GCR NEWS

Takeaways from the DOJ's ACPERA roundtable and proposed next steps

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With the US Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) due to sunset on 22 June 2020, Gibson Dunn & Crutcher partner Scott Hammond explores questions around the effectiveness of ACPERA and how its "actual damages" principle is defined and applied. He urges the Antittrust Division to take a more active role in providing guidance to Congress, the courts, the business community, and the antitrust bar regarding the application of ACPERA.

The US Department of Justice's Antitrust Division has called the corporate leniency program its "most important prosecutorial tool" and has praised its "incredible success in deterring and detecting antitrust crimes" for more than a quarter century. However, the number of leniency applicants reporting large-scale domestic and international cartels has declined in recent years. Questions about possible reasons for this decline abound, including whether the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) is working effectively as intended by inducing companies to self-report suspected antitrust violations to the Antitrust Division's Corporate Leniency Program.

The leniency program offers strong incentives to conspirators to voluntarily disclose their criminal conduct and cooperate with prosecutors. Critically, leniency is available only to the first corporate conspirator to break ranks with the cartel and come forward. This "winner take all" dynamic is intentional – it sows tension and mistrust among cartel members and encourages defection from the cartel.

ACPERA passed to ensure that the leniency applicant is better-off than its co-conspirators given its self-reporting. To that end, ACPERA limits the leniency applicant's liability for civil damages claims in private state or federal antitrust damages actions to "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."

In anticipation of Congress' renewal of ACPERA before it sunsets on 22 June 2020, the Antitrust Division hosted a public roundtable discussion on whether ACPERA is serving its purpose and whether there are issues that impede its successful implementation. In connection with this roundtable, the American Bar Association's antitrust law section submitted a comment, in which the section urged the DOJ to consider whether the recent decline in criminal antitrust cases reflects any failure of ACPERA; a clearer definition of "actual damages" should be adopted; and ACPERA's "actual damages" principle should apply to damages sought under the False Claims Act (FCA).

Whether ACPERA is working as intended

The Antitrust Division's roundtable revealed a clear divide about the effectiveness of ACPERA. Panelists from the plaintiffs' bar expressed the view that ACPERA is generally working and that "if it ain't broke, don't fix it, and it's not broken." In contrast, panelists representing the defense bar and the business community noted that the statute is failing to serve its purpose of incentivising companies to self-report cartel activity to the DOJ's leniency program and identified several issues that interfered with successful implementation of the statute.

The US Chamber of Commerce's general counsel John Wood proclaimed that ACPERA "has not fully lived up to its intended purpose [because] American businesses that are faced with making the very difficult decision of whether to self-report face uncertainty regarding the full consequences of that decision." Representing the Business and Industry Advisory Committee, John Taladay argued that "ACPERA needs to provide even more enhanced protection from civil damage actions and more certainty to entities considering leniency."

While the plaintiffs' bar undoubtedly brings a valuable perspective to the discussion, the individuals best suited to answer the question of whether ACPERA is incentivising companies to apply for corporate leniency are those that have been and will be in the boardroom when the decision is made. At the roundtable, defense practitioners with experience representing leniency applicants shared how they warn clients that ACPERA's promised benefits are, in practice, illusory and that they advise clients on ACPERA differently today than when it was enacted in 2004. The business community's observation that ACPERA is a virtual non-factor in those deliberations makes plain that changes are needed if Congress's intent to spur leniency applications is to be achieved.

Panelists identified the following impediments to the effective operation of ACPERA:

- *Uncertainty of eligibility requirements.* ACPERA requires a leniency applicant to provide plaintiffs with cooperation that is both "satisfactory" and "timely" to qualify for the statute's benefits, but it does not define either term. The relative lack of court cases – *In re Aftermarket Automotive Lighting Products Antitrust Litigation* (C.D. Cal. Aug. 26, 2013) is the only case where a court denied ACPERA benefits to a leniency recipient for failure to provide satisfactory and timely cooperation – adds to the uncertainty about the scope of the required cooperation. Panelists appealed to the DOJ to provide guidance to Congress, the courts, the business community, and the antitrust bar on areas of uncertainty, including whether ACPERA's obligation to provide "satisfactory" cooperation would be presumptively met if the leniency recipient provided the plaintiffs with essentially the same cooperation and admission of wrongdoing provided to the DOJ; and whether ACPERA's timeliness obligation would be presumptively met if the cooperation is provided after any "stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement" is lifted.

- *Uncertainty of benefits.* Congress recognised when it passed ACPERA that exposure to civil damages is a powerful disincentive to seeking leniency. Notwithstanding ACPERA's limitation on civil exposure to actual damages suffered by various injured parties, in practice, leniency applicants may face damages claims by direct and indirect purchasers, state attorneys general, the Antitrust Division, and the Civil Division. As ACPERA's limitations on civil damages liability prove illusory, it has become increasingly difficult to persuade companies that they will be better off in the resulting civil litigation for seeking leniency. As a result, some companies are choosing not to report suspected conduct that would have been reported in the past.

- *Litigation/settlement tactics that violate the "Golden Rule."* Certain plaintiffs have used tactics in litigation and in settlement negotiations that violate the spirit of ACPERA as well as the "Golden Rule" of effective leniency programs – that the leniency recipient will be better-off than its co-conspirators given its self-reporting. Plaintiffs exercise undue leverage over leniency recipients because ACPERA requires leniency recipients to provide satisfactory and timely cooperation in order to qualify for the statutory benefits with no corresponding obligation on plaintiffs to negotiate a resolution for payment of actual damages in return. Assured of the leniency recipient's unconditioned cooperation, certain plaintiffs follow a strategy of strategically offering 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 while offering less favourable settlement terms to the leniency recipient and purposely keeping the leniency recipient tied up in the civil litigation until the eve of trial or beyond. Thus, leniency recipients are deprived of ACPERA's promise of achieving expediency and finality while reaching civil settlements on the most favourable terms.

The leniency program was built on transparency, trust, and an institutional commitment to the "Golden Rule." As the Antitrust Division has long recognised, prospective leniency applicants come forward in direct proportion to the predictability and certainty of securing the promised benefits. In passing ACPERA, Congress recognised that if a company cannot accurately predict whether it will obtain substantial savings in civil litigation as a result of its corporate confession, then it is far less likely to report its suspected wrongdoing.

ACPERA's passage was supported by the plaintiff bar, the defense bar and the business community, but its biggest stakeholder is the Antitrust Division. Congress passed ACPERA for the sole purpose of incentivising companies to self-report conduct to the leniency program. While it once held promise, ACPERA is now a virtual non-factor when companies are weighing whether to make a voluntary disclosure. The DOJ should issue public policy statements and, as appropriate, intervene as *amicus curiae* in follow-on litigation to provide greater transparency and certainty regarding ACPERA's application and to ensure that ACPERA serves its purpose.

Whether Uncertainty Regarding the Meaning of "Actual Damages" Impedes ACPERA's Effectiveness

For a leniency applicant in good standing who meets cooperation obligations, ACPERA requires that the amount of damages recoverable in state or federal damages actions "shall 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." The statute, however, does not define the term "actual damages." So far, no court has ruled on what constitutes "actual damages."

The lack of guidance on the meaning of "actual damages" creates a significant hurdle for companies considering self-reporting as "[t]he dual recovery regime in the United States resulting from *Illinois Brick* that allows both direct and indirect purchasers to obtain multiple recoveries, creates the threat not only of treble damages but even something that *exceeds* treble damages". The dual (and sometimes more, as when multiple levels of direct purchasers, indirect purchasers, retailers, and state attorneys general seek damages) recovery system creates a dynamic where "actual damages" potentially becomes several times that amount, and leniency recipients have to deal with a similar volume of damages as non-self-reporting companies.

But ACPERA was passed precisely because Congress found that liability for multiple times actual damages had a chilling effect on self-reporting. As sponsoring senator Orrin Hatch made clear, ACPERA was enacted to provide "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with the Justice Department's Antitrust Division" by limiting "a cooperating company's civil liability to actual, rather than treble, damages in return for the company's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct."

ACPERA specifically references both federal damages actions, which can only be brought by direct purchasers, and state law damages actions, which are ordinarily pursued by indirect purchasers, capping recovery in all such actions to "actual damages." Thus, the most natural reading of the term "actual damages" in context, limits recovery by direct purchasers to damages suffered net of any pass-on, and recovery by indirect purchasers to that injury that was passed on.

This reading of "actual damages" is consistent with the requirement in the DOJ's leniency program that leniency recipients make restitution to injured parties. When ACPERA was passed, the leniency program required companies to make "restitution to injured parties." By reducing a leniency recipient's damage exposure to "actual damages" and eliminating joint and several liability, Congress aligned ACPERA's "actual damages" with the leniency program's "restitution" requirement. Under both ACPERA and the leniency program, leniency recipients are not permitted to profit from their crimes. Leniency recipients must make whole both direct and indirect purchasers who sustained damages in order to secure immunity from the Antitrust Division and qualify for ACPERA benefits. No more, no less.

Courts' interpretation of "restitution" in cases involving the Mandatory Victims Restitution Act (MVRA), which requires defendants of enumerated federal crimes to pay restitution to victims, lends further support to the legitimacy of this approach. For example, in *United States v. Thompson* (2015), where the victims of a federal fraud crime had been more than fully compensated for their losses by third parties (their banks), the United States Court of Appeals for the Second Circuit held that that "a defendant's restitution liability under the MVRA is capped at the actual loss incurred by his victims." The court ruled that the defendant's restitution liability consisted of the victims' net loss – ie, $0, as their banks had fully compensated them – and the amount of the victims' losses that had been effectively passed through to the banks. This approach to calculating restitution affirmed the principle of not "award[ing] the victim a windfall, ie, more in restitution than he actually lost". Other circuit courts, including the Fifth Circuit in *United States v Berry* (2019) and the Tenth Circuit in *United States v Taylor* (2002), have articulated similar principles.

Importantly, interpreting "actual damages" as "restitution" does not reduce the overall recovery to victims of antitrust crimes. Each defendant—other than the leniency recipient— is subject to joint and several liability for three times the damages suffered by the victims. Thus, this approach to calculating "actual damages" incentivises companies to self-report by substantially sweetening the rewards of leniency while preserving victims' right to seek full recovery of treble damages for losses caused by the defendants.

The Antitrust Division is encouraged to re-issue the leniency policy FAQs with guidance as to the meaning of "actual damages" and "restitution to injured parties." Congress would benefit from being able to cite to a public record of the DOJ's position when considering any possible amendments before the law sunsets on 22 June 2020.

The uncertainty regarding how courts will interpret ACPERA and define actual damages is discouraging companies from self-reporting. The DOJ could alleviate some of this uncertainty by including an explanation of its interpretation of "actual damages" in its leniency FAQs, publicly advocating for that view in speeches and amicus briefs, and/or urging Congress to clarify the definition of "actual damages" and create a clear record of legislative intent for courts when reauthorising ACPERA later this year.

Even if the definition of "actual damages" is clarified, there remains the complex task of determining "actual damages" to direct and indirect purchasers in any particular case. There again, the Antitrust Division can support its leniency applicants – and thus the leniency program – by providing courts adjudicating damages claims against leniency applicants with information about the actual damages suffered, when requested by either the leniency recipient or an injured party.

Leniency recipients and injured parties rarely ask the DOJ to get involved in calculating restitution. And it may not have been the best use of the Antitrust Division's limited resources in the past when leniency applications were rising and ACPERA's passage provided an initial boost. But that is no longer the case. If the DOJ adopted a policy of providing restitution estimates to courts, it may not take long before the Antitrust Division's involvement in calculating restitution will, once again, be rarely required. If plaintiffs know that the DOJ will assist the court in calculating "actual damages," it will curtail gaming ACPERA by taking a leniency recipient's cooperation with no intent of engaging in good faith settlement discussions tied to actual damages. If leniency recipients know that their leniency eligibility will be tied to the DOJ's restitution calculation, it will ensure that leniency applicants make every injured party whole.

Whether DOJ's Policy regarding Antitrust and False Claims Act (FCA) Damage Claims Undermines ACPERA

In November 2018, Assistant Attorney General Makan Delrahim announced that the Antitrust Division would use the authority under section 4A of the Clayton Act to seek civil antitrust damages where the US government is a victim of an antitrust crime. In making this announcement, Delrahim, who was one of the principal DOJ liaisons to Congress leading up to ACPERA's passage in 2004, recognised that ACPERA's cap on civil liability at actual damages provides an important incentive for companies to self-report. Therefore, he explained that the Antitrust Division would apply ACPERA's "detrebling incentive" to section 4A cases.

That same reasoning counsels against the antitrust division's sister agency, the DOJ's Civil Division, pursuing damages under the FCA for the same course of conduct reported by the leniency recipient that gives rise to a section 4A claim. As the district court for the Eastern District of California recognised in *Morning Star Packing Co v SK Foods, LP* (E.D. Cal. 2015), awarding multiple times actual damages to plaintiffs under different statutory schemes for the same conduct is not consistent with the purpose and intent of ACPERA, which was to encourage self-reporting by limiting damages for a single course of conduct.

Delrahim's public comments did not address whether ACPERA benefits would apply to damages that other components of the DOJ may seek. Antitrust violations in which the US government is a victim typically also give rise to FCA claims. Furthermore, although FCA cases involving bid rigging prosecuted by the Antitrust Division typically involve the U.S. government as a direct purchaser, the Antitrust Division's generic drugs investigation is believed to represent the first time that the DOJ's Civil Division brought an FCA case related to conduct prosecuted by the Antitrust Division

when the federal government was an *indirect* purchaser. It is imperative that either the attorney general, the associate attorney general, or the Antitrust and Civil Division AAGs' jointly provide clear policy guidance as to a leniency recipient's exposure to damages when the federal government is a direct or indirect victim, preferably in time for Congress to consider the department's position when reauthorising ACPERA. Is the leniency recipient's damage exposure to the federal government limited to actual damages (restitution) or will the Antitrust and Civil Division seek a multiple of actual damages from the company that self-reports the conduct?

In November 2019, the DOJ reaffirmed its commitment to protecting the US government and taxpayer dollars from antitrust crimes by announcing the creation of the procurement collusion strike force, a new interagency task force focusing on investigating and prosecuting antitrust crimes, such as bid-rigging and related fraudulent schemes, that occur in the context of government procurement, grant, and program funding. This announcement underscores the need to clarify whether ACPERA's "actual damages" provision would apply to FCA damages. If the civil division does not honor ACPERA's "actual damages" principle in seeking FCA damages, that would effectively eliminate the benefits of ACPERA for leniency recipients in government procurement cases, thereby blunting the DOJ's effort to detect, investigate, and prosecute procurement-related fraud.

The DOJ's prosecution of South Korean oil companies in 2018-19, in which the Antitrust Division and the Civil Division calculated civil damages for corporate defendants (not leniency recipients) in a way that avoided multiple recovery, demonstrates the ability and commitment of the two departmental litigation components to work together. Teaming up to announce a DOJ policy to require leniency recipients to make full restitution to the federal government in order to resolve the company's civil antitrust and FCA damage exposure would boost self-reporting and further the DOJ's goal of deterring and detecting procurement fraud.

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The DOJ took the important first step of soliciting the views of the plaintiff bar, defense bar, and the business community regarding the effectiveness of ACPERA. The upcoming ACPERA renewal process provides the Antitrust Division and Congress with the opportunity to provide guidance to the courts as to the application of ACPERA and to heed the warnings of the business community and the antitrust defense bar that ACPERA is not working as intended and has become less and less a factor when a company is deciding whether to self-report suspected collusion to the Antitrust Division. Interpreting "actual damages," like restitution, as requiring that injured parties be made whole puts leniency recipients in a materially better position than companies who do not self-report without reducing the overall recovery to victims. The courts will ultimately interpret the law, but this is a chance for the DOJ and Congress to create a clear record for the courts to consider.

First published on the *Global Competition Review* website, 17 April 2020