative tool."[7] The DOJ estimated that prior to the Corporate Leniency Program's revision, it "obtained roughly one amnesty application per year."[8] Following the 1993 revision, it estimated that "the application rate [] jumped to roughly two per month."[9]

Thus, while ACPERA unquestionably provided even greater incentives for potential candidates to apply for amnesty, it is unclear whether it alone has bolstered participation in the DOJ's Corporate Leniency Program.

As the ABA Section of Antitrust Law 2008 Transition Report notes, the Antitrust Division should examine whether the detrebling provision of ACPERA has achieved its stated objectives prior to its expiration.[10]

Specifically, the Transition Report recommends the Antitrust Division study "[h]ow often these provisions have been employed, how effective they have been, and whether changes to the statute are warranted."[11]

Still, the stated objectives of ACPERA remain timely. Private antitrust lawsuit filings have increased

demonstrably in recent years.

According to a Princeton Economics Group Inc. article, "the number of [private antitrust] cases filed was essentially constant from 2003 to 2004," but filings have "increased each year from 2004 through 2007."[12]

Given this noticeable upswing in private antitrust filings, the threat of significant civil damages facing a leniency applicant not only remains, but is arguably greater now than it has ever been.

Application of ACPERA in the Courts

Despite its passage nearly five years ago, there has been virtually no analysis of ACPERA in the courts. The result is that notwithstanding the statute's relatively straightforward and concise language, certain aspects of ACPERA are subjects of dispute.

There has been only one decision that addresses ACPERA's provisions on civil damages and the requirement that the leniency applicant provide satisfactory cooperation to the civil claimant.

In In re Sulfuric Acid Antitrust Litigation, defendants argued in an agreed motion with plaintiffs that they satisfied their cooperation obligations under ACPERA by providing plaintiffs with documents, written interrogatory responses, and an account of the relevant facts through interviews with employees and outside counsel, as well as using best efforts to locate witnesses with relevant knowledge.[13]

The court agreed and entered an order limiting defendants' damages to actual damages after finding that defendants had provided satisfactory cooperation.[14]

While other cases have raised the issue of "satisfactory cooperation," they have not resulted in litigated decisions. In In re Urethanes Antitrust Litigation, for instance, defendants filed a motion seeking a determination of satisfactory cooperation under section 213(b) of ACPERA. Shortly after the motion was filed, however, the parties settled the matter and the court never ruled on the motion.[15]

Areas of Clarification

Given the dearth of case law addressing and interpreting ACPERA, if Congress renews the statute, there are certain areas that might benefit from clarification.

First, questions can arise as to the scope of section 213(b)(1)'s requirement that the applicant provide "a full account to the claimant of all facts known to the applicant ... that are potentially relevant to the civil action."

For example, if there is evidence of sporadic competitor communications that significantly predate the time period covered in the applicant's leniency agreement, must the applicant proffer these facts to the private claimant?

Similarly, what if the communications significantly predate the beginning of the alleged putative class period in the civil complaint? Another potential issue involves the geographic scope of an applicant's cooperation.

If a leniency applicant is facing civil claims by a U.S. purchaser for U.S. sales, must it disclose facts relevant solely to foreign conduct, assuming these facts exist? And how far must a leniency applicant go in providing detailed information about its operations?

If "potentially relevant to the civil action" is interpreted broadly, it might be argued that the leniency applicant must provide comprehensive background information on the industry, key market players, manufacturing processes and/or the applicant's sales and marketing practices.

Second, what steps must a leniency applicant undertake to satisfy ACPERA's requirement in section 213(b)(3)(B) of using "best efforts to secure and facilitate" cooperation from individuals covered by the leniency agreement?

This question is complicated by the fact that many individuals are no longer employed or under the control of the leniency applicant.

In the case of a former employee, if he or she refuses to cooperate or asserts his or her Fifth Amendment rights, must the leniency applicant take actions against the former employee, such as discontinuing payment of the individual's legal fees?

We would argue that nothing in ACPERA requires this result, particularly when it involves the exercise of a witness's constitutional rights under the Fifth Amendment.

The situation for current employees is even murkier. To the extent a current employee is not willing to be interviewed or testify, does "best efforts" require the leniency applicant to take disciplinary action against the employee, or even go so far as to fire the employee? Again, we would maintain that nothing in ACPERA would require these coercive measures.

The final area we raise here that has been the subject of disagreement is the timing of a defendant's cooperation.

Section 213(c) of ACPERA provides that the timeliness of a defendant's cooperation should be considered only in two situations: (1) if DOJ cooperation occurs after a state has initiated an investigation concerning the applicant; or (2) if DOJ cooperation occurs after a civil action has been filed against the applicant. If neither applies, ACPERA is silent as to timing.

Despite the fact that ACPERA addresses timing only in these two limited situations, some have argued that an applicant's cooperation must begin immediately upon the commencement of a civil case and must continue indefinitely.

But this position has no basis in the language of the statute or its legislative history. Nor would a burden of this sort on a leniency applicant, in our view, be consistent with the stated objectives and purpose of ACPERA.

The Future of ACPERA

Congress will have to move quickly if ACPERA's single damages provisions are to be extended.

Congress enacted ACPERA in an effort to enhance DOJ's Corporate Leniency Program by eliminating the disincentive of potentially debilitating treble damages awards faced by antitrust defendants.

As discussed above, Congress's concerns remain timely as the number of private antitrust lawsuits continues to rise. But if Congress chooses to renew ACPERA's limited civil damages provisions, there are certain areas of the statute that might benefit from clarification.

If no steps are taken to extend ACPERA's lifespan, it is possible there could be a race to the DOJ to participate in the Corporate Leniency Program before the June 22, 2009 expiration date.

ACPERA specifically provides that an applicant who has entered into an antitrust leniency agreement on or before June 22, 2009 will receive the benefits of the statute even after it sunsets.

Thus, any company or its counsel that is considering whether to put down a marker and secure a leniency agreement from the DOJ has a strong incentive to do so immediately.

Given the timing of securing a marker and negotiating a leniency agreement, time will be of the essence in the next few months before ACPERA is set to expire.

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[1] Pub. L. No. 108-237, 118 Stat. 665 (codified as 15 U.S.C.A. § 1 note).

[2] The sunset provision in ACPERA does not apply to those sections of the statute increasing criminal penalties.

[3] See generally judiciary.senate.gov/nominations/AssistantAttorneyGeneralAntitrust-ChristineVarney.cfm.

[4] Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust

Criminal Penalty Enhancement and Reform Act of 2004, DOJ Press Release (June 23, 2004), available at www.usdoj.gov/atr/public/press_releases/2004/204319.htm.

[5] Antitrust Enforcement Priorities: A Year in Review, Thomas O. Barnett, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Fall Forum of the Section of Antitrust Law, American Bar Association (Nov. 19, 2004), available at www.usdoj.gov/atr/public/speeches/206455.htm.

[6] Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004, DOJ Press Release (June 23, 2004), available at www.usdoj.gov/atr/public/press_releases/2004/204319.htm.

[7] Cracking Cartels with Leniency Programs, Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, OECD Competition Committee (Oct. 18, 2005), available at www.usdoj.gov/atr/public/speeches/212269.htm.

[8] An Update of the Antitrust Division's Criminal Enforcement Program, Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, ABA Section of Antitrust Law Cartel Enforcement Roundtable (Nov. 16, 2005), available at www.usdoj.gov/atr/public/speeches/213247.htm.

[9] Id.

[10] ABA Section of Antitrust Law 2008 Transition Report, at 60.

[11] Id.

[12] Andrew E. Abere, Ph.D., "Trends in Private Antitrust Litigation: 2004-2007," Princeton Economics Group, Inc., available at www.econgroup.com/peg_news_view.asp?newid=28.

[13] Under ACPERA, a leniency applicant that possesses a currently effective antitrust leniency agreement with the DOJ is entitled to a limitation of damages so long as the company provides "satisfactory cooperation" to the civil claimant(s) as set forth in the statute. See ACPERA § 213(b).

[14] In re Sulphuric Acid Antitrust Litig., No. 1:03-cv-04576, slip op. (July 7, 2005 N.D. Ill.).

[15] In re Urethane Antitrust Litig., No. 04-md-01616-JWL (June 22, 2007 D. Kan.).

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