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ANTITRUST TRENDS

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Message From The Chair

Greetings

As we exit Winter 2022 and pass the one-year anniversary of the advent of the Biden-Harris Administration, our current issue takes stock of the policies, progress, and main players in the Administration's first year. For our international practitioners and those interested in the Administration's efforts on cartel enforcement, check out our featured article by Jennifer Driscoll of Sterlington, PLLC, "Seven Things Every Non-U.S. Company Should Know about Antitrust Investigations," providing current guidance on cartel enforcement and leniency programs. We also appreciate the contributions of Stephen M. Owen of Lockridge Grindal Nauen P.L.L.P., whose article on recent developments on the successes, or lack thereof, of defendants' pretrial challenges to the Department of Justice's burgeoning criminal prosecution of "no-poach" and wage fixing agreements across the country. Just prior to publication, juries in Texas and Colorado rejected the DOJ's theory of per se harm and acquitted the defendants on all antitrust-related charges. As we track the Administration's efforts to advocate its agenda, also included are updates on new appointees to key agency positions.

Please save the date for our upcoming webinars, including a June 8, 2022, CLE covering developments in the Biden-Administration era, details of which will be posted on the FBA website. As always, we aim to provide content that will appeal both to our Section members and to other FBA members, so we welcome you to contribute articles or suggest topics for Section discussion.

Our complete leadership team is listed below. We invite Section and new members who may be interested in serving as committee chairs newly in change of monitoring and sharing criminal, civil, or legislative developments in antitrust and trade regulation to reach out to our leadership team. Come join us!

ROBERT E. HAUBERG, JR.
Chair, Antitrust and Trade Regulation Section
rhauberg@bakerdonelson.com

Vice Chair
Scott Wagner
swagner@bilzin.com

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smowen@locklaw.com

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Mark Grundvig
mark.grundvig@usdoj.gov

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cwhittaker@gibsondunn.com

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jdirenfeld@orrick.com

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Marisa Rosen Dorough
mdorough@bakerdonelson.com

Young Lawyer Representative
Ashley Gallagher
agallagher@johnsonjackson.com

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Seven Things Every Non-U.S. Company Should Know about Antitrust Investigations

by Jennifer M. Driscoll[1]

Since President Biden's election in November 2020, the antitrust community has eagerly awaited a resurgence in enforcement against cartels, particularly international cartels.[2] Both the Attorney General and the Antitrust Division have been vocal about their commitment to combatting international cartels,[3] and the Biden Administration has also directed the U.S. antitrust agencies to probe anticompetitive conduct in all labor markets.[4]

Both domestic and non-U.S. markets may be teeming with the opportunity for the antitrust agencies to follow through. Despite cross-border efforts to educate corporations and executives, awareness that cooperating with competitors constitutes illegal misconduct is not yet mainstream in some jurisdictions, particularly with smaller companies that may not have in-house counsel or are headquartered in countries where working with other companies is an established tradition.[5] In anticipation of the new era of cross-border enforcement, this article offers practical suggestions for guiding non-U.S. corporations through the antitrust investigation and leniency process.

1. Antitrust investigations are cross-border undertakings. According to a survey conducted by the International Competition Network ("ICN"), between 2010 and 2020, antitrust agencies in at least 17 countries, including the United States, entered cooperation agreements with their international counterparts or increased participation in cartel working groups with the ICN or the Organisation for Economic Co-operation and Development ("OECD").[6] With the uptick in multi-jurisdictional coordination, a company's antitrust exposure is as wide-reaching as their commercial activity. Upon discovery internally of antitrust misconduct, a company should consider filing leniency applications (or request a marker) in every country in which it has an office or conducts business. If the company's products enter the stream of commerce in an EU Member State, applications should be filed with the European Commission in addition to the specific country. Accounts of one company receiving leniency in one jurisdiction but losing it in another have become cautionary tales for the antitrust defense bar.

2. The finishing line for obtaining leniency does not end with the marker. Despite the proliferation of leniency programs abroad, the process of obtaining leniency remains opaque, especially for non-U.S. companies. It is important for counsel to describe the benefits and risks of pursuing leniency. When misconduct is on the margin, such as information sharing, the calculus may be different than when the misconduct qualifies as a *per se* violation, such as price fixing. This is a choice that applicants (with the guidance of counsel) must make for themselves.

It is also critical for the applicant to understand that leniency is a protracted undertaking that will require a significant investment of time and resources over a period of years. In their "Leniency FAQ," the Antitrust Division requires that a company must provide "truthful, full, continuing and complete cooperation with the investigation"[7] to maintain their first-place position and secure the conditional leniency letter that memorializes the Government's promise not to prosecute the company for antitrust misconduct that occurred before the date of the letter. In practice, the Antitrust Division will require a leniency applicant to furnish documents (with translations if the documents are not in English) and witnesses in accordance with the Division's timeline[8] as prosecutors establish their case against co-conspirators—all of which impose a substantial burden on the company and their employees.[9]

3. Second-in cooperation has significant benefits. Even if a corporation loses the race to obtain leniency, the Antitrust Division recognizes—and rewards accordingly— the value of "second-in cooperation" from one of the remaining co-conspirators. Qualifying for the benefits of second-in treatment, which can reduce if not fully avoid criminal exposure, involves more than good timing. The Division will also consider "the nature, extent, and value of that cooperation to the investigation."[10]

Second-in cooperation can take several forms, such as providing the Government with non-cumulative evidence that "will significantly advance an investigation" or self-reporting cartel activity that has not been detected for "Amnesty Plus" credit.[11] The incentives for cooperating when leniency is not available include lower fines and sentences for culpable executives, and reducing the scope of "affected commerce," which is the basis for calculating corporate fines.[12]

As with the race to obtain leniency, time is of the essence. But in contrast to the marker system, securing the second-in position is a more amorphous process. When a leniency candidate receives a marker, they are given a specific amount of time within which to perfect their application. For a company seeking the second-in position, the race against co-conspirators continues without the benefit of written guidance and feedback from the Antitrust Division—and without a specific deadline. Counsel for the potential second-in candidate may be challenged to explain why a company and its executives should self-report when corporate fines and prison terms are an inevitable outcome and should be prepared to do the necessary hand-holding.

4. A deal with the Antitrust Division does not shield the company from prosecution if there is other undisclosed misconduct or subsequent antitrust violations, but there is an opportunity to mitigate penalties with prompt disclosure. The conditional leniency letter only shields a company from liability with respect to the antitrust misconduct set forth in the letter.[13] If a company and its executives have violated other statutes, such as the Foreign Corrupt Practices Act[14] ("FCPA"), a deal with the Antitrust Division—whether it be a leniency agreement or credit for cooperation—does not prevent the U.S. enforcement agencies from prosecuting the other misconduct.[15] Indeed, the Antitrust Division is currently the only U.S. government agency that offers complete amnesty to the first self-reporting company.[16] Nonetheless, reporting all violations of U.S. law all at once is worth the risk. For example, in 2011, Bridgestone Corporation entered a plea agreement with the Department of Justice for rigging bids (antitrust) and bribing foreign officials (FCPA) in connection with their sales of marine hose.[17] At the time, the Antitrust Division praised Bridgestone for its cooperation and remediations efforts on both fronts and rewarded the company with a "substantially reduced fine" of $28 million.[18]

Three years later, Bridgestone was again an example of why a company should report all known misconduct at the outset of an investigation. This time, the Antitrust Division was investigating anticompetitive misconduct in the auto supply industry. In the course of the Division's investigation, prosecutors discovered that Bridgestone had colluded with competitors in the market for automotive anti-vibration products and did not disclose it at the time it pleaded guilty to misconduct in the marine hose industry. The Antitrust Division fined Bridgestone $425 million for its recidivist misconduct—the seventh highest fine for a Sherman Act criminal violation[19]—citing the Division's "hard line when repeat offenders fail to disclose additional anticompetitive behavior."[20]

The saga of Bridgestone is a cautionary tale for companies in the midst of a government investigation. Bridgestone's decision not to disclose all known antitrust misconduct during the marine hose investigation was the difference between amnesty for price fixing in the auto parts market and the record-setting fine that the Antitrust Division imposed. Counsel for both the company and individuals targeted by the government should ask (more than once) whether there is other misconduct that needs to be reported and explain the importance of doing so now.

5. Face-to-face meetings with potential witnesses are worth the effort. Despite the importance of reporting cartel misconduct as soon as it is detected, the notion of admitting wrongdoing to antitrust agencies may be counter-intuitive—particularly if a different company has received a leniency marker and criminal penalties are still possible for a second-in applicant. With the prevalence and newfound acceptance of remote work, there may be an inclination to forego the arduous travel and jet lag that face-to-face meetings entail for multinational companies. However, there is no substitute for consistent, in-person meetings with witnesses. In particular, when meeting with a non-U.S. client requires the services of a translator, there is already a communication barrier that creates distance between the attorney asking sensitive questions and the witness who has to disclose conduct that may cause, at a minimum, embarrassment or disciplinary action or, worse, impose criminal penalties. In these interactions, nuances such as facial expressions and gestures of empathy may be lost on video. But these social cues are needed to build the relationship that facilitates witness disclosures.

6. Obstruction of justice carries harsher penalties than the antitrust misconduct itself. Any attempt to conceal or destroy evidence exacerbates the potential consequences for individuals and corporations, especially with the advent of forensic discovery that can detect efforts to erase data and can restore files that have been deleted. Under federal law, interfering with a criminal investigation is punishable by fine, a 20-year prison sentence, or both.[21] For individuals facing prison for anticompetitive conduct, participating in obstruction of justice is an aggravating factor in sentencing that can lead to an increased prison term.[22] The Antitrust Division is also willing to prosecute individuals who instruct employees to conceal or destroy communications and cell phone records with competitors even if they have no involvement with the *per se* criminal misconduct.[23] For individuals who plead guilty to price-fixing or another hard-core antitrust violation, obstruction of justice is an aggravating factor that can result in an upward departure of the sentence for the underlying antirust offense.[24]

7. A guilty plea in a criminal antitrust investigation is the springboard for civil litigation. Although private rights of action are becoming more prevalent in non-U.S. jurisdictions, the follow-on civil litigation that ensues after the criminal investigation closes is an unfamiliar and daunting process. The milestone of entering a plea agreement with prosecutors opens the floodgates for class action lawsuits on behalf of consumers who paid inflated prices as a result of the conspiracy. By statute, plaintiffs can use the guilty plea made in a cartel investigation as prima facie evidence that the defendants violated Section 1 of the Sherman Act.[25] If defendants have produced documents to the Government, plaintiffs are entitled to obtain these documents from defendants in discovery,[26] even if the criminal investigation is ongoing for co-conspirators.[27] For this reason, the company and its counsel should not provide notes or written materials to the Antitrust Division and witness proffers and plea agreement negotiations should be done orally, to avoid creating a paper trail of culpability.

Guiding a non-U.S. corporation and its executives through an antitrust investigation poses challenges to the company and their counsel. The unique complexities of the U.S. criminal justice system and civil litigation are difficult to navigate even before the additional wrinkle of leniency is introduced. The best counsel for non-U.S. companies in these circumstances will possess a combination of expertise and empathy to maneuver in this minefield.

Editor's Note: Prior to publication, on April 4, the Division released updated FAQs on the Leniency Program: https://www.justice.gov/atr/page/file/1490311/download.

Endnotes

[1]Partner, Sterlington, PLLC. The author extends her gratitude to Donald C. Klawiter of Sterlington, PLLC and Hiroko Namura and Atsushi Tanaka of Namura & Partners for their mentoring and support in cross-border investigations, which has enabled her to write this article. All errors and omissions are the author's alone.

[2]*See, e.g.,* Donald C. Klawiter, "The new US antitrust administration," Concurrences No. 1-2021 at 38 (Feb. 2021).

[3]*See* Remarks of Merrick B. Garland, U.S. Att. Gen., at Amer. Bar Ass'n Inst. on White Collar Crime at 4 (Mar. 3, 2022) at https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime (Remarks of Richard A. Powers, Acting Ass't Att. Gen. of the U.S. Dep't of Justice, Antitrust Div., at Fordham University's 48th Annual Conference on International Antitrust Law and Policy at 3 (Oct. 1, 2021) at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-antitrust-division-delivers-remarks ("As remote work becomes more prevalent, labor markets will become less confined by geographic limitations, and companies competing for workers across borders may be tempted to enter into unlawful agreements. We must remain vigilant.").

[4]Executive Order on Promoting Competition in the American Economy (July 9, 2021) at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[5]*See, e.g.,* John M. Connor, "Twilight of Prosecutions of the Global Auto-Parts Cartels," Amer. Antitrust Inst. at 7 at https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Auto-Parts-Cartel-Twilight-of-AAI-WP_7.17.19.pdf ("The remote causes of the price-fixing behavior may lie in the customary organization of many Japanese suppliers of components to brand-name manufacturers; these organizations are called *keiretsu*. . . . [M]embers of a *keiretsu* share a consensus view that incumbent suppliers deserve protection from competitive rivalry.").

[6]*See* ICN, Trends and Development in Cartel Enforcement 2010 – 2020 at 69 – 74 (2021) at https://www.internationalcompetitionnetwork.org/portfolio/trends-and-developments-in-cartel-enforcement-2010-2020/.

[7]U.S. Dep't of Justice, Antitrust Div., Frequently Asked

Questions about the Antitrust Division's Leniency Program and Model Leniency Letter (hereinafter, "Leniency FAQ") at 10 (originally published Nov. 18, 2008 and updated on Jan. 26, 2017) at https://www.justice.gov/atr/page/file/926521/download.

[8]*See* Remarks of William J. Baer, Ass't Att. Gen., at the Georgetown University Law Center Global Antitrust Enforcement: Prosecuting Cartels at 2 (Sept. 10, 2014) at https://www.justice.gov/atr/file/517741/download.

[9]*See* Robert B. Bell & Kristin Millay, "The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs," Antitrust Vol. 33 No. 1 at 83 (2018) available at https://files.hugheshubbard.com/files/The-Corporate-Leniency-Program-Did-The-Antitrust-Division-Kill-The-Goose-That-Laid-The-Golden-Eggs.pdf ("The cumulative effect of [the Division's] statements is to create concern and uncertainty for leniency applicants as to whether their cooperation will be thorough enough to meet the Division's standards . . . and whether they will be able to discover all of the relevant facts in time to provide what the Division considers prompt cooperation.").

[10]*See* Remarks of Richard A. Powers. Dep. Ass't Att. Gen., at the American Bar Ass'n Section of Antitrust Law International Cartel Workshop at 2 at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.

[11]*See* Remarks of Scott D. Hammond, Dep. Ass't Att. Gen., at the American Bar Ass'n Section of Antitrust Law Spring Meeting at 2 (Mar. 29, 2006) at https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations.

[12]*See generally id.*

[13]See Leniency FAQ, *supra* note 7, at 7.

[14]15 U.S.C. §§ 78dd-1, *et seq.*

[15]*See* Leniency FAQ, *supra* note 7, at 7.

[16]Although the U.S. Department of Justice offers incentives to self-report violations of the Foreign Corrupt Practices Act, the FCPA Corporate Enforcement Policy does not provide complete amnesty. *See* U.S. Dep't of Justice, FCPA Corporate Enforcement Policy (Nov. 2019) at https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120 (Fraud Section will recommend a 50% reduction of low end of Sentencing Guidelines and waive appointment of corporate monitor for a company that has "voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated").

[17]*See U.S. v. Bridgestone Corp.,* Plea Agreement (S.D. Tex. Oct. 5, 2011) at https://www.justice.gov/atr/case-document/file/489806/download.

[18]U.S. Dep't of Justice, Antitrust Div., *Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials,* at 2 (Sept. 15, 2011) at https://www.justice.gov/opa/pr/bridgestone-corporation-agrees-plead-guilty-participating-conspiracies-rig-bids-and-bribe.

[19]*See* U.S. Dep't of Justice, Antitrust Div., *Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More* (July 16, 2021) at https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

[20]U.S. Dep't of Justice, Antitrust Div., *Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars,"* at 1 (Feb. 13, 2014) at https://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

[21]*See* 18 U.S.C. § 1512(b).

[22]*See* U.S. Sentencing Guidelines § 3C1.1 (2021) at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf. *U.S. v. Ukai,* Plea Agreement at 7 (E.D. Mich. Nov. 10, 2011) at https://www.justice.gov/atr/case-document/file/513881/download.

[23]*See U.S. v. Higashida & Katsumaru,* 2:16-cr-20641-GAD-APP (E.D. Mich. Sept. 21, 2016) at https://www.justice.gov/atr/file/899166/download.

[24]*See* U.S. Sentencing Guidelines § 3C1.1 (2021) at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

[25]*See* 15 U.S.C. 16(a). *See also In re Capacitors Antitrust Litig.,* Case No. 17-md-02801-JD, at *8 (N.D. Cal. Nov. 14, 2018) ("criminal judgments that followed from . . . guilty pleas are admissible at trial as prima facie evidence of the violation of antitrust laws") (inner quotation marks omitted).

[26]*See Emerson Elec. Co. v. Le Carbone Lorraine, S.A.,* No. 05-6042 (JBS), at *6 (D.N.J. Aug. 27, 2008) (documents or other materials already produced to the Department of Justice in connection with the . . . investigation does not impose an undue burden on the producing party given the needs of this case, the amount in controversy, the parties' resources, and the significance of these items in helping to resolve the issues").

[27]*See in re Residential Floor Antitrust Litig.,* 900 F. Supp. 749, 756 (E.D. Pa. 1995) (stay of discovery "inappropriate" where parties "do not dispute that that the criminal proceedings have concluded for each defendant in these civil actions").

The Department of Justice's Pursuit of Wage Fixing and No-Poach Agreements

By Stephen M. Owen. Stephen is an associate at Lockridge Grindal Nauen P.L.L.P. in Minneapolis. He practices in the firm's antitrust, data breach, consumer protection, and employment practice areas.

In October 2016, the Department of Justice (DOJ) and Federal Trade Commission (FTC) jointly released their *Antitrust Guidance for Human Resource Professionals*, warning employers that agreements between competitors to set wages or to refrain from soliciting each other's employees, so-called "no-poach" agreements, could result in criminal prosecution. The guidance advised such agreements are "naked agreements" without any redeeming value and thus appropriate for *per se* treatment under the antitrust laws.[1]

On the campaign trail, the Biden Administration announced that it would put this guidance into effect, proclaiming its intention to "[e]liminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers."[2] Indeed, during the first year of the Biden Administration, the DOJ indicted companies and individuals, alleging their agreements with competitors to fix wages and not to solicit each other's employees constituted *per se* violations of the Sherman Act. Of this first wave of indictments, many defendants have challenged the DOJ's "novel" *per se* treatment of these alleged restraints. This article reviews the parties' relative arguments on DOJ's *per se* theory and several courts' preliminary analyses and rulings in this emergent context.

I. Wage Fixing: *United States v. Jindal*

On November 29, 2021, an Eastern District of Texas district court ruled that an alleged agreement to fix wages is appropriate for *per se* treatment under the Sherman Act. The decision sends a strong message to employers and human resource professionals that "naked" agreements between competitors in the context of compensation, benefits, or other hiring practices are subject to scrutiny under the antitrust laws and may result in criminal prosecution.

The decision arose after the DOJ indicted two individuals, Neeraj Jindal and John Rodgers. Jindal was the owner of a physical therapist staffing company and Rodgers was a clinical director of the company and a physical therapist who contracted with the company. The company acted as a "middleman," contracting with physical therapists (PTs) and physical therapist assistants (PTAs) and placing them with home-health agencies to provide in-home patient care.[3]

The company would pay PTs and PTAs specific prices for their services and in turn, the company would bill the home-health agencies for their services. The alleged price-fixing conspiracy consisted of allegations that the Defendants, on behalf of the company, contacted competing therapist staffing companies and requested those companies to lower the rates they compensated their PTs and PTAs.[4]

The DOJ charged that the Defendants' conduct constituted a *per se* violation.[5] *Per se* treatment is typically reserved for "horizontal restraints" such as price fixing, market allocation, bid rigging, and certain group boycotts, which are "manifestly anticompetitive" and "always or almost always tend to restrict competition."[6]

The DOJ alleged that Jindal and Rodgers "knowingly entered into and engaged in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to PTs and PTAs."[7] In response, The defendants argued that the DOJ failed to allege a price fixing conspiracy appropriate for *per se* treatment. Specifically, the Defendants argued that price fixing means fixing the price of a commodity and that fixing "wages do[es] not fall within the definition of 'price fixing.'"[8]

The question for the Eastern District of Texas, therefore, was whether the allegations of wage-fixing between Jindal's company and its competitors constituted a *per se* offense under the Sherman Act. The court concluded it did.

First, the court determined that the antitrust laws fully apply to buyers of labor. The court cited *Anderson v. Shipowners' Association of Pacific Coast*, 272 U.S. 359, 361–65 (1926), a nearly century-old Supreme Court case, which held that fixing wages of ship employees violated the Sherman Act.[9] In citing *Anderson*, the court concluded that the Sherman

Act applied equally to all industries and markets, including employers in the labor market.[10]

Next, the court analyzed whether the alleged wage-fixing agreement constituted a price-fixing agreement deemed unlawful *per se*. To do so, the court explained that the term "price fixing" is broad, encompassing the "naked price-fixing conspiracy among buyers in the labor market to fix the pay rates of the PTs and PTAs."[11] The court elaborated that when employers conspire to lower the price of labor, wages become suppressed, which results in fewer people taking jobs. According to the court, this outcome "always or almost always tend[s] to restrict competition and decrease output."[12] The court reasoned that this type of agreement is "plainly anticompetitive" with no purpose but to stifle competition. [13]

Reiterating that the Sherman Act applies to employee services, the court addressed the Supreme Court's recent decision in *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021), which ruled on the NCAA's cap on education-related compensation for student athletes. Although the scheme in *Alston* did not qualify for *per se* treatment, the court noted Justice Kavanaugh's concurrence in which he stated, "[p]rice-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."[14] Thus, the Eastern District of Texas concluded that, "outside the extraordinary context at issue in *Alston*, naked horizontal agreements to fix the price of labor, like the agreement here, are ordinarily *per se* illegal."[15]

The court also rejected the Defendants' contentions that wage fixing could actually benefit consumers by lowering the price of PTs and PTAs and consumer prices for physical therapy services.[16] The court found that such benefit "is surely not necessarily to be anticipated" and, in any event, would not prevent the conduct from being deemed unlawful *per se*.[17]

The court also concluded that the indictment was legally sufficient on its face to state a *per se* offense.[18] In doing so, the court explained that the indictment: (1) alleged the Defendants knowingly formed, joined, or participated in the conspiracy; (2) alleged the conspiracy was meant to suppress competition by agreeing to fix prices; and (3) alleged that the activities subject to the conspiracy occurred within the flow of, and substantially affected, interstate trade and commerce.[19]

The Defendants raised several constitutional arguments against the application of the *per se* rule, but the court rejected these arguments as well. The Defendants argued that the indictment violated the Fifth Amendment's "fair warning" requirement purportedly because no court had yet found wage fixing to be *per se* illegal.[20] Relatedly, the Defendants contended that there was "grievous uncertainty as to whether the Supreme Court condemns wage fixing as a *per se* antitrust violation" and therefore the rule of lenity[21] required dismissal.[22] The court rejected these arguments, noting that the Sherman Act and "decades of case law" made it clear that Defendants' conduct was unlawful.[23] Finally, the Defendants argued the indictment violated the Sixth Amendment because the *per se* designation improperly presumed they had the requisite criminal intent to restrain trade.[24] The court rejected this argument as well, concluding that a finding to fix prices equates to a finding of intent to restrain trade.[25]

The *Jindal* defendants ultimately fared better with the jury; on April 14, 2022, the defendants were acquitted on all antitrust charges, though Jindal was convicted of obstruction.

II. No-Poach Agreements: *United States v. DaVita Inc.*; *United States v. Surgical Care Affiliates, LLC*; and *United States v. Hee*

Following the indictment in *Jindal*, the DOJ filed indictments alleging healthcare providers entered into agreements not to solicit each other's employees, *i.e.*, no-poach agreements, and that such agreements constitute *per se* violations of the Sherman Act. The defendants have made arguments similar to those advanced by the *Jindal* defendants, namely that the alleged unlawful conduct does not constitute a *per se* offense and that by prosecuting such conduct, the DOJ violates their due process rights.

A. *United States v. DaVita Inc.*: No-Poach Agreements Warrant *Per Se* Treatment.

On January 28, 2022, the District of Colorado denied the Defendants' motion to dismiss in *United States v. DaVita Inc.*[26] The DOJ alleged that the owners and operators of medical care facilities and their co-conspirators colluded to allocate the market for employees from approximately February 2012 to June 2019. Specifically, the Defendants allegedly agreed not to solicit employees from co-conspirators, required employees to notify their current employers before seeking employment with a co-conspirator,

and met to discuss the terms of their agreement.[27] In response, the Defendants argued that the alleged conduct did not constitute a horizontal market allocation. The court swiftly rejected this argument.

As a threshold matter, the court noted that there is a lack of precedent regarding *per se* treatment of market allocation in the employment context. But the court determined that this lack of case law made no difference because "anticompetitve practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services."[28] Noting the indictment's language stating that the conspirators *"allocate[d]"* employees, the court concluded that the indictment set forth a horizontal market allocation.[29]

Next, the Defendants argued that the indictment lacked sufficient facts to show that the non-solicitation agreements actually allocated the market for employees. But the court found that the indictment sufficiently alleged that the conspirators met to discuss terms of the agreement, that they agreed not to solicit employees from each other, that they monitored compliance with the agreement, and that they required their employees to provide notification if they sought a job at one of the other conspirators.[30]

In addressing the Defendants' legal arguments, the court clarified the proper analysis for determining whether a restraint deserves *per se* treatment. The court explained that the preliminary step is to determine whether the restraint falls into a category that has traditionally been found to be subject to *per se* treatment. If not, then the court asks whether the creation of a new category is appropriate. If the restraint falls into one of these categories, the final question is whether the restraint is "naked," *i.e.*, "has no purpose except stifling competition."[31]

The Defendants asserted that non-solicitation agreements are not unlawful *per se* because there is no precedent that says they are. The court rejected this argument, relying on *United States v. Cooperative Theatres of Ohio, Inc.,* 845 F.2d 1367 (6th Cir. 1988). There, the Sixth Circuit held that an agreement between competitors not to solicit customers was both a horizontal market allocation and a naked restraint of trade warranting *per se* treatment.[32] The court determined that *Cooperative Theatres* was "sufficiently analogous" and held that the Defendants' non-solicitation agreements fell into the existing *per se* category of horizontal market allocation.[33] Notably, the court declined to rule that all non-solicitation agreements and all non-hire agreements are *per se* unlawful.[34] To be sure, however, the court explained, "if naked non-solicitation agreements or no-hire agreements allocate the market, they are *per se* unreasonable."[35]

As in *Jindal* , the Defendants in *DaVita* argued that their due process rights were violated because they purportedly lacked notice that non-solicitation agreements were unlawful. The court rejected these arguments in a similar fashion as the *Jindal* court, reasoning that the non-solicitation agreements are a form of horizontal market allocation, a well-established category of per se unlawfulness.[36]

Although not prevailing in their pretrial challenge, a jury acquitted the defendants on all charges on April 15, 2022.

B. Pending Motions To Dismiss: *United States v. Surgical Care Affiliates, LLC* and *United States v. Hee*

The DOJ is currently pursuing two other cases with similar allegations as *DaVita*. Orders on motions to dismiss in these two cases, *United States v. Surgical Care Affiliates, LLC* and *United States v. Hee*, are currently pending.

In *Surgical Care Affiliates*, a federal grand jury in Las Vegas, Nevada, returned an indictment alleging that Surgical Care Affiliates, LLC and a related entity (collectively, "SCA"), owners and operators of medical centers, conspired with the owners and operators of rival medical centers to agree not to solicit each other's senior-level employees.[37] According to the indictment, SCA and its unnamed competitor participated in meetings, conversations, and communications to that end from approximately May 2010 through October 2017.[38] SCA and its competitor also monitored compliance with the agreement by requiring employees seeking employment with the competitor to notify their current employer.[39]

SCA filed a motion to dismiss arguing that no-poach agreements do not qualify for *per se* treatment.[40] As such, SCA posited that prosecuting their conduct as a *per se* violation would deny it due process because it purportedly lacked notice that no-poach agreements are, as a matter of law, illegal.[41]

The DOJ also indicted a healthcare staffing company in *Hee*. There, the DOJ alleged that the company, its agent, and their co-conspirators entered into a conspiracy to both allocate nurses and fix the wages of school nurses in Las Vegas from approximately October 2016 through July 2017.[42] According to the indictment, the company, its agent, and

their co-conspirators participated in conversations and other communications through which they refused to negotiate wage increases for the school nurses, agreed not to recruit each other's nurses, and agreed notify each other if a nurse sought employment at their company.[43]

Like the conspirators in *Surgical Care*, the Defendants in *Hee* argued that the *per se* rule did not apply. Specifically, the Defendants noted that, "[n]o federal court has ever even concluded that agreements not to solicit employees are *per se* illegal under the Sherman Act, let alone found that agreements not to recruit another company's employees are criminal violations of the Sherman Act."[44] The Defendants also argued that no-poach agreements had procompetitive effects, namely the ability to staff the schools more efficiently and effectively with nurses.[45]

In addition to raising due process arguments like the defendants in *Jindal, DaVita,* and *Surgical Care*,[46] the Defendants in *Hee* also argued that because the no-poach agreements affected only one entity in one state, the Defendants argued that the indictment did not affect interstate commerce.[47] The parties await whether the District of Nevada will find merit to these arguments.

Conclusion

The DOJ has notched two important pretrial victories in vigorously pursuing no-poach agreements and wage-fixing agreements in the healthcare industry. Although decisions on the no-poach agreements in *Surgical Care* and *Hee* are still pending, *DaVita* sends a strong signal that the the courts (if not juries) agree with the DOJ that no-poach agreements should receive *per se* treatment, a conclusion further buttressed by *Jindal's* emphasis on applying antitrust laws to buyers of labor.

Endnotes

[1]Department of Justice Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (October 2016), available at https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.
[2]President-elect Joe Biden, "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions," available at https://joebiden.com/empowerworkers/.
[3]*United States v. Jindal*, No. 4:20-CR-00358, 2021 WL 5578687, at *1 (E.D. Tex. Nov. 29, 2021).
[4]*Id.* at *1–2.
[5]*Id.* at *4.
[6]*Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (internal citations omitted).
[7]First Superseding Indictment as to Neeraj Jindal and John Rodgers, ¶ 11, Dkt. No. 21 (April, 15, 2021).
[8]*Jindal*, 2021 WL 557867, at *4 (quoting Defendant Jindal's Motion to Dismiss Count One of the First Superseding Indictment).
[9]*Id.* at *5 (summarizing *Anderson*).
[10]*Id.*
[11]*Id.*
[12]*Id.*
[13]*Id.*
[14]*Id.* at 2167–68 (Kavanaugh, J., concurring).
[15]*Jindal*, 2021 WL 557867, at *6. In doing so, the court cited numerous other appellate and district court opinions holding that wage fixing is unlawful *per se*.
[16]*Id.* at *7.
[17]*Id.* (citing Catalono, Inc. v. Target Sales Inc., 446 U.S. 643, 649 (1980)).
[18]*Id.* at *8.
[19]*Id.*
[20]*Id.* at *9.
[21]The Rule of Lenity is a principle of statutory interpretation dictating that courts resolve ambiguities in criminal statutes in favor of defendants. *Crandon v. United States*, 494 U.S. 152, 168 (1990).
[22]*Jindal*, 2021 WL 557867, at *9 (quoting Reply to Response to Motion by Neeraj Jindal, Dkt. No. 47).
[23]*Id.* at *10.
[24]*Id.* at *11.
[25]*Id.* (citing United States *v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683–84 (5th Cir. 1981)).
[26]No. 1:21-cr-00229-RBJ, 2022 WL 266759, at *1 (D. Colo. Jan. 28, 2022).
[27]*See id.* at *1–3.
[28]*Id.* at *5.
[29]*Id.* at *6–7 (emphasis in original)(alteration added).
[30]*Id.* at *7–8.
[31]*Id.* at *9.
[32]*Id.* at 1372.
[33]*DaVita, Inc.*, 2022 WL 266759, at *10, 13–14.
[34]*Id.* at *16.
[35]*Id.* at *17.
[36]*Id.* at *18.
[37]Indictment at ¶ 9, *United States v. Surgical Care Assocs.,* LLC, No. 3:21-cr-00011-L (N.D. Tex. Jan. 5, 2021).
[38]*Id.* at ¶¶ 9–11.

[39]*Id.* at ¶ 11.
[40]The motion and reply brief were filed before the *DaVita* decision. See, section II(A), *supra*. DOJ filed the *DaVita* decision as supplemental authority.
[41]Mtn. to Dismiss at 8–9, Doc. No. 38, *United States v. Surgical Care Assocs., LLC*, No. 3:21-cr-00011-L (N.D. Tex. May 14, 2021); Reply In Support of Defendants' Motion to Dismiss at 7–10, Doc. No. 87, *United States. v. Surgical Care Assocs., LLC*, No. 3:21-cr-000111-L (N.D. Tex. Dec. 20, 2021).
[42]Indictment at ¶ 14, *United States v. Hee,* No. 2:21-cr-00098 (D. Nev. Mar. 30, 2021).
[43]*Id.*
[44]Defendant VDA OC's Motion to Dismiss at p. 7, *United States v. Hee*, No. 2:21-cr-00098 (D. Nev. Sept. 3, 2021).
[45]*Id.* at 14.
[46]*Id.* at 16–18.
[47]*Id.* at 19–22.

New Administration, New Leadership

Antitrust Division

Assistant Attorney General of DOJ's Antitrust Division Jonathan Kanter was confirmed on November 16, 2021. As head of the Antitrust Division, Kanter is supported by top advisors in his Deputy Assistant Attorneys General, positions which he has been filling slowly. His first move was to name Doha Mekki as Principal Deputy Assistant Attorney General, his top advisor.

Hetal J. Doshi has recently been named an Acting Deputy Assistant Attorney General. She previously served as Assistant U.S. Attorney in the economic crimes section for the District of Colorado in Denver. During her years of private practice, she also spent time Kenya, New York City, and Atlanta, where she began her career and developed a passion for white collar crime defense and government investigations while at Alston & Bird LLP.

Carol Sipperly was also elevated to Acting Deputy Assistant Attorney General. Sipperly is known as a veteran prosecutor who began her career in the Southern District of New York. She was involved in several high-profile criminal cases, including leading prosecutions of Daryl Strawberry for tax evasion and mafia boss John A. Gotti. Later she worked for Main Justice in several sections of DOJ's Criminal Division before joining the Antitrust Division.

Richard Powers, who served as Acting Assistant Attorney General during the Biden Administration until Kanter's confirmation, remains part of Kantor's team of deputies. The two remaining deputy positions remain vacant.

Consumer Financial Protection Bureau

Following his confirmation Director in September 2021, Rohit Chopra actively sought to both shake up and beef up the enforcement attorneys at the Consumer Financial Protection Bureau. His top advisors now include Zixta Martinez, overseeing the Operations Division as Deputy Director; Karen Andre, as Associate Director for Consumer Education and External Affairs; Jan Singelmann, as Chief of Staff; and Erie Meyer, joining in a new role as Chief Technologist. In addition, Lorelei Salas stepped into the roles of Assistant Director for Supervision Policy and Acting Assistant Director for Supervision Examinations, and Eric Halperin has been named as Assistant Director for the Office of Enforcement.

It has also been reported that the CFPB is adding up to 30 new attorneys in its Supervision, Enforcement and Fair Lending Division to bolster its revitalized enforcement efforts.

Federal Trade Commission

Privacy advocate and Biden Administration nominee Alvaro Bedoya remains subject to confirmation by the Senate to fill the vacant Commissioner seat. After the Senate Commerce Committee deadlocked twice in voting on whether to recommend his confirmation to the Senate, the full Senate voted 51-50 (along party lines) to bypass the Commerce Committee and allow a floor vote on his nomination. If confirmed, Bedoya would become the fifth current Commissioner alongside Chair Lina M. Khan, Rebecca Slaughter, Noah Joshua Phillips, and Christine S. Wilson.

New Section Members

We wanted to specially welcome some of our recent additions to Section membership. If a new member practices in your area, we invite you to reach out and connect. Also, we welcome new members to become actively involved and contribute their talents to the Section.

October 2021:

Richard E. Davis	Birmingham, AL
Mark Grundvig	Washington, DC
Christopher Ralston	New Orleans, LA
Gregory Sapire	Austin, TX
Thomas Segars	Raleigh, NC

November 2021:

Tim L. Collins	Cleveland, OH
Fred A. Kelly, Jr.	Boston, MA
Henry L. Kitchin, Jr.	Wilmington, NC
Joshua Mone	Farmington, MN
Bogdan Tereshchen	Arlington, VA
Serina M. Vash	Westfield, NJ

December 2021:

Rachel Epstein	Manhattan, NY
James McGrath	Boston, MA
Matthew D. Segal	Sacramento, CA

January 2022:

Noah Cozad	Minneapolis, MN
Jaycee Nall	Boise, ID
Nora Elisa Pou	Wellesley, MA
Jessica W. Rosen	Encino, CA
Prof. Steven Semeraro	San Diego, CA
Emily Werkmann	New York, NY

Antitrust Apprentice

For members who are novices or could simply use a refreshing in some aspects of antitrust and trade regulation, this segment highlights some basics and resources for more information.

Cartels

- Cartels are enterprises that join together in certain anticompetitive conduct.
- The Sherman Act does not define the term "cartel" and it is not an element of any offense. However, case law describes cartel activity. Hence, "cartel" is generally used as a descriptor and indicates independent companies engaged in cartel activity.
- "Hard-core" cartel activities are generally interpreted to cover collusive agreements among horizontal competitors that are clearly *per se* illegal and subject to criminal prosecution, such as fixing prices, rigging bids, allocating markets, or adopting quotas. In short, "hard-core" violations merit criminal prosecution.
- A corresponding term for non-hard-core violations is not coined in case law, though commentators occasionally refer to conduct subject to the rule of reason comparatively as "soft-core" violations.
- Cartels can be domestic or international. The Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, extends the reach of U.S. antitrust laws to certain foreign conduct that involves U.S. trade or import commerce, but not to export cartels.
- A cartel can be difficult to uncover. According to the DOJ, the Antitrust Division's Leniency Program is its most important tool for detecting cartel activity. The Leniency Program allows individuals and companies who are the first (and sometimes second) reporters of their cartel activity and who cooperate in the DOJ's investigation to avoid criminal penalties.
- The Sherman Act imposes severe criminal penalties. Individuals face fines of up to $1 million and 10 years in prison, while companies can be fined up to $100 million or twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime. Restitution payments to victims can also be ordered.

Save the Date

Please save the date for the Section's next upcoming programming:

May 20, 2022
1-hour webinar highlighting tips on how to conduct criminal investigations.

June 8, 2022
1-hour webinar on the Biden-Harris Administration's antitrust attitudes, actions, and aims during the first 18 months of its term. CLE credit eligible (approval pending).

Contact Jonathan Direnfield for more information or simply stay tuned — more details will follow via email to Section members as the events near!

Spotlight on Younger Lawyers Division

If you have enjoyed reading the Antitrust & Trade Regulation Section's newsletter, you may also enjoy reading the YoungerLawyers Division's newsletter, *Perspectives*. The Winter 2022 edition of *Perspectives* features several articles discussing legal issues at the forefront of current events and national discussion, including an article discussing recent regulations and court decisions regarding Federal vaccination mandates. The Winter 2022 edition also features an article discussing legal writing and another installment of our interview series, introducing members of the Senior Lawyers Division to members of the Younger Lawyers Division. Current and past editions of *Perspectives* are available here: https://www.fedbar.org/younger-lawyers-division/yld/yld-perspectives/

If you are not already a member of the Younger Lawyers Division, please consider becoming one! More information is available here: https://www.fedbar.org/younger-lawyers-division/

Contribute and Collaborate!

Get published! Become a thought leader! Spark a friendly debate!

We are seeking articles for inclusion in *Antitrust Trends*. If you or a colleague is interested in writing an article on a topic related to antitrust and trade regulation, particularly any emerging issues and recent developments, consider submitting for publication the *Antitrust Trends*! Submissions should be sent for consideration to the Section's Publications Chair Marisa Rosen Dorough at mdorough@bakerdonelson.com. Articles typically run from 1,000-2,500 words, with annotations by endnotes rather than footnotes. Please include with your submission a short bio of the author(s), with any photos in .jpeg format.