

Cartel

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The Increasingly Aggressive Focus on Individual Executives in U.S. Cartel Investigations and the Implications for Criminal and Follow-on Civil Litigation

By Lisa M. Phelan, Joseph Charles Folio III, & Samuel Pollock-Bernard



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In 2020, the U.S. Department of Justice's Antitrust Division indicted 10 corporate executives in the broiler chicken industry before indicting or reaching a plea agreement with a single company.¹ This was an anomaly compared to decades of past practice by the Division, which traditionally secured multiple corporate plea agreements—along with the commitment that their employees would cooperate—before indicting any recalcitrant executives. However, since 2015, the Division reversed this practice and began charging corporate executives before charging their companies in its investigations of generic drugs, packaged seafood, aerospace, and broiler chicken. Perhaps relatedly, in follow-on civil litigation, private plaintiffs are now routinely naming corporate executives as defendants even though individuals are typically not a “deep pocket” source for the recovery of monetary damages. What explains this apparently newfound focus on individual corporate executives in cartel prosecutions and private civil enforcement actions?

In many ways, the Division's focus on corporate executives is not new at all. The Division has a long history of holding individual corporate executives accountable for cartel conduct. Indeed, between 1990 and 2021, the Division

charged 1,454 corporate executives compared to 893 companies.² Since 2000, the Division has been charging between 2 and 3 executives for every corporate resolution. Perhaps most notably, the Division indicted or reached plea agreements with nearly 170 corporate executives as part of its long-running auto parts investigation, which was one of the most successful crackdowns on corporate executive malfeasance in recent memory.³

Although the Division's focus on corporate executives may not be new, *how* Division prosecutors are approaching their cartel investigations appears to have shifted in notable ways. In particular, the Division appears to be targeting corporate executives more aggressively, charging individuals first or before any company, and having them arrested and processed—or even detained pending trial—rather than allowing for self-surrender. In follow-on civil litigation, more plaintiffs are naming executives as defendants rather than treating them as an ordinary part of discovery.⁴

These trends suggest that both executives and companies—and counsel advising them—need to question their assumptions about how individual executives will be treated in criminal antitrust investigations and follow-on civil litigation, and plan accordingly. Individual

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¹ Press Release, U.S. Dep't of Justice, *Senior Executives at Major Chicken Producers Indicted on Antitrust Charges* (June 3, 2020), <https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges>; Press Release, U.S. Dep't of Justice, *Six Additional Individuals Indicted on Antitrust Charges in Ongoing Broiler Chicken Investigation* (Oct. 7, 2020), <https://www.justice.gov/opa/pr/six-additional-individuals-indicted-antitrust-charges-ongoing-broiler-chicken-investigation>.

² Brent Snyder, *Individual Accountability for Antitrust Crimes* (Feb. 19, 2016), <https://www.justice.gov/opa/file/826721/download> (1990 through 2015); U.S. Dep't of Justice, *Criminal Enforcement Trends Charts*, <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts> (2016 through 2021).

³ John M. Connor, *Twilight Prosecutions of the Global Auto-Parts Cartels*, Am. Antitrust Inst. (July 17, 2019), at 7, https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Auto-Parts-Cartel-Twilight-of-AAI-WP_7.17.19.pdf.

⁴ See Part III, *infra*.

executives may no longer have the luxury of lying low and letting the companies chart the path to resolution. Moreover, they cannot assume their interests are completely aligned with those of their company.

Companies should realize that these changes alter the incentives for corporate executives to cooperate early or otherwise report wrongdoing they see, which may change how the company proceeds in an investigation as well. As the Division takes steps to heighten the sense of a “race” between all parties for immunity, companies and individuals alike should recognize the increasing value of a sound compliance program both to identify issues early and to mitigate the harm of any potential violation.

I. Background: What’s Old Is New Again, and Again...

Although the Division has charged and convicted many corporate executives for criminal antitrust violations over the last several decades,⁵ certain significant policy changes acted as accelerants. In 1993, the Division developed its corporate and individual leniency policies.⁶ The fundamental purpose of the policies is to provide immunity to the first member of a cartel, whether a company or individual, that reports the conduct to the Division. The policies were intended to create a prisoner’s dilemma between co-conspirators that sparked a race to report cartel activity. To protect all executives, a company needs to report the conduct before the Division began investigating,⁷ or early enough to demonstrate that the cooperation of its executives is invaluable for the prosecution of any case.⁸ The

risk that a company may not be able to protect all its executives is a feature, not a flaw, to encourage early reporting and enhance cartel detection. By offering leniency to individual executives and not just companies, the Division altered the calculus of co-conspirators even further by making executives part of the race.⁹ After all, corporations can act or collude only through their executives/employees.

Another shift occurred with Deputy Attorney General Sally Yates’s issuance of a memorandum titled “Individual Accountability for Corporate Wrongdoing,” which was a clarion call to federal prosecutors to address the role of individual corporate executives in criminal cases.¹⁰ The Yates memo reflected a DOJ-wide emphasis on holding individual executives accountable for corporate crimes. The so-called Yates Memo made its premise clear: “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”¹¹ The Division quickly voiced its support for the principles set forth in the Yates Memo.¹² In a February 2016, the then-Deputy Assistant Attorney General for Criminal Enforcement, Brent Snyder, gave a speech recounting the Division’s long history of holding executives accountable, but promising an even keener focus moving forward. The Division promised to “bring cases against individuals as quickly as evidentiary sufficiency permits,” and to “undertak[e] a more comprehensive review of the organization structure of culpable companies to ensure [it is] identifying and investigating all senior executives who

⁵ See Snyder, *supra* note 1.

⁶ See U.S. Dep’t of Justice, Antitrust Division, Corporate Leniency Policy (Aug. 10, 1993), <https://www.justice.gov/atr/file/810281/download>.

⁷ *Id.* at § 7-3.310.

⁸ *Id.* at § 7-3.320.

⁹ See Robert B. Bell and Kristin Millay, *The Antitrust Division’s Corporate Leniency Program* at 1, Criminal Justice Journal (Spring 2019), <https://files.hugheshubbard.com/files/Antitrust-Division%E2%80%99s-Corporate-Leniency-Program.pdf>.

¹⁰ Mem. from Sally Quillian Yates, Deputy Attorney General, U.S. Dep’t of Justice, to All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

¹¹ *Id.* at 1.

¹² Brent Snyder, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, *Individual Accountability for Antitrust Crimes, Remarks as Prepared for the Yale School of Management Global Antitrust Enforcement Conference 2* (Feb. 19, 2016), <https://www.justice.gov/opa/file/826721/download>.

potentially condoned, directed, or participated in the criminal conduct.”¹³

The DOJ’s emphasis on greater accountability for corporate executives endured over the next two administrations. During the Trump administration, although Deputy Attorney General Rod Rosenstein changed several aspects of the Yates Memo, including a narrowing of the “all or nothing” policy for cooperation credit, he ultimately doubled-down on the importance of “identifying and punishing the people who committed the crime” and, in fact, made clear that “pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation.”¹⁴

On October 28, 2021, Deputy Attorney General Lisa Monaco announced that individual accountability “is unambiguously this department’s first priority in corporate criminal matters.”¹⁵ Among other things, DAG Monaco told prosecutors to take new, “bold” steps toward holding corporate executives accountable for wrongdoing and that “the fear of losing should not deter” prosecutors from bringing difficult cases.¹⁶

Finally, in April 2022, the Division published an updated version of its leniency program and frequently-asked questions supplement that seeks to make leniency more accessible for individuals.¹⁷ Among other updates, the revised policy explains how individuals can report suspected wrongdoing even if the company refuses or backs away from its own leniency application. These revisions also dovetail with the 2019 Criminal Antitrust Anti-Retaliation Act,

which provides additional protections for employees who report suspected violations to authorities.¹⁸

II. The Division’s Enhanced Focus Individual Corporate Executives

Since the Yates memo, the Division continues to charge approximately 2.5 executives for every corporation.¹⁹ Although the numbers have remained steady, the Division appears to be pursuing executives more aggressively by, among other methods, charging executives sooner and often before the company, arresting executives rather than allow self-surrender, seeking pretrial detention, and using red notices and extradition requests to pursue individuals for years.

A. Charging Corporate Executives Before Indicting Companies

In several cases since 2015, the Division has indicted or reached plea agreements with individual corporate executives before resolving with the company.

In December 2016, the Division charged Jeffrey Glazer and Jason Malek, the former CEO and president of Heritage Pharmaceuticals, respectively, for conspiring to fix prices, rig bids, and allocate customers for its antibiotic and

¹³ *Id.*

¹⁴ Rod Rosenstein, Deputy Attorney General, U.S. Dep’t of Justice, Remarks at the Am. Conference Inst.’s 35th Int’l Conference on the Foreign Corrupt Practices Act (Nov. 2, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

¹⁵ Lisa O. Monaco, Deputy Attorney General, U.S. Dep’t of Justice, Keynote Address, Am. Bar Assoc’n’s 36th Nat’l Inst. on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

¹⁶ Lisa O. Monaco, Deputy Attorney General, Keynote Address, American Bar Association’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

¹⁷ *Supra* note 8.

¹⁸ See 15 U.S.C. § 7a-3(a)(1) (“No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against a covered individual in the terms and conditions of employment of the covered individual because of any lawful act done by the covered individual” including providing “to the Federal Government or a person with supervisory authority over the covered individual . . . information relating to any violation of, or any act or omission the covered individual reasonably believes to be a violation of the antitrust laws . . .”).

¹⁹ U.S. Dep’t of Justice, Antitrust Division, *Criminal Enforcement Trends Chart* (last accessed Nov. 1, 2022), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

diabetes drugs.²⁰ In January 2017, they pleaded guilty and “agreed to cooperate in a multi-state investigation into whether multiple companies in the industry colluded to inflate drug prices.”²¹ Since then, the Division charged or filed resolutions with several other generic pharmaceutical companies and other executives.²²

In June and October 2020, the Division filed charges against ten corporate executives in the broiler chicken industry.²³ The executives worked for several of the nation’s largest broiler chicken suppliers (Koch Foods, Claxton Poultry Farms, and Pilgrim’s Pride, Inc.) and included CEOs, presidents, vice presidents, and other high-ranking executives. The indictments alleged that they rigged bids for broiler chicken products by “reach[ing] agreements and understandings to submit aligned . . . bids and to offer aligned . . . prices, and price-related terms . . . for broiler chicken products sold in the United States.”²⁴ Only after several months did federal prosecutors unveil indictments against corporate entities.²⁵

In December 2021, the Division indicted six corporate executives and managers in the aerospace industry for allegedly agreeing to “suppress competition . . . by agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees.”²⁶ To date, the Division has not charged any of the companies with antitrust violations.

By charging corporate executives before it charges or reaches a resolution with the company, the Division gains several advantages. First, a resolution with an executive maximizes the pressure on all remaining parties—the company, its other executives, and other companies and their executives—to reach a resolution because the seats at the table are disappearing quickly. When one executive has admitted to wrongdoing, and has information about others, then all parties who have not resolved with the Division lose leverage in negotiations. Second, if an individual executive is charged before the company, this increases pressure on the company because the prospect of charges is more concrete for its stakeholders (*i.e.*, other executives, board, shareholders) and bad facts are likely to emerge as the criminal case against the executive progresses. This likely pushes the company to one of two extremes: it either hastens plea negotiations or freezes negotiations by locking the Division into a position that the company is unwilling to accept. In the latter instance, the company then must wait and see how the criminal litigation against its executive unfolds.

In either situation, by charging an executive before the company, the Division seeks to shake-up the investigation. By altering the risk-reward calculus of several parties at the same time, the Division is hoping to convince parties to reach a more prompt resolution. But the

²⁰ Press Release, U.S. Dep’t of Justice, *Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging, and Customer Allocation Conspiracies* (Dec. 14, 2016), <https://www.justice.gov/opa/pr/former-top-generic-pharmaceutical-executives-charged-price-fixing-bid-rigging-and-customer>.

²¹ U.S. Dep’t of Justice, Antitrust Division, *Summary of Antitrust Division Health Care Cases (Since August 25, 1983)*, <https://www.justice.gov/atr/page/file/1077686/download>; see also Brent Johnson, *Ex-N.J. Pharma Execs Cooperate in Probe Into Drug Price Hikes*, NJ.COM (May 24, 2017), https://www.nj.com/news/2017/05/ex-pharma_execs_cooperate_in_probe_into_drug_price.html.

²² Press Release, U.S. Dep’t of Justice, *Seventh Generic Drug Manufacturer is Charged in Ongoing Criminal Antitrust Investigation* (Aug. 25, 2020), <https://www.justice.gov/opa/pr/seventh-generic-drug-manufacturer-charged-ongoing-criminal-antitrust-investigation>; Press Release, U.S. Dep’t of Justice, *Former Generic Pharmaceutical Executive Pleads Guilty for Role in Criminal Antitrust Conspiracy – Fourth Executive to Be Charged in Ongoing Investigation* (Feb. 14, 2020), <https://www.justice.gov/opa/pr/former-generic-pharmaceutical-executive-pleads-guilty-role-criminal-antitrust-conspiracy>.

²³ *United States v. Penn, et al.*, 1:20-CR-152-PAB (D. Colo. Oct. 6, 2020); see also DOJ *Broiler Chickens Cartel Investigation Chart*, WESTLAW NEXT PRACTICAL LAW (June 30, 2022) (overview of litigation), [https://1.next.westlaw.com/Document/l8b46a42664911ebbea4f0dc9fb69570/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=f40a0bfd8f0e4d7e90e5fcc824958b16&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/l8b46a42664911ebbea4f0dc9fb69570/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=f40a0bfd8f0e4d7e90e5fcc824958b16&contextData=(sc.Default)&firstPage=true&bhcp=1).

²⁴ *Id.* at 9.

²⁵ See *United States v. Koch Foods, Inc.*, 1:21-cr-00168-RM (D. Colo. July 28, 2021); *United States v. Norman W. Fries, Inc.*, 1:21-cr-00168-RM (D. Colo. May 5, 2021); *United States v. Pilgrim’s Pride Corporation*, 1:20-cr-00330-RM (D. Colo. Oct. 13, 2020).

²⁶ Press Release, U.S. Dep’t of Justice, *Six Aerospace Executives and Managers Indicted for Leading Roles in Labor Market Conspiracy that Limited Workers’ Mobility and Career Prospects* (Dec. 16, 2021), <https://www.justice.gov/opa/pr/six-aerospace-executives-and-managers-indicted-leading-roles-labor-market-conspiracy-limited>.

broiler chickens investigation is a cautionary tale about the potential consequences of aggressive charging decisions against individual executives. The Division tried its case against the 10 executives in the fall of 2021 and the spring of 2022, but neither jury was able to reach a verdict, resulting in a mistrial each time that led to calls for the Division to reevaluate its tactics.²⁷ Then-newly installed Assistant Attorney General for antitrust, Jonathan Kanter, echoed DAG Monaco's sentiment of not backing down, and vowed that the Division would try the case for a third time against 5 of the 10 executives.²⁸ But the third jury acquitted all 5 executives, and the scrutiny on the remaining parts of the investigation—indictments against two companies and four additional executives—intensified.²⁹ The Division dismissed the charges against the two companies (Claxton Poultry and Koch Foods) and two of the four remaining executives,³⁰ but that still proved to be too little, too late. In October 2022, a judge issued a pretrial ruling that the Division presented “only the faintest whiffs of an agreement to fix prices.”³¹ In other words, the judge found that the Division was not able to show that it was more likely than not that a conspiracy existed at all—a fact they would need to prove to a jury beyond a reasonable doubt. Two days later, the Division admitted defeat and dismissed all remaining charges.³² So, whatever early momentum the Division had from charging 10 executives quickly evaporated

and, as the setbacks began to mount, the entire investigation became undone.

B. Surprise Arrest and (the Rare) Pretrial Detention

The Division typically relies on “self-surrender” to secure the initial appearance of an executive who has been charged. When the Division charges an executive, counsel likely has been in touch with Division prosecutors for some time about the investigation. It is common for prosecutors to notify counsel about the fact of their pending indictment and settle on a specific date and time for the executive to surrender to authorities. Recently, however, there have been several instances in which the Division arrested executives without such notice.

In 2018, the Division arrested Roberto Dip and Jason Handal—the CEO and manager of an international freight forwarding company, respectively—in Miami on charges of conspiring to fix prices for international freight forwarding services.³³ In addition to a “surprise” arrest, the Division also sought, and the court granted, the pretrial detention of Dip, a foreign national, as a flight risk—an unusual step in criminal antitrust cases.³⁴ Both Dip and Handal pleaded guilty soon after their arrests.³⁵

In December 2021, the Division arrested Mahesh Patel, a manager at an aerospace engineering firm, before announcing charges against him for allegedly reaching a no-poach

²⁷ Bob Van Voris, *Chicken Price-Fixing Case Ends in Mistrial After Seven Weeks*, Bloomberg (Dec. 16, 2021), <https://www.bloomberg.com/news/articles/2021-12-17/chicken-price-fixing-case-ends-in-mistrial-as-jurors-deadlocked>; Ben Remaly, *Judge declares second mistrial in broiler chicken case*, Global Competition Review (Mar. 30, 2022), <https://globalcompetitionreview.com/gcr-usa/article/judge-declares-second-mistrial-in-broiler-chicken-case>.

²⁸ Bryan Koenig, *Poultry Execs Accuse Antitrust Chief of Tainting Jury Pool*, Law360 (Apr. 27, 2022), <https://www.law360.com/articles/1487908/poultry-execs-accuse-antitrust-chief-of-tainting-jury-pool>; *United States v. Penn, et al.*, 1:20-cr-00152, Unopposed Motion to Dismiss Count 1 of the Superseding Indictment with Prejudice as to Five Defendants, ECF No. 1238 (Mar. 31, 2022).

²⁹ Dan Papszun, *DOJ Tactics Come Under Scrutiny After Chicken Price-Fixing Loss*, Bloomberg Law (July 13, 2022), https://www.bloomberglaw.com/bloomberglawnews/antitrust/XD1T36OG000000?bna_news_filter=antitrust#cite.

³⁰ *United States v. Norman W. Fries, Inc, et al.*, 1:21-cr-00168 (Sept. 15, 2022) (DKT 70); *United States v. McGuire, et al.*, 1:21-cr-00246, ECF No. 124 (Aug. 5, 2022).

³¹ *United States v. McGuire, et al.*, 1:21-cr-00246, Order on Rule 801(d)(2)(E) Evidence, ECF No. 268 at 11 (Oct. 14, 2022).

³² *United States v. McGuire, et al.*, 1:21-cr-00246, United States' Unopposed Motion to Dismiss, ECF No. 272 (Oct. 16, 2022); Dave Michaels, *Price-Fixing Charges Against Chicken-Industry Executives Are Dismissed*, Wall St. J. (Oct. 17, 2022), <https://www.wsj.com/articles/price-fixing-charges-against-chicken-industry-executives-are-dismissed-11666031388>.

³³ Press Release, U.S. Dep't Justice, *Two Freight Forwarding Executives Arrested in Miami* (July 3, 2018), <https://www.justice.gov/opa/pr/two-freight-forwarding-executives-arrested-miami>; see also *United States v. Dip, et al.*, 2:18-cr-00214-EEF-JCF (S.D. Fla. Oct. 16, 2018).

³⁴ *Id.*

³⁵ *United States v. Handal*, 1:18-cr-20877-DPG, ECF No. 20, Plea Agreement (S.D. Fla. Nov. 30, 2018); *United States v. Dip*, 1:28-cr-20877-DPG (S.D. Fla. Nov. 30, 2018).

agreement with his suppliers for engineers.³⁶ After making an initial appearance, the court released him on a \$100,000 bond rather than seek pretrial detention.³⁷ The Division never explained its decision to arrest Patel rather than allow for his self-surrender.

A “surprise” arrest places a significant amount of pressure on a corporate executive, as well as on other executives and the companies. Detention drives home the most serious consequences of the charged offense, and may motivate an executive to cooperate to avoid confinement. The arrest also demonstrates to other executives and companies how seriously the Division is taking the investigation.

C. Red Notices

The Division’s recent focus on and success with extradition is another way that it holds executives accountable. Although the Division regularly places foreign national defendants on Interpol’s “red notice” list,³⁸ it seems to have hastened its efforts. In January 2020, Italy extradited Maria Christina Ullings, a former senior vice president for Martinair N.V., to face September 2010 charges about participation in the air cargo cartel.³⁹ Ullings ultimately pleaded guilty and agreed to pay a \$42 million criminal fine. In March 2020 and March 2022, the Division extradited Eun Soo Kim (from Germany) and Volker Hohensee (from Spain), respectively, for their involvement in the auto parts investigation.⁴⁰ Ultimately, both Kim and Hohensee entered into plea agreements with the Division

These recent extraditions show that the Division is committing the time, resources, and political capital necessary to work with its foreign partners to effectuate arrests. These would not be occurring unless a foreign partner believed the arrest of these individuals was something that the DOJ cared about and would fight for.

III. Trickle-Down Tactics? The Evolving Role of Executives in Follow-on Civil Litigation

Private plaintiffs usually race to the courthouse to file the first civil action related to a criminal investigation because of the prospective financial recovery (treble damages), the lower burden of proof, and the potential admission of a criminal violation. For example, just one month after the indictment against the aerospace engineers was unsealed, plaintiffs filed over 20 lawsuits against several aerospace companies.⁴¹ This is not unique.

Over the last several years, private plaintiffs’ view of individual corporate executives in these lawsuits seems to have shifted as well. Private plaintiffs now regularly name executives as separate defendants. At first glance, this does not make much sense because most individuals do not add much marginal value to the damages that parties can recover. Yet five of the largest civil antitrust class actions in the last several years named individual corporate executives as defendants: *In re Generic Digoxin and Doxycycline Antitrust Litigation*, MDL No. 2724 (E.D. Penn. Mar. 28, 2017) (*Generic Pharmaceuticals*); *Doe, et al. v. Raytheon, et al.*, 3:22-cv-00035 (D. Conn. Jan. 7, 2022)

³⁶ Press Release, U.S. Dep’t of Justice, *Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy* (Dec. 9, 2021), <https://www.justice.gov/usao-ct/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy>.

³⁷ Michael Volkov, *Department of Justice Does the Two-Step and Announces Criminal Conspiracy Charges Against Aerospace Executives*, JDSupra (Dec. 20, 2021), <https://www.jdsupra.com/legalnews/departement-of-justice-does-the-two-step-6494110/>.

³⁸ See Am. Bar Ass’n, *Keeping Current: Department of Justice’s First Antitrust Extradition Highlights the Danger of Foreign Travel for Executives Under Investigation* (Apr. 22, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/04/keeping_current_cherry/. German authorities detained Pisciotti pursuant to an INTERPOL “Red Notice” while catching a connecting flight in Germany in June 2013. After pleading guilty, Pisciotti was sentenced to serve two years in prison and a \$50,000 criminal fine. *United States v. Pisciotti*, 10-cr-60232 ECF No. 22 (Apr. 24, 2014).

³⁹ See Client Alert, *Second Executive Ever to be Extradited Solely on Antitrust Charges Pleads Guilty within Two Weeks of Arriving in the United States*, Morrison & Foerster LLP (Jan. 28, 2020), <https://www.mofo.com/resources/insights/200128-executive-extradited-antitrust-charges-pleads-guilty.html>.

⁴⁰ Press Release, U.S. Dep’t of Justice, *Fugitive Executive Pleads Guilty in Parking Heaters Price-Fixing Conspiracy* (Mar. 3, 2022), <https://www.justice.gov/opa/pr/fugitive-executive-pleads-guilty-parking-heaters-price-fixing-conspiracy>.

⁴¹ Mike Scarcella, *Big Plaintiffs’ Firms Vie for Lead Role in Aerospace Antitrust Cases*, Reuters (Feb. 2, 2022), <https://www.reuters.com/legal/litigation/big-plaintiffs-firms-vie-lead-role-aerospace-antitrust-cases-2022-02-02/>.

(*Aerospace Engineers*);⁴² *In re Outpatient Medical Center Employee Antitrust Litigation*, 1:21-cv-00305 (E.D. Ill. Aug. 9, 2021); *Associated Wholesale Grocers, Inc. v. Bumble Bee Foods L.L.C., et al.*, No. 15-md-2670-JLS-MDD (S.D. Cal. Oct. 5, 2018) (*Seafood Packaging*); and *In re Broiler Chicken Litigation*, 1:16-cv-08637 (N.D. Ill. Sept. 16, 2016) (*Broiler Chickens*).

There are several non-monetary reasons why private plaintiffs are choosing to name individual corporate executives as defendants. Plaintiffs may be hoping to secure early cooperation to hasten corporate settlements. The cost of a contested defense and the prospect of personal liability incentivizes executives to cooperate early and completely with the plaintiffs. This approach also ensures that an executive does not join forces with the company. Second, settling with an executive provides better assurances of cooperation than third-party discovery through subpoenas. Third, an executive may provide insight about the broader case such as what occurred during the criminal investigation, not all of which may be known by civil plaintiffs.

Although this trend is still developing, private plaintiffs seem to be more interested in executives than ever.

IV. Conclusion

These “bold” steps by the Division regarding its approach to individual executives appear to have borne little fruit so far. In the broiler chickens investigation, the Division was not able to convict any of the 10 executives it charged at the outset of the investigation. By October 2022, after five acquittals, two mistrials, and an adverse pretrial ruling about the evidence it

would be able to introduce at trial, the Division finally admitted defeat and dismissed all remaining charges. So, an investigation that started with a bang—the indictment of 10 executives in a familiar, “kitchen-table” industry—ended with a whimper, and has only a single corporate plea to show for years of investigation and multiple trials. Although it is only one investigation, the Division’s pursuit of individual executives may have come at the expense of building a sound and sustainable case sufficiently persuasive to a jury.

Regardless, the Division’s evolving focus on individual executives continues to present novel strategic issues for companies and executives alike to consider. As the subject of a criminal antitrust investigation, individuals must appreciate that they can no longer sit comfortably waiting for corporate resolutions to lead the way. Additionally, the full scope of exposure for a possible criminal antitrust violation may well include the follow-on civil litigation as well. In these circumstances, the incentives for executives to cooperate with an investigation—perhaps even if the company is not—must be carefully considered.

On the other hand, companies must now understand that both the Division and private civil plaintiffs are finding new ways to increase the pressure on executives to cooperate with their respective investigations. Companies must be prepared to address these situations, whether with robust compliance programs at the outset that have well-established mechanisms for dealing with possible antitrust violations, or with knowledgeable counsel on the back-end once the race for leniency and cooperation credit has begun.

⁴² On June 28, 2022, the plaintiffs in the aerospace engineers lawsuit agreed to voluntarily dismiss, without prejudice, the case against seven individual defendants. See *Bronzy, et al. v. Pratt & Whitney, et al.*, 3:21-CV-01657 ECF No. 457 (June 28, 2022). Although the stipulation did not explain the basis for the dismissal, that fact that it was without prejudice for the plaintiffs to add the individual defendants back at a later time suggests that the parties reached some type of resolution.