

Antitrust Whistle-Blowers Get Clarity

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Daily Journal
09.16.2013

In a recent decision, U.S. District Court Judge George H. Wu directly ruled that an amnesty applicant who fails to satisfactorily cooperate with plaintiffs in an antitrust multi-district litigation waived any claim to the benefits of *limited civil liability* under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA).

ACPERA was intended to cause and motivate violators of the antitrust laws to report themselves to the Department of Justice and to cooperate with their victims by providing full disclosure of their illegal conduct. In return, a cooperating defendant - frequently referred to as the "applicant" - may receive benefits, including limiting their liability to single (as opposed to treble) damages and avoiding joint and several liability. In today's world of economics, this involves millions of dollars in damages. Unfortunately, the statute only provides that cooperation must be "satisfactory" as determined by the court, and applicants have often flirted with providing limited information instead of following through with meaningful cooperation.

To be entitled to ACPERA protection in civil litigation, an applicant must provide a full account to the plaintiff of all facts that are potentially relevant to the claims, and furnish all documents or other items potentially relevant that are in the applicant's custody or control. In practice, antitrust violators have gamed the system by belatedly providing less than full cooperation. Many antitrust defendants simultaneously seek the benefits of ACPERA while attempting to dismiss civil claims against them on technical grounds. Judicial interpretations of ACPERA's obligations have been rare, and in this case Judge Wu laid out some clear lines.

Under the DOJ Corporate Leniency Program, the first illegal cartel participant to report a criminal Sherman Act violation to the Antitrust Division can receive immunity from prosecution if it provides

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satisfactory cooperation to DOJ concerning the antitrust violation - i.e., if it blows the whistle on its co-conspirators. In addition, the applicant can reduce its own potential liability by providing full and timely disclosure of its illicit conduct to the victims of that conduct. Judge Wu's ruling in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*, Case 2:09-ml-02007-GW-PJW (C.D. Cal. Aug. 26, 2013) (AALP), is the first to review an applicant's conduct vis-à-vis its obligations. Although ACPERA was enacted with high (albeit foggy) standards, few opportunities have arisen for judicial consideration of the adequacy of cooperation and the entitlement to ACPERA benefits. As a result, the issue tends to be contentious throughout litigation and the lack of clarity on whether ACPERA will apply leads to uncertainty on the part of plaintiffs and defendants.

In AALP, three manufacturers and four distributors allegedly conspired to fix the prices of, and allocate customers for, the aftermarket replacement auto lights. Judge Wu ruled that TYC Brother Industrial Co. Ltd and Genera Corporation were not entitled to damages limitations because their cooperation had been inadequate to the surprise of many observers.

The defendants contended that they provided to Direct Purchaser Plaintiffs (DPPs): (1) seven fact witness depositions in the U.S. and Taiwan; (2) the voluntary appearance of a former employee outside of the U.S.; (3) nine attorney proffers on key witnesses and documents; (4) 50,000 pages of documents, including 2,000 pages of Chinese to English translations, and 13 years' worth of transactional data; (5) prompt and complete responses to DPPs' discovery requests; (6) timely and accurate responses to inquiries from DPPs; and (7) offers to informally interview certain witnesses. The defendants argued that they were entitled to ACPERA benefits because their cooperation was satisfactory and timely in light of the multiple stays and protective orders requested by the DOJ and granted by the court. Judge Wu found that this was inadequate.

The court found this cooperation - or its execution style - was *insufficient* to limit the defendants' liability under ACPERA. The issue was whether the defendants provided a "full account" of the "potentially relevant," known facts to plaintiffs in a timely fashion per Section 213(b) of ACPERA. The court was therefore less concerned with what the defendants did, and more concerned with when the cooperation was provided and what the defendants *failed* to do. Judge Wu expressed that the stays and protective orders were not so sweeping that they precluded the defendants from providing cooperation to the plaintiffs.

As an example of the defendants' inadequate cooperation, the plaintiffs learned too late to move to further amend their complaint that the defendants had entered into a price-fixing agreement with another defendant in the case in 1999. The defendants did not provide this information to the plaintiffs during their first proffer in 2010, although the defendants *knew this at that time*. The court rejected the defendants' argument that they were incapable of verifying the accuracy of that information because

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ACPERA required the defendants to provide to DPPs facts *potentially* relevant to the conspiracy. Sen. Jim Sensenbrenner commented in the Committee Report that ACPERA's "use of the term 'potentially relevant' is intended to preclude a parsimonious view of the facts or documents to which a claimant is entitled." 150 Cong. Rec. H 3658 (June 2, 2004). It is necessary for amnesty applicants to cooperate at the outset. In *In re TFT-LCD Antitrust Litigation*, Judge Susan Illston found persuasive plaintiffs' argument that "the value of an applicant's cooperation diminishes with time" where "plaintiffs are about to embark on significant and costly discovery that, at least in part could be obviated if the applicant cooperated with plaintiffs." 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009).

Furthermore, Judge Wu declined to address each specific instance of cooperation disputed by the parties. Instead, he reviewed the matter holistically and ruled that overall the defendants had not provided satisfactory cooperation in the civil action such that they are entitled to ACPERA benefits. He indicated that the cooperation the defendants provided to the plaintiffs over five years amounted to little more than compliance under the federal rules governing discovery. "ACPERA, however, requires more," he stated. "Section 213(b) obligates an amnesty applicant in a civil action to provide a 'full account' of 'all facts known' and 'all documents' that are *potentially* relevant to the civil action."

Interestingly, the parties disputed whether the court should make the ACPERA determination before or after trial. Judge Wu ruled that the ACPERA determination should be made before trial. This contrasts with Judge Phyllis J. Hamilton's finding that the "court is ... required to make the substantive determination whether the amnesty applicant has satisfied the requirements of the civil amnesty provisions near the end of litigation, not at the outset." *Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128, 1133 (N.D. Cal. 2011). A compelling argument can be made that this determination should be made sooner in the case, so as to provide certainty to parties evaluating the risks of settling or taking a case to trial. This argument is supported by the recent amendments to ACPERA, which made explicit that in determining whether an applicant's cooperation was sufficient the court must evaluate "the timeliness of the [] cooperation." This approach would also tend to mitigate the desire of applicants to hedge their bets by withholding cooperation in the hopes that a plaintiff's case will be dismissed early in the litigation. An applicant's conduct in seeking to dismiss a claim based upon facts that the applicant has acknowledged to be a violation of the antitrust laws frustrates Congress' purposes in enacting ACPERA.

A decision interpreting ACPERA has widespread implications because most, if not all, antitrust litigation involves an applicant. Sen. Orrin Hatch remarked that applicants are entitled to a limitation on their damages under ACPERA only if they "provide adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct." 150 Cong. Rec. S 3615. As an applicant is solely liable for its actual damages from its own product sales, not for trebled damages or for the sales of its co-conspirators, ACPERA benefits may amount to just as many zeroes in savings for defendants as recovery for plaintiffs in multimillion-dollar

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lawsuits.

Judge Wu's decision provides much needed clarity as to ACPERA, and has caused applicants and their counsel to re-evaluate the timing and quality of their cooperation with civil plaintiffs. AALP signals that impassive efforts at whistleblowing will no longer be tolerated in the antitrust sphere.