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INTRO

Without question, 2022 has been a remarkably busy time for the US Department of Justice's (DOJ's) Antitrust Division (Division). Over just a few months, the Division rolled out meaningful revisions to its leniency policy aimed at encouraging prompt reporting of criminal violations, announced that it will (for the first time in nearly 50 years) bring criminal monopolization cases under Section 2 of the Sherman Act, continued to increase enforcement resources, and brought a number of new cases and obtained multiple guilty pleas.

However, activity does not always mean success. If there is any theme that defines the Division's efforts over the last quarter, it is this: If at first you don't succeed, try, try again. That is exactly what the Division has done. It tried two labor markets cases, ultimately losing both on a new and untested legal theory. And, over strong objections from a district court, the Division pursued an unprecedented third trial against those in the broiler chicken industry, resulting in a full acquittal for all defendants. None of this, however, has deterred the Division from continuing to pursue new investigations and bring new cases under novel legal theories.

In this installment of Cartel Corner, we examine recent and significant developments in antitrust criminal enforcement and profile what the Division has highlighted as its key enforcement priorities. If the past is prologue, we are bound to see more aggressive antitrust enforcement in the months to come, testing the boundaries of current antitrust law. Whether the Division can ultimately shift those boundaries, however, remains to be seen.

KEY DEVELOPMENTS IN COMPETITION

EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY – ONE YEAR LATER

In July 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy. This order affirmed his administration's policy to combat excessive consolidation, abuses of market power, and the harmful effects of monopolies and monopsonies. It also directed that antitrust enforcement should focus on healthcare, labor, agricultural markets and the tech sector. The order called for a coordinated federal government response to competition issues—a whole-of-government approach that has become a hallmark of this administration. At the one-year anniversary of the order, the White House described the actions it has taken in the past year to carry out the policy announced in the order.

IMPENDING CRIMINAL MONOPOLIZATION CASES

Earlier this year, Deputy Assistant Attorney General (DAAG) Richard Powers revealed that the DOJ intended to investigate and pursue alleged criminal violations of Section 2 of the Sherman Act. While criminal enforcement of the antitrust laws has traditionally focused on *per se* anticompetitive agreements between two or more horizontal competitors, Section 2 primarily focuses on conduct by one firm or company with significant market power. The Division has not criminally prosecuted a Section 2 case in approximately 50 years. This change would mark a radical departure from longstanding DOJ antitrust enforcement of monopolization claims and an expansion of its cartel enforcement efforts.

The Division described what a Section 2 criminal case could look like in its recently updated Antitrust Primer for Federal Law Enforcement Personnel:

> Section 2 of the Sherman Act makes it a crime to conspire to monopolize, among other things. Such a conspiracy could represent, among other scenarios, (1) a conspiracy to monopolize through *per se* Section 1 anticompetitive conduct (*e.g.*, market allocation); or (2) a conspiracy to monopolize through other criminal conduct.
>
> The elements of a Section 2 conspiracy offense are:
>
> 1. An agreement;
> 2. A specific intent to monopolize, *i.e.*, an intent to (1) acquire or maintain a monopoly (2) via anticompetitive or exclusionary conduct; and
> 3. A nexus to interstate or foreign commerce.

DAAG Powers subsequently noted that the Division's plan to bring criminal cases for breaches of Section 2 is more than just "an academic exercise" and stated that the Division is actively investigating conduct in several sectors of the economy. Powers further announced in June 2022 that the Division does not plan to provide guidance regarding what criminal enforcement of a Section 2 claim may look like but stated that "there's ample case law out there to help inform those who have concerns or questions." This means that companies and their counsel seeking to understand the contours of a criminal Section 2 claim must rely on court decisions from many decades ago.

It remains to be seen whether this significant change to the Division's longstanding criminal enforcement practices will result in criminal cases based solely on Section 2 alleged conduct. The DOJ would face burden of proof challenges by suddenly trying to introduce criminal liability to Section 2 claims. Since the lesser rule of reason imposes a balancing test that is akin to the preponderance-of-evidence standard, the higher criminal beyond-a-reasonable-doubt burden of proof could clash with existing case law and agency guidelines on Section 2 enforcement standards. Still, given the high-profile rollout of this enforcement expansion, companies should consider agreements with competitors that may exclude other competitors from the market in their antitrust risk evaluations.

REVISIONS TO LENIENCY POLICY

This spring, the DOJ announced meaningful updates to its Corporate Leniency Program and the FAQs that explain the program. The Division stated that the updates were intended to increase its "commitment to transparency, predictability, and accessibility in antitrust enforcement." The Leniency Program generally provides immunity from prosecution for the first company or individual to self-report its participation in a criminal antitrust conspiracy and cooperate fully with the Division's investigation, in addition to other program requirements.

The DOJ revised the Leniency Program to institute a promptness requirement. Companies seeking leniency must now promptly self-report after discovering wrongful conduct. This change reflects the DOJ's emphasis on timely cooperation. Another key change is a requirement that a leniency applicant presents a defined, conduct-specific restitution plan to receive a conditional leniency letter. The plan must be appropriately tailored to prevent recidivism.

INCREASING ENFORCEMENT RESOURCES

In conjunction with the administration's focus on competition-related issues, the Division has sought budget increases for its antitrust programs for the second year in a row. Attorney General (AG) Merrick Garland previously noted that "reinvigorating Antitrust enforcement" was a top priority for the DOJ. In fiscal year 2022, the Division requested an increase of almost $17 million for its budget, and for fiscal year 2023, it has sought a historic budget increase of $88 million. In its request, the Division noted that these funds would provide for more than 100 new lawyers and more than 100 new paralegals and other staff. It would also provide for approximately 25 additional personnel to help modernize the Division's information technology.

The Division is already ramping up its hiring of trial attorneys. According to the federal jobs hiring site, the Division is seeking to fill "many vacancies" in each of its locations—Washington, DC, New York, Chicago and San Francisco. Such hiring would result in a remarkable influx of resources that would vastly expand and bolster the Division's ability to scrutinize, investigate, pursue and prosecute alleged antitrust violations in its current priority areas, including government procurement (PCSF), labor markets, healthcare and consumer products.

LABOR MARKETS

The DOJ continues its efforts to create a novel area of potential criminal liability for labor market investigations. Historically, government enforcement of alleged anticompetitive labor market practices occurred in the civil context, resulting in fines for companies and individuals found to have participated in inappropriate practices. In late 2016, the DOJ began its campaign to expand Section 1 of the Sherman Act to include naked wage-fixing and no-poach agreements. Since then, labor market criminal investigations—now under their third administration—have become a programmatic and core DOJ investigative priority. This policy shift has resulted in many investigations and more than a dozen criminal cases filed against individuals and corporations to date.

The DOJ's first two prosecutions for alleged labor market crimes went to trial in spring 2022. The DOJ's attempts to jam a square peg into a round hole of a *per se* antitrust law violation resulted in full acquittals on the charged Sherman Act conduct in both instances. Despite the lack of precedent supporting the prosecution of certain labor market practices as *per se* criminal violations, the DOJ in both instances asserted that the mere existence of any naked wage-fixing or no-poach agreement would constitute a crime. In *United States v. Jindal*, the first-ever wage-fixing case, the DOJ alleged that the defendants entered into a conspiracy to suppress competition by agreeing to fix prices to lower the pay rates of certain employees. On April 14, 2022, a Texas jury found both defendants not guilty of all Sherman Act charges but convicted one defendant of obstructing a Federal Trade Commission (FTC) investigation.

In *United States v. DaVita, Inc. and Kent Thiry* (McDermott represented Mr. Thiry in the investigation and trial), the DOJ indicted the defendants on three counts of criminal conspiracy to allocate the market for employees by allegedly entering into non-solicitation agreements with three other companies. This was a landmark case of first impression—the first criminal trial of its kind for liability under the Sherman Act for so-called non-solicit agreements. The court did not agree with the DOJ that a typical *per se* approach was appropriate. First, the judge held that not every non-solicitation, or even every no-hire, agreement would allocate the market and be subject to *per se* treatment. The court also required the DOJ to prove that the defendants acted with the specific intent to constrain the labor markets. Given the draconian nature of the *per se* standard, the court held that the DOJ would "not merely need to show that the defendants entered the non-solicitation agreement and what the terms of the agreement were. It will have to prove beyond a reasonable doubt that the defendants entered into an agreement with the purpose of allocating the market" and that the defendants "intended to allocate the market as charged in the indictment."

There were two important jury instructions in the same matter. In one, the court instructed that the jury "may not find that a conspiracy to allocate the market for the employees existed unless you find that the alleged agreements and understandings *sought to end meaningful competition* for the services of the affected employees." The jury inquired about what "meaningful competition" meant. The court instructed that "meaningful competition" essentially is another way of saying "significant competition" or "competition of consequence." In the other key jury instruction, the court instructed the jury that "*evidence of lack of harm or procompetitive benefits might be relevant* to determining whether defendants entered into an agreement with the purpose of allocating the market."

Ultimately, on April 15, 2022, a Colorado jury acquitted both defendants of all charges, casting doubt as to whether the *per se* standard is appropriate for alleged "no-poach agreements" and whether criminal prosecution is appropriate for such alleged agreements.

Other defendants charged with alleged no-poach agreements have challenged the appropriateness of the *per se* standard in labor market criminal prosecutions. In *US v. Patel, et al.*, the DOJ indicted six former aerospace executives for allegedly agreeing not to hire or solicit employees from one another's companies. In a recent motion to dismiss, the defendants argued that their case did not involve a naked horizontal agreement between competitors. Instead, the "allegations hinge on an agreement in furtherance of a legitimate business collaboration, removing it further from the reach of the *per se* rule than any prosecution to date." Defendants further argued that the alleged no-poach was limited, applying only to specific employees working on specific projects. The court has yet to decide whether it will sustain the DOJ's aggressive stance and allow this case to proceed to trial.

TAKEAWAYS

- In the *DaVita/Thiry* trial, the court ruled that the DOJ would need to prove that the defendants acted with the purpose or intent to allocate the market as charged in the indictment. This is a potential watershed moment for Section 1 litigation. In typical criminal antitrust enforcement, the general intent is conflated with the agreement itself—*i.e.*, the parties knowingly intended to agree. But where the DOJ seeks to create a new category of *per se* liability or push the outer boundaries of traditional categories of *per se* offenses, a required specific intent to allocate the alleged market may be significant.
- The DOJ continues to take an assertive posture on what it means to be a horizontal competitor in labor market investigations and prosecutions. Even in instances where a company may not compete with another company in its business, or where vertical relationships exist, the DOJ deems competition for employee labor to be the determining factor. This has the potential to significantly broaden the definition of "competitor" for Section 1 litigation.
- In typical antitrust cartel investigations, the focus has traditionally been on alleged conspiracies relating to pricing, sales or bidding regarding certain products or in certain geographic areas. The DOJ is trying to shift this typical landscape with its criminal approach towards labor market antitrust cases. In response to the DOJ's aggressive approach, companies should be vigilant and stay current with regard to their antitrust compliance and should recognize that labor markets remain a focus, despite the DOJ's recent trial losses. Groups and individuals involved in hiring and compensation-related decisions may benefit from antitrust training relating to these issues, and they should ensure that direct and third-party employment agreements and arrangements are made with antitrust laws in mind.
- Despite its losses, the DOJ does not intend to back off of its aggressive posture in labor market investigations. Shortly after the *DaVita/Thiry* verdict, Assistant Attorney General (AAG) Jonathan Kanter noted that the DOJ "won't back down." In a recent filing in another charged labor market case (*US v. Hee*), the parties indicated that they had reached a preliminary resolution relating to alleged wage-fixing and no-hire agreements. A potential guilty plea would provide the DOJ with its first-ever successful criminal prosecution of a labor market antitrust case and would likely embolden the DOJ even further on these matters.

NEW LABOR MARKET MOUs WITH NLRB

In July 2022, the National Labor Relations Board (NLRB) penned two interagency Memorandum of Understandings (MOU) with the DOJ and the FTC that will allow the agencies to share information and coordinate enforcement actions on potential labor market antitrust investigations and violations. Although MOUs generally do not permit agencies to do something that they are not otherwise permitted to do, it is yet another signal from the Biden administration of future collaborations between the NLRB, the DOJ and the FTC on labor market investigations. This whole-of-government approach will facilitate both the DOJ's and the FTC's robust engagement on a wide range of labor market issues. Importantly, the DOJ-NLRB MOU permits referrals to the DOJ from the NLRB, after which "the Antitrust Division will determine whether to open a civil or criminal investigation into the conduct and, after investigation, whether to bring a lawsuit based on the complaint." The potential for referrals from the NLRB to the DOJ, as well as eased information sharing, raises the stakes for individuals and companies being investigated by the NLRB.

PROCUREMENT

Procurement continues to be a priority for DOJ investigations and prosecutions. In fact, the Procurement Collusion Strike Force (PCSF) has been active in recent months, obtaining a number of convictions and bringing some new indictments.

US V. PADRON (W.D. TX.)

On June 29, 2022, a Texas jury convicted Angelo Padron, the owner of several construction companies, of defrauding the US Small Business Administration (SBA) out of more than $240 million between 1998 and 2018. Padron allegedly pretended his companies were disabled veteran-owned businesses in order to secure certain government contracts. Padron was convicted of one count of conspiracy to defraud the United States and six counts of wire fraud. The DOJ had alleged that Padron's companies would hire disabled veterans and name them as the owner of various businesses to qualify for set-aside contracts from the SBA's Service-Disabled Veteran-Owned Small Business Program. According to the DOJ, Padron continued to control his businesses even though disabled veterans were the business owners on paper.

US V. GUILLORY (E.D. LA.)

In early 2021, Johnny C. Guillory, Sr., was charged with conspiring to defraud the United States and making false statements. The DOJ alleged that Guillory conspired with Cajan Welding & Rentals, Ltd. and others to seek out non-public pricing and cost information to win subcontract awards and funding from the US Department of Energy. Cajan was awarded more than 50 Department of Energy subcontracts and received more than $15 million in payments from 2002 to 2016. Guillory also allegedly received financial benefits from Cajan. Guillory was convicted on May 18, 2022, on both counts after a jury trial.

CORRECTION: *[8/25/2022] An earlier version of this article erroneously stated that Fluor Federal Petroleum Operations, LLC, and Johnny C. Guillory, Sr., were charged with crimes. Only Mr. Guillory was charged; FFPO intervened in the matter.*

US V. YONG (E.D. CAL)

On April 11, 2022, Choon Foo "Keith" Yong agreed to enter a guilty plea in the US District Court for the Eastern District of California. Yong and two others allegedly conspired from 2015 to 2019 to rig government contract bids involving improvement and repair contracts. In return for rigging bids, Yong received more than $800,000 in bribes and unlawful payments in the form of cash, wine, furniture and remodeling services on his home. Yong was a senior transportation engineer at Caltrans between 2015 and 2019.

US V. O'BRIEN, ET AL. (M.D. FLA.)

In April 2022, the DOJ indicted three individuals for conspiring to rig bids for customized promotional products sold to the US military. Two of the individuals also were charged with defrauding the government. The three individuals allegedly sold millions of dollars' worth of customized promotional products to the military, which the military used for recruitment and retention of its service members. The DOJ alleged that between 2014 and 2019, the defendants shared their bids with one another and determined a winner in advance of submitting bids to the military. The DOJ also alleged that the individuals set up shell companies to submit fake bids so that the procurement process would appear to be competitive, when in fact it was not. The individuals also allegedly altered bids to make them appear to come from different sources.

US V. STEPHENS (E.D. TEX.)

In May 2022, the DOJ indicted Aaron Stephens for allegedly conspiring to rig bids on eight government contracts between 2013 and 2018 in Texas and Michigan. Stephens allegedly received more than $15 million from the Red River Army Depot, the US Army Contracting Command and the Sierra Army Depot for the work.

U.S. V. LEVERITT (E.D. TEX.)

On July 13, 2022, John "Mark" Leveritt entered a plea of guilty to rigging government contract bids from May 2013 to April 2018. According to the plea agreement, Leveritt conspired to rig bids on government contracts worth more than $17.5 million by falsely representing himself to be an employee of one business so that he could obtain government contracts that were set aside for qualifying businesses that were required to be owned and operated by certain categories of minority, disadvantaged or disabled persons. In exchange for helping to secure contracts performed for the Red River Army Depot and the US Contracting Command in Warren, Michigan, Leverett provided benefits to a government procurement official, including tickets to a 2011 World Series game, tickets to two college football games, two expense-paid family vacations to Las Vegas, approximately 100 meals at restaurants and donations to youth sports teams coached by the government employee.

SOUTH KOREAN ENGINEERING AND CONSTRUCTION COMPANIES SETTLE FALSE CLAIMS ACT ALLEGATIONS

In May 2022, seven South Korean companies agreed to pay $3.1 million to resolve civil False Claims Act allegations for bid rigging on US Department of Defense contracts. The involved companies included Korea Engineering Consultants Corporation; Yul Lim Construction Co., Ltd.; Shin Woo Construction & Industrial Co., Ltd.; Seongbo

Const. Ind. Co., Ltd.; Wooseok Construction Co., Ltd.; Yuil Engineering and Construction Co.; and Seokwang Development Co., Ltd. The bid rigging conspiracy allegedly targeted US Army Corps of Engineers contracts for construction and engineering work on US military bases in South Korea.

TAKEAWAYS

- Investigations and prosecution of cases involving government contracting remain a top priority for the DOJ and the PCSF, which seek to hold accountable those companies and individuals who defraud US taxpayers. The PCSF is closely watching how and where government dollars are being spent at both the federal and local level.
- The PCSF's two primary areas of focus remain set-aside fraud and infrastructure fraud. Other PCSF focus areas include healthcare, energy, technology, supply chain and stimulus-related matters.
- The PCSF continues to use data analytics to identify potential collusion, suspicious procurement bidding and other types of fraud.
- The PCSF has dozens of open investigations and a significant number of charged cases, and thus will remain active in the coming months. Its recent activity should stimulate companies to continue to monitor and review their compliance programs and protocols to ensure they are up to date.
- The PCSF continues to collaborate with and leverage the resources of numerous other law enforcement agencies in its investigations and prosecutions. This is consistent with the Biden administration's whole-of-government approach.
- The PCSF it not limiting its enforcement to antitrust violations—it is also investigating and prosecuting other alleged conduct relating to the government procurement process, including fraud and bribery.

CONSUMER PRODUCTS

Consumer products continue to be a top DOJ priority. In addition to pursuing its long-running broiler chickens investigation, the DOJ remains active in commercial flooring and e-commerce, among other areas. The latest developments in these investigations reflect the DOJ's persistent approach to prosecuting high-ranking individuals, even with limited evidence.

BROILER CHICKENS

The DOJ's first two trials in its ongoing investigation into the broiler chicken industry both resulted in mistrials in December 2021 and March 2022 in Denver after two separate juries were unable to reach verdicts on charges against any of 10 individual defendants. The DOJ had alleged that the defendants agreed to fix prices for chicken sold to restaurant chains and other stores in the United States. After the second mistrial, the DOJ stated its intention to try the case against the defendants a third time. In response, the court summoned AAG Kanter to appear for a hearing—a highly unusual step—to explain the government's decision to pursue a third trial against the defendants.

Before the hearing could occur, the DOJ dismissed five of the 10 defendants. At the April 14, 2022, hearing, the court questioned AAG Kanter about the standard in the DOJ prosecutorial manual for bringing a criminal case and about the evidence presented in the first two trials. Ultimately, the third criminal trial (an uncommon occurrence) commenced against five former broiler chicken company executives in June 2022. The DOJ's tactic of cutting the number of defendants in half and trying to streamline the evidence presented to the third jury proved unsuccessful, and the jury acquitted the five remaining broiler chicken executives on July 7, 2022.

Despite these results, the DOJ continues to press forward with its broiler chickens investigation. The DOJ had separately charged four additional individuals relating to the same price-fixing investigation, including adding recent charges for obstruction of justice, alleging that one of the defendants intimidated a witness and destroyed evidence. But notably on August 5, 2022, the DOJ dropped its criminal charges against half of the individuals. This case is scheduled for trial in Denver in October 2022. The DOJ also has charged two companies in a different case that is scheduled for trial in April 2023, also in Denver. To date, the DOJ's long-running and wide-ranging investigation has resulted in only one conviction: a corporate guilty plea from Pilgrim's Pride in February 2021 for a $107 million criminal fine.

POULTRY FIRMS RESOLUTION FOR WAGE-FIXING CLAIMS

The DOJ's focus in the chickens industry isn't limited to alleged price-fixing schemes; The DOJ recently announced it had reached a civil settlement with three poultry firms for allegedly conspiring to lower employee wages. On July 25, 2022, three poultry producers agreed to pay almost $85 million in restitution to processing plant workers, with no admission of wrongdoing. The proposed deals also come with 10-year compliance plans that will be overseen by a monitor and prohibit the sharing of competitively sensitive information about plant workers' compensation. The DOJ noted that these civil resolutions are "part of a broader investigation into anticompetitive labor market abuses in the poultry processing industry," so it's likely that the DOJ is not finished with its labor market enforcement in the industry.

COMMERCIAL FLOORING

Another long-running DOJ investigation recently netted two additional plea agreements. In the commercial flooring industry, Commercial Carpet Consultants, Inc., and its former president agreed to enter a guilty plea for conspiring with other companies and individuals over an eight-year period to agree which company would win bids on commercial flooring contracts and which would instead submit a complementary, intentionally losing bid. The company agreed to pay a $1.2 million criminal fine. Three other companies have already agreed to enter a guilty plea and pay criminal fines totaling approximately $2.5 million. The former Commercial Carpet Consultants president is the sixth individual to be charged in the DOJ's commercial flooring investigation.

E-COMMERCE

The DOJ continues to actively prosecute price-fixing conspiracies for consumer goods in online marketplaces. The DOJ recently charged two individuals and four companies with allegedly fixing prices of DVDs and Blu-Ray discs sold on an online marketplace for a three-year period. Four other individuals were charged in the same investigation in 2021, and each defendant pled guilty.

Although the affected sales in this investigation and the commercial flooring investigation are on a smaller scale than matters such as the broiler chickens investigation, they demonstrate the DOJ's resolve to aggressively pursue alleged collusive conduct in smaller or otherwise emerging industries, particularly in online sectors.

SUPPLY CHAINS

In response to supply chain disruptions amid the global COVID-19 pandemic, the DOJ announced an initiative to protect consumers from collusive schemes relating to such disruptions. The initiative calls for the Antitrust Division to prioritize "investigations where competitors may be exploiting supply chain disruptions for illicit profit and is undertaking measures to proactively investigate collusion in industries particularly affected by supply disruptions." The DOJ has partnered with four other global competition agencies (the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the UK Competition and Markets Authority and the New Zealand Commerce Commission) to create a working group that will share market intelligence regarding global supply chains and utilize existing international cooperation tools to detect and combat collusive schemes. This initiative represents another instance of the current administration's aggressive approach to antitrust enforcement.

CONCLUSION

On June 3, 2022, DAAG Powers delivered a keynote address at the University of Southern California Global Competition Thought Leadership Conference. Powers explained that aggressive enforcement of the Sherman Act "has never been more important and relevant." He continued: "[t]o understand what aggressive enforcement will look like in the future, the best place to start is to look at what the criminal program has done recently."

As we move into the end of 2022, Powers' remarks make one thing clear: The Division will continue its aggressive and sometimes boundary-shifting enforcement of the antitrust laws. It will continue to open investigations and push for indictments in nearly every industry, including cases involving labor markets, procurement and consumer products, even when confronted with losses and setbacks. It will continue to expand its litigation capabilities and hire new prosecutors to meet the demand of these new cases. It will continue to use all the statutory tools at its disposal, even pursuing criminal charges in Section 2 monopolization cases for the first time in 50 years. Finally, it will do all of this with a new, aggressive and unwavering tone. As Powers noted in his remarks, by hiring new prosecutors and support staff, the Division will be "best position[ed] . . . to bring *righteous*, but challenging, cases that may not settle pretrial" (emphasis added). Once again, past is indeed prologue. In the months to come, we can expect the Division to continue its aggressive march to enforce—and sometimes seek to remake—the antitrust laws. With this surge of resources and aggressive posture, the importance of an effective corporate compliance plan cannot be overstated.

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