SPECIAL REPORT

YEAR IN REVIEW: CRIMINAL ENFORCEMENT BY THE DOJ ANTITRUST DIVISION IN 2023

McDermott Will & Emery

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INTRODUCTION

When it comes to antitrust criminal enforcement, 2023 will be remembered as the year when the US Department of Justice's (DOJ) Antitrust Division redefined and tested the outer boundaries of its authority. Here is a look back at the key events that defined the DOJ's year in criminal antitrust enforcement.

LOSSES IN LABOR MARKETS

The DOJ continued its focus on labor markets in 2023 by pursuing *per se* no-poach and wage-fixing prosecutions despite resounding resistance by fact finders. In these cases, the DOJ alleged that companies and executives restrained trade in labor markets in violation of Section 1 of the Sherman Act through agreements that restricted movement and suppressed the wages of workers.

Courts have allowed these *per se* no-poach and wage-fixing cases to survive the motion to dismiss stage of litigation, but the DOJ's success has routinely ended there. In 2022, the DOJ tried its first criminal no-poach case in ***US v. DaVita***, which was successfully defended by McDermott and resulted in a complete acquittal of both corporate and individual defendants. In 2023, the DOJ fared no better:

- In ***US v. Manahe*** (D. Maine), the DOJ charged four business managers in an alleged conspiracy to fix the wages and restrict the hiring of personal support specialist workers for two months during the pandemic. The government presented evidence such as text messages discussing hourly wages and recordings of meetings between the defendants, while the defendants countered by showing that the discussed prices were not implemented, and a draft agreement went unsigned. The jury acquitted all four defendants following a two-week trial in March 2023.
- As we previously reported, the DOJ suffered a blow in ***US v. Patel*** (D. Connecticut) in April 2023. During a four-week trial, the government alleged that defendants conspired to restrict the hiring and recruiting of skilled workers and engineers in the aerospace industry. The defense moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, an extreme lever that judges rarely pull to end a trial before it reaches the jury. Judge Victor A. Bolden granted the motion and acquitted all the defendants. He found that the engineers' freedom to switch companies and the number of exceptions to the agreements could not support finding market allocation as a matter of law.
- In November 2023, the DOJ stunningly moved to dismiss its own case alleging a conspiracy by outpatient medical care competitors not to solicit senior-level employees. The case was three years into litigation; in its motion, the DOJ simply stated that dismissal would conserve court time and resources. This was the DOJ's last pending no-poach case against a corporation.

If the DOJ's labor markets cases have a theme, it is this: If at first you don't succeed, try, try again. Despite four straight losses and a voluntary dismissal, the DOJ remains undeterred in bringing additional criminal wage-fixing and no-poach suits. The Biden administration's "whole of government" approach to enforcement means that shared resources and collaboration among agencies, including the DOJ and the National Labor Relations Board, will continue into 2024. Assistant Attorney General Jonathan Kanter left no doubt that the DOJ is doubling down on its executive authority despite a losing track record in court: "Let me confirm: We are just as committed as ever to, when appropriate, using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets." Addressing the Women's White Collar Defense Association in December 2023, Deputy Assistant Attorney General Doha Mekki echoed, "We look forward to charging more no-poach and wage-fixing cases."

PER SE PROBLEMS

The DOJ stumbled in a different *per se* setting in December 2023, when a three-judge panel on the US Court of Appeals for the Fourth Circuit affirmed fraud charges but reversed the *per se* bid-rigging conviction of a steel and aluminum manufacturing sales manager turned executive. In *US v. Brewbaker*, the appellate panel found that "caselaw and economics show that the indictment failed to state a *per se* antitrust offense as it purported to do."

In its 2020 indictment, the DOJ alleged that Brent Brewbaker of Contech Engineered Solutions conspired with a North Carolina distributor and exclusive dealer, Pomona Pipe Products, to share total bid pricing information on North Carolina Department of Transportation (NCDOT) aluminum projects and use that information to purposefully submit losing bids. This allegedly appeased Pomona and maintained Contech's status on NCDOT's "emergency bid list." Contech pled guilty, but Brewbaker continued to trial. A jury found him guilty of bid rigging and other fraud charges; he appealed.

The Fourth Circuit held that the DOJ's indictment implicated Contech and Pomona as horizontal competitors in NCDOT aluminum projects and as vertical competitors through their manufacturer-dealer relationship, resulting in a "hybrid" restraint. The DOJ sought to isolate Contech's role as a manufacturer and competing bidder for NCDOT aluminum projects, focusing solely on the horizontal nature of the restraint and subsequently arguing for *per se* treatment.

The panel did not accept the DOJ's argument that the conspiracy itself involved only horizontal *conduct* and instead considered the parties' competitive *relationship*, which involved both horizontal and vertical aspects. The panel found that "agreements that look otherwise identical in form produce different economic effects based on how the parties relate to one another," and stated that the DOJ's theory would "force . . . arbitrary and likely impossible line-drawing" to determine which "part" of the entity to consider. The court continued, "The Sherman Act doesn't ignore reality; it treats the entire business entity as the single party it is. . . . Antitrust law does not turn on such artificial mental gymnastics."

Under this premise, the court moved through an analysis of case law and economic rationale to determine appropriate scrutiny. Although there is no direct guidance on hybrid restraints in the bid rigging context, the panel contrasted the present case with *Leegin Creative Leather Products*, 551 U.S. 877 (2007), where the Supreme Court of the United States applied *per se* scrutiny to a price fixing case despite both horizontal and vertical elements. In *Brewbaker*, the court found instead that the restraint in the indictment should not have been subject to the *per se* standard based on precedent, nor would it invariably lead to anticompetitive effects upon economic analysis—all making *per se* scrutiny inappropriate. As a result, and in a blow to the DOJ, the court reversed Brewbaker's Sherman Act conviction.

IN FULL (STRIKE) FORCE

The DOJ's Procurement Collusion Strike Force (PCSF) succeeded in securing several guilty pleas and stiff penalties in 2023. The PCSF is tasked with training government personnel and enforcing antitrust and fraud laws related to government contract bidding, grants and program funding.

PCSF Director Daniel Glad spoke to the National Association of State Procurement Officials in November 2023, highlighting the state and agency partnerships that comprise the PCSF. He pushed for even greater collaboration with state officials in 2024 and coming years, noting the recent influx of funds from the Infrastructure Investment and Jobs Act, which authorized billions of dollars in transportation and infrastructure programs. Later that month, the PCSF held its first summit to discuss strategies, priorities and resources. As reported by the DOJ, attendees included

11 "law enforcement partners" from across the country and 22 US Attorneys' Offices.

These partnerships have surely strengthened the PCSF, and it has an extensive track record of successful convictions and guilty pleas. Among them are the following:

- In January 2023, military contractor Aaron Stephens pleaded guilty to rigging bids related to the maintenance and repair of military tactical vehicles, following his alleged co-conspirator Mark Leveritt's guilty plea July 2022. In August 2023, Stephens received an 18-month prison sentence and a $50,000 criminal fine. Leveritt received a six-month sentence and a $300,000 fine.
- Also in January 2023, a construction company owner received a 27-month sentence and was ordered to pay a $1.75 million fine for fraudulently securing government contracts meant for service-disabled veteran-owned small businesses.
- A Metropolitan Transportation Authority (MTA) employee out of New York pleaded guilty to engaging in wire fraud related to MTA excess vehicle auctions. Assistant Attorney General Jonathan Kanter described the conduct as "stealing from the public" and promised that the DOJ would continue to "detect and punish" those who abuse the public trust. Two additional guilty pleas by fellow MTA employees followed.
- An insulation contractor out of Connecticut was the seventh person sentenced in a bid rigging and contract fraud investigation, resulting in a 15-month prison sentence and a restitution fine of more than $1 million. The alleged scheme related to insulation contracting at both public and private institutions, including universities and hospitals.
- In March 2023, a Georgia jury found three military contractors guilty of conspiring to defraud the United States and two counts of major fraud related to two years of conduct.
- A construction company owner faced a 78-month prison sentence and an almost $1 million restitution fine for bid rigging and bribery involving the California Department of Transportation (Caltrans). Defendant Bill Miller previously pled guilty to recruiting others to submit sham bids and to paying almost $1 million in cash bribes to a Caltrans contract manager. The manager himself received a 49-month prison sentence and a similar restitution fine, and a co-conspirator who submitted false bids received 45 months in jail and a $797,940 restitution fine.
- A Texas judge ordered corporate defendant J&J Korea to pay almost $9 million for wire fraud and conspiracy to restrain trade related to subcontract work for US military hospitals in South Korea. A grand jury indicted two corporate officers for the same conduct in 2022.
- Three military contractors received their sentences in December 2023 following a jury trial related to their alleged procurement fraud scheme. The defendants' sentences included prison, supervised release and fines ranging from $50,000 to $250,000.

In December 2023, the PCSF also secured a seven-count indictment using wiretap evidence to charge two forest firefighting services executives with bid rigging, allocating markets and fraud. Wiretap evidence is rarely used in cartel investigations and marks a meaningful step in PCSF's investigative approach. PCSF likely has already begun obtaining wiretap evidence in other cases and, based on its success in 2023, will continue pursuing aggressive investigative and litigation strategies moving forward.

PARTNERSHIPS AND COLLABORATION

Taking the PCSF to the global stage, the DOJ announced a joint initiative with Mexico's Federal Economic Competition Commission and the Canadian Competition Bureau to collaborate on "outreach to the public and business community about anti-competitive conduct, as well as on investigations, using intelligence sharing and existing international cooperation tools" in the run-up to the 2026 FIFA World Cup to be hosted across the three countries.

In addition to its international partnerships for the World Cup, the DOJ is tackling technology with global efforts. In November 2023, DOJ leaders met with G7 competition authorities in Tokyo to discuss competition in digital markets and enforcement priorities. This was one in a series of meetings among authorities that have taken place since 2019 with a goal of setting and issuing guidance on shared priorities for regulating competition in tech. Following the summit, the group published a "communique" grounded in concern around emerging technologies, including risks in the criminal realm. The leaders noted, "As firms increasingly rely on AI to set prices to consumers, there is risk that such tools could facilitate collusion or unfairly raise prices."

This sentiment is consistent with statements made earlier in the year by DOJ leadership. For example, Principal Deputy Assistant Attorney General Doha Mekki highlighted the role of technology in information exchanges. She described the current "inflection point" of algorithms, data and cloud computing as creating new market realties. Assistant Attorney General Jonathan Kanter stated that artificial intelligence's "boundless potential" comes with "risks [that] transcend borders." The consistency of rhetoric and global dedication to tackling the risks of emerging technology signals a potentially busy 2024 in this space.

The DOJ also continued its practice of partnering with fellow domestic law enforcement agencies. For example, the DOJ secured three guilty pleas in August 2023 for bid rigging asphalt paving services contracts in Michigan from 2013 to 2021. The DOJ worked with the Offices of Inspector General for the US Department of Transportation and the US Postal Service, and highlighted the partnership in public statements on the pleas. Deputy Assistant Attorney General Manish Kumar said, "Along with our law enforcement partners, the division will continue to seek justice when corporations and their leaders deprive customers of fair and open competition." Cross-agency collaboration is a hallmark of the DOJ's criminal enforcement and there is no reason to believe this practice will change in 2024.

ANYTHING BUT GENERIC REMEDIES

In August 2023, the DOJ announced that it had entered into two unprecedented deferred prosecution agreements (DPAs) to resolve price fixing charges in the generic drug industry against Teva Pharmaceuticals USA, Inc., and Glenmark Pharmaceuticals, Inc. Teva and Glenmark agreed to pay $250 million and $30 million, respectively, in criminal penalties and compliance monitoring, with Teva also obligated to donate $50 million worth of drugs to aid organizations. These agreements included divestitures of the companies' product lines for the cholesterol drug pravastatin, alleged as central to the alleged price fixing conspiracy underlying the agreements. These arrangements are unusual for two reasons.

DPAS

First, DPAs are typically unfavored by the government and used as incentives for cooperation early in investigations. It is striking that the DOJ entered into these agreements in such an advanced stage of litigation, where five other corporations and three individuals had already admitted to the implicated

conspiracy. DPAs are agreements between the government and defendants in which the defendants accept certain penalties in exchange for prosecutors stopping their pursuit of the underlying charges. Prosecutions are "deferred" indefinitely while defendants fulfill their end of the bargain. Although both DPAs and plea agreements involve admitting wrongdoing, DPAs allow defendants resolution without admission of legal guilt. In the event defendants fail to meet the terms of the agreement, the government resumes its prosecution and seeks convictions.

"EXTRAORDINARY" REMEDIAL MEASURES

Second, both DPAs involved unheard of divestitures of product interests in the cholesterol drug pravastatin, with Teva's DPA requiring an additional measure of $50 million in donated clotrimazole and tobramycin to humanitarian organizations. All three generic drugs were impacted by the charged conspiracy. This remedy is first of its kind—criminal antitrust enforcers historically have sought monetary and prison sentences only. However, DOJ criminal enforcers driving outside of their historic lane is not necessarily inconsistent or surprising. The current administration has repeatedly committed to "using the whole legislative toolbox" in litigation.

Deputy Assistant Attorney General Manish Kumar stated in October 2023 that these divestitures were appropriate in the "heavily regulated" context of generic pharmaceuticals, where a corporate conviction could have precluded Teva and Glenmark's participation in federal drug programs to such an extent that the companies would have gone out of business. Of course, these are not the first defendants to face corporate convictions in heavily regulated industries, and they are not even the first to do so in this specific alleged conspiracy.

Whether this specific tool will build or break down competition, whether criminal enforcers are equipped to evaluate the impact of divestiture, and whether it is appropriate to test this novel approach in an industry with an alleged prolific conspiracy among major players and thus among potential buyers remains to be seen. For better or worse there will be more data points to answer these and other uncertainties: Kumar noted that the DOJ hopes to implement divestitures as criminal remedies "in other contexts" moving forward.

INVESTIGATION NEARING ITS END

On November 16, 2023, in a surprising turn of events shortly after the DOJ announced the resolutions with Teva and Glenmark, the DOJ moved to dismiss a February 2020 indictment against Ara Aprahamian, a former senior executive of Taro Pharmaceutical Industries charged with fixing prices, rigging bids and allocating markets for generic drugs. The district court granted the motion to dismiss the indictment with prejudice. Prior to filing the motion, the DOJ had been preparing for a February 2024 criminal trial against Aprahamian. As a result of these recent actions, the DOJ has no remaining public proceedings in connection with its investigation of pricing in the generic drug industry. And, in December 2023, a district court overseeing the multidistrict civil litigation against generic drug manufacturers for the same alleged conduct terminated the DOJ's intervenor status in the case. Thus, the DOJ's nearly decade-long investigation of the generic drug industry appears to be ending.

MONACO ON MERGERS AND CORPORATE COMPLIANCE

In a speech at the Society of Corporate Compliance and Ethics' Annual Compliance & Ethics Institute, Deputy Attorney General Lisa Monaco emphasized the importance of compliance programs and announced a safe harbor policy for voluntary self-disclosures of

antitrust wrongdoing by companies engaged in mergers and acquisitions.

COMPLIANCE

Deputy Attorney General Monaco focused her remarks on the increased importance of, and scrutiny on, corporate compliance programs. She noted that under a new initiative, every resolution by the Criminal Division requires companies to add compliance-promoting criteria to compensation systems. She also shared that the Division is enacting "clawback credits" to incentivize tying executive compensation to compliance. Remaining focused on bottom lines, she warned: "Invest in compliance now or your company may pay the price—a significant price—later." These sharp words are consistent with the DOJ's increased rhetoric on and policy prioritization of compliance programs throughout 2023.

MERGERS & ACQUISITIONS SAFE HARBOR POLICY

Deputy Attorney General Monaco also commented on the recently unveiled DOJ-wide safe harbor allowing companies to report misconduct by the companies they seek to acquire or merge with. The covered conduct must be discovered through the M&A process. Conduct that should have otherwise been disclosed or which could have been publicly known does not count. Conduct already known to the DOJ is not entitled to safe harbor protection either.

Monaco stated, "Going forward, acquiring companies that promptly and voluntarily disclose criminal misconduct within the Safe Harbor period [six months from date of closing], and that cooperate with the ensuing investigation, and engage in requisite, timely and appropriate remediation, restitution, and disgorgement [within one year of closing]—they will receive the presumption of a declination." In line with remarks by enforcers earlier in the year, Monaco specifically highlighted cybersecurity, tech and national security as areas of heightened risk and thus heightened scrutiny. Corporations in these markets should take heed of the DOJ's emphasis on corporate compliance in 2024.

LOOKING AHEAD

In 2023, criminal antitrust authorities used novel approaches at every stage of enforcement—from charging decisions to partnerships, to litigation, to remedies— and they show no sign of slowing down in 2024. The emergence of new technologies and a policy promise to forego old guideposts takes the DOJ further from the familiar, and perhaps further from its expertise.

In a high-stakes election year and with an influx of federal funds in infrastructure and defense spaces, the DOJ will likely hit the accelerator sooner than it hits the breaks. Markets that impact maximum voters, including employment, tax-funded government contracts, national security and healthcare, are likely focuses. All considered, it is more important than ever for businesses and individuals to stay up to date on policy priorities, revamp and champion internal compliance programs, and seek agile counsel in the ever-changing landscape of criminal enforcement to avoid costly investigations.

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