THE NEWEST WAVE OF ANTITRUST "CRIMES": REVIVAL OF CRIMINAL MONOPOLIZATION

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By Ann O'Brien

The Antitrust Division of the Department of Justice is aggressively enforcing and expanding the scope of criminal antitrust cases it is willing to bring, including a first wave of novel criminal no-poach cases. In its next criminal wave, the Antitrust Division has revitalized its use Section 2 of the Sherman Antitrust Act to criminally prosecute monopolization, something the Division has not done in over 40 years. These modern criminal monopolization cases raise many questions for companies and the counsel who advise them. Is the mere invitation to collude now a prosecutable criminal offense? How will the U.S. Sentencing Guidelines, which lacks a section explicitly governing criminal monopolization, apply in these cases? These seismic shifts from the Antitrust Division underscore the importance of robust and regular antitrust compliance for companies and executives so that employees and counsel are aware of the changing landscape, can spot new red flags, and know to immediately report any potential issues to counsel.

I. INTRODUCTION

The Antitrust Division (the "Division") of the Department of Justice ("DOJ") is zealously expanding the types of conduct it is prosecuting criminally. In recent years, the Division has aggressively exercised its prosecutorial powers to criminally prosecute more conduct under both Section 1 and Section 2 of the Sherman Antitrust Act.[2] Indeed, waves of significant policy and practice changes are making the criminal waters of antitrust choppier than ever.

II. THE FIRST WAVE – CRIMINAL NO POACH AND LABOR FOCUS

The first wave of criminal antitrust expansion was the criminalizing of no-poach agreements as part of an intense focus on labor movement.[3]

In 2016 the DOJ and FTC issued joint guidance for HR professionals about the application of the federal antitrust laws to hiring practices and worker mobility.[4] The DOJ said it would criminally prosecute no-poach agreements and other forms of collusion in the labor market, with a pointed warning: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poach agreements."[5]

Wage-fixing, a form of price-fixing, includes agreements among firms to fix salaries at a certain level or within a certain range, which the Division analogizes to price-fixing. No-poach agreements, on the other hand, are agreements among firms not to solicit or hire each other's employees, which the Division analogizes to market allocation. Comparing to these long-recognized categories of *per se* antitrust conduct – price fixing and market allocation – is important to the Division's criminal prosecution of this conduct because *per se* antitrust offenses typically require no showing of actual harm or affect; the agreement itself is considered a per se crime. While criminal antitrust cases, like any other federal criminal case, require DOJ proof beyond a reasonable doubt, the per se classification allows a shortcut, i.e. converting the conduct to essentially a strict liability crime, once the DOJ shows an agreement.

For years after the release of the 2016 HR Guidance, the DOJ continued to foreshadow criminal no-poach and labor market charges were coming.[6] Yet, they did not bring the first criminal wage-fixing case until December 2020;[7] the first criminal no-poach case did not come

2 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Address at the 2022 Spring Enforcers Summit, at 6 (Apr. 4, 2022), https://www.justice.gov/atr/page/file/1494606/download ("When Congress passed the Sherman Act in 1890, it made Section 2 monopolization a crime just as it did for Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. . . . the [Antitrust] Division will not hesitate to enforce the law.").

3 This is a topic CPI has covered in prior columns. See, e.g. Ann O'Brien and Kaley Sullivan, *DOJ Antitrust Division Not Backing Down on Labor*, Competition Pol'y Int'l (Oct. 5, 2022). This continues to be in the news, particularly in light of the FTC's recent move to outlaw all non-compete agreements. See Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

4 DOJ Antitrust Division & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (2016), https://www.justice.gov/atr/file/903511/download [hereinafter Antitrust Guidance].

5 *Id.* at 4.

6 See Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Assistant Attorney General Makan Delrahim Delivers Remarks at the Public Workshop on Competition in Labor Markets, (Sept. 23, 2019) ("I want to reaffirm that criminal prosecution of naked no-poach and wage fixing agreements remains a high priority for the Antitrust Division."), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition. Also, in April 2020, with the spread of the COVID-19 pandemic, the DOJ and FTC issued a Joint Agency Statement, noting that the agencies are on "alert" and carefully observing the hiring, recruiting, retention, or placement of workers to identify collusive and anticompetitive conduct, including wage-fixing, no-poach agreements, the exchange of competitively sensitive information, and non-compete agreements. See also DOJ Antitrust Division and Fed. Trade Comm'n, Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets (Apr. 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

7 Press Release, U.S. Dep't of Just., Former Owner of Health Care Staffing Company Indicted for Wage Fixing, (Dec. 10, 2020), https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

until 2021.[8] The first criminal wage-fixing and no-poach trials began on April 4, 2022, and both resulted in across-the-board acquittals for all defendants on all antitrust charges.[9]

Despite back-to-back losses in these critical first criminal trials, Antitrust Division Assistant Attorney General Kanter has repeatedly vowed that he and the Division won't back down in efforts to investigate and criminally charge no-poach and wage-fixing agreements.[10]

The Division has brought other criminal no poach cases that are pending trial,[11] and obtained one plea in a no poach case, resulting in the payment of a $62,000 fine and $72,000 in restitution[12] and a post-indictment pretrial diversion for the charged executive.[13] However, the Division has yet to convince a jury to criminally convict a single defendant for no-poach or wage-fixing conduct.

The Division has spent significant resources investigating and attempting to prosecute no poach crimes, with, so far, underwhelming results. But, given its aggressive approach, we can expect to see the Division bring more labor cases as it forges forward relentlessly into the choppy waves of these murky labor-focused criminal antitrust waters.

III. THE NEW WAVE – CRIMINAL MONOPOLIZATION

The Division has recently returned to criminally prosecuting monopolization, bringing its first criminal monopolization case under Section 2 of the Sherman Act in over 40 years.[14] The DOJ has long been able to bring criminal charges under both Sherman Act Sections 1 (collusion) and 2 (monopolization), but for decades it has exercised its prosecutorial discretion to reserve criminal antitrust cases under Section 1 for only the post pernicious horizontal agreements among competitors not to compete deemed by courts *per se* harmful to competition – such as price-fixing, bid-rigging, and market allocation.

When the Division last brought criminal Section 2 cases in the 1970s, the Sherman Act did not carry felony penalties, so a corollary Section 2 case brought alongside a traditional Section 1 case allowed for cumulative penalties for multiple counts. This was no longer necessary after Sherman Act crimes became felonies in 1974, and even less so, after the US Sentencing Guidelines came into existence in the 1980's providing direction for sentencing multiple counts.

The resurrection of criminal prosecution of monopolization, just like criminal no poach cases, overturns decades of antitrust enforcement practice, creating new uncertainty. These cases blur previously bright criminal antitrust lines, and have enormous implications for companies and individual executives who operated under different rules for the past half century and the in-house and outside counsel advising them.

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8 Press Release, U.S. Dep't of Just., Health Care Company Indicted for Labor Market Collusion, (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion; Press Release, U.S. Dep't of Just., Indictment in Ongoing Investigation of Labor Market Collusion in Health Care Industry, (Jul. 15, 2021), https://www.justice.gov/opa/pr/indicted-ongoing-investigation-labor-market-collusion-health-care.

9 See *[Company] and its Former CEO Acquitted of U.S. Antitrust Charges*, Reuters (Apr. 18, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/ acquitted-antitrust-charges-2022-04-15/; Katie Buehler, *DOJ's 1st Wage-Fixing Suit Ends With Not Guilty Verdicts*, Law360 (Apr. 14, 2022), https://www.law360.com/articles/1484191/doj-s-1st-wage-fixing-suit-ends-with-not-guilty-verdicts; See also Ann O'Brien & Kayley Sullivan, *Cartels 2022 – Halfway There Update: Policy Shifts, Labor and Trial Losses, and DOJ Not Backing Down … In Fact, Tripling Down*, Competition Pol'y Int'l, (Sept. 11, 2022), https://www.competitionpolicyinternational.com/cartels-2022-halfway-there-update-policy-shifts-labor-and-trial-losses-and-doj-not-backing-down-in-fact-tripling-down/.

10 Khushita Vasant, *Kanter Says US DOJ 'Not Backing Down' From Recent Losses In Criminal Antitrust Trials, Pledges More Litigation*, MLex Marketing Insight (Apr. 21, 2022), https://mlexmarketinsight.com/news/insight/kanter-says-us-doj-not-backingdown-from-recent-losses-in-criminal-antitrust-trials-pledges-more.

11 See, e.g. Ann O'Brien & Kayley Sullivan, *Cartels 2022 – Halfway There Update: Policy Shifts, Labor and Trial Losses, and DOJ Not Backing Down … In Fact, Tripling Down*, Competition Pol'y Int'l, (Sept. 11, 2022), https://www.competitionpolicyinternational.com/cartels-2022-halfway-there-update-policy-shifts-labor-and-trial-losses-and-doj-not-backing-down-in-fact-tripling-down/.

12 Press Release, U.S. Dep't of Just., Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

13 Megan Rahman, Laura Kuykendall & A. Christopher Young, *Hee Pretrial Diversion Agreement Signals Small Victory for Antitrust Division in Wage Fixing and Staffing Allocation Case*, Lexology (Jan. 30, 2023), https://www.lexology.com/library/detail.aspx?g=aca550a9-98e3-4497-a063-407fb62d840e#:~:text=The%20government%20filed%20the%20pretrial%20diversion%20agreement%20on,hours%20of%20community%20service%20and%20maintaining%20good%20behavior.

14 Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers ("We will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers and businesses harmed by unlawful collusion and monopolization.").

The first criminal monopolization cases brought are somewhat confusing and leave many unanswered questions about the direction the Division will take and where the criminal versus civil line will be drawn in monopolization cases brought under the Sherman Act.

IV. FIRST CRIMINAL MONOPOLIZATION CASES IN DECADES

A. Zito: An Invitation to Collude – No Actual Agreement Reached

On October 31, 2022, in a case called *U.S. v. Zito*, the Division announced its first criminal conviction for monopolization under Section 2 of the Sherman Antitrust Act since the 1970s.[15] Zito is an invitation to collude — i.e. offer that did not result in an agreement — that could have been charged under Section 1 of the Sherman Act as a *per se* market allocation case criminal antitrust case *if* the solicited competitor had agreed rather than reporting the overtures to federal authorities.

Zito, the owner of a paving and asphalt company that primarily worked to seal cracks in federal highways, pled guilty to one count of attempted monopolization for proposing to a competitor a market allocation scheme whereby his company would cease competing for business in Nebraska and South Dakota in exchange for the same treatment by a competitor operating in Montana and Wyoming. He also offered to pay the competitor $100,000 for lost business in those two states. The scheme, had it been agreed-to, would have created an effective monopoly for Zito's company in his allocated territory.

In the plea agreement, Zito agreed to pay a $27,000 fine (apparently calculated from one percent of the "relevant volume of commerce"). Zito has not yet been sentenced, and that sentencing will be closely watched by the antitrust bar.

This case was very significant because for decades, Section 1 criminal enforcement by the Division has been reserved for horizontal agreements among competitors that have been deemed by courts per se harmful to competition. For decades the Division insisted the *agreement* was the crime, but now it appears DOJ views the *invitation itself* without any agreement, as a crime again too.

It is notable that the Division has previously pursued some invitation to collude cases as attempted wire fraud cases[16], and that the FTC has used Section 5 of the FTC Act to challenge invitations to collude.[17]

The Division and FTC have traditionally pursued violations of Section 2 civilly under an analytical framework that painstakingly defines the relevant market in which the conduct is occurring, assesses market power, determines harm to competition, and weighs procompetitive justifications for the conduct.

Another criminal monopolization case that quickly followed *Zito*, raised more questions in this area.

B. Martinez, et al.: An Allegedly Violent Cartel of Another Sort

On the heels of *Zito*, in December 2022, the Division and the Criminal Division's Organized Crime and Gang Section, along with the U.S. Attorney's Office for the Southern District of Texas, filed *US v. Martinez et al.*, the second modern criminal monopolization case. This time, as a contested, indicted case rather than a conviction by plea agreement. The Division charged violations of both Section 1 and Section 2 of the Sherman Act.

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15 The Division had not brought a criminal case under Section 2 since 1977 in when it indicted Braniff Airways, Inc., and Texas International Airlines, Inc., on charges of conspiring to monopolize air service designed to keep another airline from offering air service between Dallas-Fort Worth, Houston and San Antonio. See Carole Shifrin, Braniff, TI Indicted for Monopoly, Wash. Post (Aug. 17, 1977), https://www.washingtonpost.com/archive/business/1977/08/17/braniff-ti-indicted-for-monopoly/8b809f34-a831-4f83-813b-3d28fd698e5a/; *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724 (W.D. Tex. 1978). Interestingly, a few years later, in *United States v. American Airlines, Inc. and Crandall*, Civ. Action No. 3-83-0325-D (N.D. Tex. Feb. 23, 1983), DOJ sued the defendants civilly for allegedly inviting Braniff Airlines to collude on certain city-pair routes involving the Dallas-Fort Worth airport. Braniff declined the invitation and reported the conduct to the DOJ. DOJ brought a Section 2 case on the theory that the invitation to collude would have resulted in a monopolized market. The Fifth Circuit held that no agreement was required in order to sustain the Section 2 verdict, and given the relevant market conditions, American Airlines had a dangerous probability of obtaining monopoly power had Braniff agreed to its proposal. *United States v. American Airlines*, 743 F.2d 1114, 1116 (5th Cir. 1984).

16 See *United States v. Ames Sintering*, 927 F. 2d 232 (6th Cir. 1990) (bid rigging attempt); United States v. Critical Industries, Crim. No. 90-00318 (D. N.J. July 24, 1990) (price-fixing attempt).

17 Press Release, Fed. Trade Comm'n, Two Barcode Resellers Settle FTC Charges That Principals Invited Competitors to Collude (Jul. 21, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/07/two-barcode-resellers-settle-ftc-charges-principals-invited-competitors-collude.

The 11-count indictment charged 12 individuals in a conspiracy to monopolize the transmigrante forwarding industry in the Texas border region. Charges included conspiracies to fix prices and allocate the market for transmigrante services in violation of Section 1 of the Sherman Act, and conspiracy to monopolize the same market in violation of Section 2 of the Sherman Act. Certain defendants were also charged with various extortion and money laundering charges. The factual allegations include threats, intimidation, and acts of violence against.

While the *Martinez* case involves a host of typical organized crime-type criminal charges, sounding more like a different kind of "cartel" than an antitrust cartel, AAG Kanter's remarks in the press release emphasized the Antitrust Division's continued intent to "use all the tools at its disposal – including Section 2 of the Sherman Act – to target anticompetitive conduct . . . "[18]

The *Martinez* case was a real head-scratcher for many in the antitrust cartel bar. The conduct charged allegedly involved threats of physical violence and extortion along the Texas border and does not seem to naturally cry out for antitrust charges. The antitrust charges do not add to any potential sentence under the US Sentencing Guidelines, making the deterrent effect of the charges even more confusing. The inclusion of the antitrust count will likely complicate the proceedings.

The *Martinez* case seems very fact-specific and does not provide guidance to the bar or business community regarding the types of business conduct the Division views as constituting criminal monopolization. Given the alleged facts and multiple defendants involved, and the lack of modern precedent, the Division can expect intense motion practice and argument over jury instructions in this novel criminal prosecution.

V. OPEN QUESTIONS REGARDING CRIMINAL MONOPOLIZATION

A. Sentencing

Because the *Zito* plea agreement does not offer a clear recommended sentence—it merely refers to the sentencing guidelines—we can only speculate about what kind of sentence Zito might face. The threat of jail time for individuals has long been a Division goal and threatening it here is consistent with DAG Monaco's recent pronouncement this is the DOJ's intent to hold individuals accountable.[19] But, the relatively small fine suggests the potential for a relatively light sentence. And, while not the same jurisdiction as *Zito*, a recent ruling from the Third Circuit interpreting the word "loss" in the U.S. Sentencing Guidelines for fraud as only "actual loss" (as opposed to intended loss) could be helpful precedent for defendants like Zito, who was convicted for an attempt.[20]

Another interesting issue the sentencing raises is the plea agreement's reference to U.S. Sentencing Guidelines ("USSG") §2R1.1. That guideline, by its own title, does not clearly apply to criminal monopolization. The title is: "bid-rigging, price-fixing, and market-allocation agreements among competitors."[21] Not only is monopolization absent from the title, but the plain language of the statute contemplates agreements between competitors, i.e. conspiracies, which were not part of the charge against Zito and would not apply in potential future criminal monopolization cases involving unilateral conduct.

USSG §2R1.1 has never been applied to Section 2 conduct, and even if Zito agreed in his plea that it should apply, future defendants in litigated cases like *Martinez* have several good arguments why it should not. The fact is there is no sentencing guideline for criminal monopolization, probably because the Antitrust Division has not, by policy or practice, pursued such conduct criminally in so long. Indeed, the Sentencing Guidelines did not exist the last time the Division brought a criminal monopolization case.

B. Elements of Criminal Monopolization

Lacking modern precedent for criminal monopolization, it appears that in the Zito case, DOJ defaulted to citing the same elements as have been used in civil monopolization cases. Those elements are:

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18 Press Release, U.S. Dep't of Just., Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0.

19 See Lisa Monaco, Deputy Attorney General, U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

20 See *United States v. Banks, ___ F.4th ___, 2022 WL 17333797 (3d Cir. Nov. 30, 2022).*

21 U.S. Sent'g Guidelines Manual § 2R1.1(c) (U.S. Sent'g Comm'n 2021), https://guidelines.ussc.gov/gl/%C2%A72R1.1.

(1) Knowingly engaging in anticompetitive conduct;
(2) intent to gain monopoly power; and
(3) a dangerous possibility that, had the defendant's proposed agreement been effectuated, the relevant company would have gained monopoly power in the relevant market.

In future litigated cases like Martinez, it will be interesting to see whether defendants will dispute these elements, or if the government will find it difficult to meet the criminal "beyond a reasonable doubt" burden of proof on these typically civil elements.

VI. THE NEXT WAVE: CRIMINAL PROSECUTION OF INFORMATION SHARING?

On February 2, 2023, the Division announced it was withdrawing three policy statements outlining safe harbors for information sharing in the healthcare industry, calling the three longstanding antitrust policies concerning healthcare markets (two from the 1990s, and one from 2011), calling them outdated.[22] These withdrawals signal increased scrutiny of information sharing extending to other industries beyond healthcare.

While agreements to share information have not previously been considered *per se* illegal or prosecuted criminally by the Division,[23] the law in the United States differs from that in the European Union and some other countries that consider information exchanges closer to antitrust cartels. The Division's increased scrutiny on information exchange, and the U.S.'s seemingly less aggressive position on than foreign enforcers, make information exchanges that do not rise to the level of an agreement a possible next wave to watch closely on the horizon.

VII. CONCLUSION

The criminal no-poach and monopolization cases illustrate that antitrust law is nuanced and actively developing, underscoring just how important antitrust compliance is for companies and their executives. During the last four decades, there wouldn't have been a criminal antitrust prosecution against Zito because the competitor did not agree to the plan and therefore there would have been no market allocation *agreement* to prosecute. Now, executives risk jail time for merely extending the invitation. With the Division aggressively expanding the scope of antitrust conduct that it is willing to prosecute criminally, and self-reporting benefits based on speed of reporting, it is more imperative than ever that employees are aware of antitrust red flags and know to report to counsel immediately.

22 See Press Release, U.S. Dep't of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements.

23 Antitrust Guidance, *supra* note 3, at 4 (2016) ("While agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect."), https://www.justice.gov/atr/file/903511/download#:~:text=Sharing%20information%20with%20competitors%20about%20terms%20and%20conditions,example%2C%20the%20DOJ%20sued%20the%20Utah%20Society%20for.

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