WHERE HAVE WE BEEN, AND WHERE ARE WE GOING? THE CRIMINAL PROSECUTION OF BUYER CARTELS

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The announcement in October 2016 that the Antitrust Division of the U.S. Department of Justice intended "to criminally investigate naked no-poaching or wage-fixing agreements," or buyer cartels for labor, was widely viewed as a momentous shift in enforcement policy. This was not only because of the focus on labor as a commodity was previously not a significant area of interest for antitrust enforcement — much less criminal enforcement — but also because it represented a buyer-side agreement. But, in light of the Division's history prosecuting other buyer cartels, particularly auction bidders, why has this new criminalization policy sent shock waves through the business world? Does the difference between buyer and seller cartels matter and, if so, how? As the Division enters this brave new world of prosecuting buyer cartels for labor, answers to these questions will help establish guideposts for understanding what the Division is doing, why it is doing it, and some of the likely consequences. Time will tell if courts support the Division's aggressive interpretation of its authority or reject the assertion that this is *per se* conduct that the Division just didn't bother pursuing criminally for the past 130 plus years since the Sherman Act was passed.

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The prosecution of buyer cartels as conduct contrary to antitrust laws is not new. Although buyer cartels are a minority of the cartel prosecutions by the U.S. Department of Justice's Antitrust Division, they have been a regular feature of the Division's enforcement efforts over decades. In fact, the Division has prosecuted a variety of buyer cartels, though until recently most involved collusion during auctions.

Despite this history, in October 2016, when the Division announced that it intended "to criminally investigate naked no-poaching or wage-fixing agreements,"[2] or buyer cartels for labor, it was widely viewed as a momentous shift in policy. Perhaps in recognition that this was a somewhat shocking change in policy and interpretation of its criminal authority, rather than charge such cases right away, the Division instead filed a handful of statements of interest in civil wage-fixing and no-poach cases, while its leadership addressed the contours of the new policy across several public speeches. As perhaps an implicit acknowledgement of the significance of this policy shift, the Division waited more than four years to charge its first criminal wage-fixing and no-poach cases. To better understand the expansion of the Division's scope of criminal enforcement and its implications, it is helpful to place the newfound focus on prosecuting buyer cartels for labor in context with both the Division's history of prosecuting buyer cartels and the underlying economics of the risk of harm posed by buyer cartels.

I. GASOLINE, BILLBOARDS, AND MOVIE THEATERS . . . BUT MOSTLY AUCTIONS

Although buyer cartel prosecutions may be less frequent, they are not insignificant. The Supreme Court's seminal decision holding that price fixing is illegal *per se* involved an agreement between buyers of gasoline.[3] Over the years, the Division has prosecuted billboard companies for colluding on the rents they would pay to property owners[4] and movie theaters for agreeing to allocate the rights to show different films.[5]

By far, however, the majority of buyer cartel prosecutions have involved auctions. Between 1997 and 2006, all 70 criminal cases brought by the Division against buyer cartels involved collusion among auction bidders.[6] In 2014 and 2015, the Division prosecuted more than 50 individuals for conspiring not to bid against one another at public real estate foreclosure auctions.[7] While the country was reeling from the 2008 recession, the conspirators agreed before the auctions who would win certain properties, thereby ensuring an artificially lower price, and then held follow-on auctions among themselves to ensure the equitable distribution of properties.[8] As of January 2021, the Division had charged 139 individuals and three companies in these real estate foreclosure conspiracies.[9] Over 120 individuals pleaded or were found guilty, the longest prison sentence was for 21 months, and the criminal fines totaled more than $1,400,000.[10]

2 Press Release, U.S. Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

3 *U.S. v. Socony-Vacuum Oil Co.*, 310 US. 150 (1940).

4 See *U.S. v. Brown*, 936 F.2d 1042 (9th Cir. 1991).

5 *U.S. v. Plitt So. Theaters, Inc.*, 1987 WL 19346 (W.D.N.C. Aug. 10, 1987).

6 Roundtable on Monopsony and Buyer Power: Note by the United States to the Organization for Economic Co-operation and Development (Oct. 13, 2008), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf.

7 Press Release, U.S. Dep't of Justice, Northern California Real Estate Investor Agrees to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (May 4, 2015), https://www.justice.gov/opa/pr/northern-california-real-estate-investor-agrees-plead-guilty-bid-rigging-public-foreclosure-6.

8 Information at 3, *U.S. v. Alvin Florida, Jr.*, No. 17-10330, 4:14-cr-00582 (N.D. Cal. Nov. 19, 2014).

9 DOJ Public Real Estate Foreclosure Auction Cartels Investigation Chart, WestLaw Practical Law Antitrust (Dec. 2020).

10 *Id.*

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In 2019, the Division charged individuals for colluding during auctions hosted by the General Services Administration ("GSA"), the federal government's primary administration agency. GSA auctions allowed the public to bid electronically on various federal assets no longer needed by the government, such as old computer equipment,[11] and the proceeds would go the U.S. Treasury or the agencies themselves.[12] The Division alleged that the co-conspirators agreed on who would submit bids for particular lots and who would win each lot, and then later they would agree on how to divide the assets they won among themselves.[13] Two of the three individuals charged in the investigation have pleaded guilty.[14]

II. [*ENTER STAGE RIGHT, SLOWLY*] WAGE-FIXING AND NO-POACH PROSECUTIONS

In October 2016, at the tail-end of the Obama administration, the Division and Federal Trade Commission ("FTC") unveiled Antitrust Guidance for Human Resource Professionals. Notably, the guidance made clear that, "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[15] According to those Guidelines, "[t]h[o]se types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocation customers, which have traditionally been criminally investigated."[16]

Rather than start charging cases, the Antitrust Division spent the next few years filing statements of interest in several civil cases involving wage-fixing or no-poach claims.[17] Of particular note is the statement of interest the Division filed in the case concerning allegations of no-poach agreement between fast-food franchisors and their franchisees. There, the Division argued that the more flexible rule of reason should apply when determining whether the plaintiffs had stated a Section 1 claim because the alleged agreements were vertical rather than horizontal, and "[v]ertical arrangements are almost always assessed under the rule of reason."[18]

It was not until December 2020 — more than four years after issuance of this guidance — that the Division filed its first criminal charges for both wage-fixing (*U.S. v. Jindal*, December 2020)[19] and no-poach (*U.S. v. Surgical Care Affiliates LLC*, January 2021)[20] agreements. The fact that the Division waited several years to allow its "prosecutorial intent" to sink-in seems to be an implicit recognition of the significance in this shift in enforcement.

11 U.S. Gen. Serv. Admin., https://gsaauctions.gov/html/static/about.htm (last visited May 9, 2021).

12 Press Release, U.S. Dep't of Justice, Texas Bidder Pleads Guilty To Rigging Bids at Online Auctions for Surplus Government Equipment (Apr. 10, 2019), https://www.justice.gov/opa/pr/texas-bidder-pleads-guilty-rigging-bids-online-auctions-surplus-government-equipment.

13 *Id.*

14 Press Release, U.S. Dep't of Justice, Missouri Businessman Arrested on Antitrust Charge for Rigging Bids at Online Government Auctions (Feb. 5, 2020), https://www.justice.gov/opa/pr/missouri-businessman-arrested-antitrust-charge-rigging-bids-online-government-auctions.

15 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resources Professionals at 4 (2016) (hereinafter DOJ-FTC Guidance For HR Professionals).

16 *Id.*

17 See *In re: Railway Industry Employee No-Poach Antitrust Litig.*, 18-mc-0798, ECF No. 158 (W.D. Pa. Feb. 8, 2019); *Seaman v. Duke Univ.*, 15-cv-0462, ECF No. 325 (M.D.N.C. Mar. 7, 2019); *and Stigar v. Dough, Inc.*, 18-cv-0244, ECF No. 38 (E.D. Wash. Mar. 8, 2019).

18 Corrected Statement of Interest of the United States, *Harris v. CJ Star, LLC*, 2:18-cv-00247 at 7 (E.D. Wash. Mar. 8, 2019) (citation omitted).

19 Press Release, U.S. Dep't of Justice, 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.

20 Press Release, U.S. Dep't of Justice, Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion.

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III. WHAT MAKES A BUYER CARTEL "NAKED," AND WILL YOU KNOW IT WHEN YOU SEE IT?

According to Phillip Areeda and Herbert Hovenkamp, "[p]roperly defined naked price fixing by buyers raises the same issues and poses the same dangers as price fixing by sellers,"[21] and therefore "most" buyer cartels "are readily condemned under the *per se* rule."[22] Like the DOJ-FTC Guidance for Human Resources Professionals, Areeda & Hovenkamp do not condemn all buyer agreements, only "naked" buyer agreements. This stands in stark contrast with seller cartels, which are labeled almost uniformly as *per se* antitrust violations. But what makes a buyer agreement "naked," and what does it mean to be "[p]roperly defined"?

In the DOJ-FTC guidance, the agencies defined a "naked" agreement as one that is "separate from or not reasonably necessary to a larger legitimate collaboration between the employers."[23] This definition is consistent with Areeda's and Hovenkamp's use of the term "naked," which they define as "cartels where the only or principal purpose of the agreement is to fix the buying price or output and where the challenged restraint cannot be said to be ancillary to a significant integration of the firms' operations."[24]

An example of a buyer arrangement that academics, economists, and government antitrust agencies have not identified as "naked" is joint purchasing agreements.[25] The purported virtues of a joint purchasing agreement are reduced transaction costs (e.g. purchasing, transportation, storage, etc.) and increased negotiating power (i.e. lower prices).[26] In their examination of these types of arrangements, Areeda and Hovenkamp conclude that, "whenever the joint purchasers engage in some significant productive activity in addition to setting a price or restricting output, the restraint should generally not be considered as naked."[27]

Consistent with that assessment, federal agencies have exempted certain types of buyer arrangements from antitrust scrutiny. The 2000 DOJ-FTC Antitrust Guidelines for Collaborations Among Competitors created "safety zones" for collaborations, both general and specific to research and development efforts, to protect allegedly procompetitive conduct.[28] In 1996, the DOJ and FTC issued a joint statement of enforcement policy about the health care industry declaring, among other things, that "[m]ost joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concern" because "[s]uch collaborative activity typically allows the participants to achieve efficiencies that will benefit consumers."[29] Both the Guidelines for Collaboration and the policy statement about the health care industry expressly note, however, that neither applies to agreements that are *per se* illegal.[30] In fact, the policy statement makes clear that it does not apply to "an agreement among competitors as to the prices for health care services or the wages to be paid to health care employees," which it described as "unlawful *per se*."[31]

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21 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis Of Antitrust Principles And Their Application ¶ 2010 (4th ed. 2015) (hereinafter Areeda & Hovencamp, Antitrust Law).

22 *Id.*

23 DOJ-FTC Guidance For HR Professionals at 3.

24 Areeda & Hovencamp, Antitrust Law at ¶ 2010.

25 *Id.* at ¶2012b.

26 *Id.* at ¶2010; *see also* Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 Wm. & Mary Bus. L. Rev. 1 30, (2010).

27 Areeda & Hovencamp, Antitrust Law at ¶2012b.

28 Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors at §§4.2–4.3 (2000) (hereinafter Guidelines for Collaborations Among Competitors), https://www.justice.gov/atr/page/file/1098461/download.

29 U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care at 53 (1996) (hereinafter DOJ-FTC Enforcement Policy in Health Care), https://www.justice.gov/atr/page/file/1197731/download.

30 *Id.*; Guidelines for Collaborations Among Competitors at §4.2.

31 DOJ-FTC Enforcement Policy in Health Care at 52.

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IV. ARE BUYER CARTELS DIFFERENT, AND DOES THAT MATTER?

Although Areeda and Hovenkamp classify naked cartels by both buyers and sellers as "equally harmful,"[32] the economic consequences are not the same.[33] The primary concerns with buyer cartels are that they risk a reduction in production,[34] an increase in price,[35] and a distortion of market signals.[36] One possible consequence of distorted market signals is that pricing below a competitive level undermines investment and innovation.[37]

But in practice, unlike seller cartels, a buyer cartel does not necessarily result in higher prices for consumers. When buyers collude and pay less for an input, less of the affected input is produced.[38] If the market for the sale of the finished product is competitive, prices do not increase; but if the buyers have market power for the sale of the finished product, prices would likely increase as supply diminishes.[39] However, even if a buyer cartel does not result in higher prices for consumers, as many economists and academics have argued,[40] there is a cost — though perhaps less visible — to producers and to consumers in the form of foregone investment and innovation.

Although Areeda and Hovenkamp state that "most" buyer cartels "are readily condemned under the *per se* rule,"[41] the economic effects also seem to vary based on the type of buyer cartel. On one end of the spectrum, Areeda and Hovenkamp have described buyer cartels in auctions as "very common."[42] As they see it, auctions present ideal circumstances for a buyer cartel to be successful: it involves a discrete market composed of the potential buyers in attendance, the conspiracy between buyers needs to last for only a short time, and the prompt and public announcement of the results is an effective deterrent for cheating.[43] This seems to explain why most of the Division's prosecutions of buyer cartels to date have focused on auctions.

On the other end of the spectrum, Areeda and Hovenkamp, as well as the DOJ and FTC, have acknowledged that joint purchasing agreements are appropriate in certain circumstances. What is the difference between a joint purchasing agreement and a "buyer cartel"? A typical defense of buying groups highlights the benefit to consumers from lower prices and reduced transaction costs. Buying groups are often viewed as a means for pushing back against sellers who have amassed some amount of market power.[44] But these benefits do not mean that buying groups are harmless. Like buyer cartels, joint purchasing agreements also typically result in a lower price for sellers, which risks decreasing production and distorting market signals. Interestingly, the primary justification for a buying group — the need for "countervailing power" — is also the primary argument in support of buyer cartels.[45] In fact, comparing buying arrangements in auctions and purchasing, arguably the harms caused during an auction are more fleeting because that market exists for only a short period of time.

32 Areeda & Hovencamp, Antitrust Law at ¶ 2011.

33 *Id.* at ¶ 2011b.

34 Carstensen, *supra* note 26 at 20–21.

35 *Id.*

36 *Id.* at 24-25.

37 *Id.* at 25.

38 Areeda & Hovencamp, Antitrust Law at ¶ 2011b.

39 *Id.*

40 Roger D. Blair and Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 299 (1991).

41 Areeda & Hovencamp, Antitrust Law at ¶ 2010.

42 *Id.* at ¶2011c.

43 *Id.* at ¶ 2011a & 2011c.

44 Chris Doyle & Martijn A. Han, *Efficient Cartelization Through Buyer Groups* (Amsterdam Ctr. for Law & Economics, Working Paper No. 2009-03, 2010).

45 Carstensen, *supra* note 26 at 25.

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So, although some academics and federal antitrust authorities have labeled "naked" buyer cartels as *per se* illegal[46] and joint purchasing groups as generally lawful, the difference between the two may not be as stark as those labels suggest. The primary characteristics that seem to distinguish joint purchasing groups are the fact that the economic benefits to consumers are "more visible,"[47] and that they operate openly and notoriously pursuant to the exemptions set forth by antitrust authorities. But the likely lack of harm to consumers, and the historical absence of enforcement seem to raise a real question as to whether there is a clear, defensible distinction to be made — or that a court will feel justified in making — when criminal penalties are on the line.

The similarities between buyer cartels that the Division now seeks to charge criminally and other buying arrangements that the Division has treated as acceptable create fertile ground for defendants to challenge their indictments. The Division is likely to face numerous arguments about the applicable standard of review and whether pro-competitive aspects of a buyer arrangement should be considered.[48] For example, in the labor market, arrangements between buyers may serve a number of different pro-competitive ends: companies may be seeking to protect investments they make in employees (e.g. advanced training), to provide continuity of operations (i.e. avoid frequent turnover that harms productivity), or to create stability in the market (e.g. seek to avoid retaliation from competitors).[49] Even if the reasoning for such an arrangement was not set forth in a formal agreement, like joint purchasing groups typically do, a court may still entertain them. And companies in some buying arrangements that the Division may seek to investigate criminally may choose to start operating openly and notoriously so that, like a joint purchasing agreement, their conduct would be subject to the rule-of-reason rather than be consider *per se* illegal.[50]

The Division claimed that it would criminally prosecute naked wage-fixing or no-poaching agreements because they "eliminate competition in the *same* irredeemable way as agreements to fix produce prices or allocate customers."[51] But unlike seller cartels that the Division almost uniformly seeks to prosecute in all forms, the Division has long tolerated certain forms of buyer arrangements. Additionally, even for the buyer arrangements it could not tolerate, the Division has historically pursued most of those — the primary exception being collusion during auctions — in civil actions. As the Division starts to re-think how it treats different types of buyer arrangements, and especially as it starts to prosecute some criminally, the focus on the differences between them will intensify. That focus may well reveal that the line between legal and illegal buyer arrangements may not be as clear as the Division and others suggest.

46 DOJ-FTC Guidance For HR Professionals at 3.

47 Areeda & Hovencamp, Antitrust Law at ¶2010.

48 In 2010, the Division reached a civil settlement with six major tech companies based on the principle that a no-poach agreement will not be prohibited if it (1) is ancillary ("reasonably necessary") to a legitimate business agreement; (2) is "narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement"; (3) "identif[ies] with reasonable specificity the employees who are subject to the agreement"; and (4) "contain[s] a specific termination date or event." *U.S. v. Adobe Sys., Inc., et al.*, No. 1:10-cv-01629-RBW (D.D.C. Mar. 18, 2011).

49 See also, e.g. *AYA Healthcare Services, Inc. v. AMN Healthcare, Inc.,* 2018 WL 3032552 at *10–12, *15 (S.D. Cal. June 19, 2018) (finding it plausible that defendants were engaged in a joint venture); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143–45 (3d Cir. 2001) (allowing a no-poach agreement that was conditioned on the sale of a business).

50 *Cf.* Richard Vanderford, *Canada Competition Bureau on lookout for 'sham' agreements, agency says in new collaboration guidelines*, MLex (May 6, 2021), https://content.mlex.com/#/content/1291286 (explaining that Canada's Competition Bureau "was 'cognizant' that certain companies might be structuring agreements to deliberately avoid scrutiny under section 45 of the Competition Act, which allows criminal sanctions for nakedly anticompetitive agreements among companies").

51 DOJ-FTC Guidance For HR Professionals at 4 (emphasis added).

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V. WHERE DO WE GO FROM HERE?

The Division's focus on bringing wage-fixing and no-poach cases, which it re-emphasized as recently as March 2021 in both speeches and charges filed, is likely to consume a significant amount of its time for the foreseeable future. The Division spent more than four years laying the groundwork for execution on this shift in enforcement, and now, having finally brought cases, cartel prosecutors are going to work hard to ensure that those cases are successful.

It will be an uphill battle. Case in point, on March 26, 2021, former solicitor general Paul Clement filed a motion to dismiss the indictment against Surgical Care Affiliates LLC — the first company the Division charged with a no-poach violation — that raised several constitutional challenges, some of which were based on the Division's historical treatment of this type of conduct.[52]

In additional to historical treatment, the Division continues to treat different types of buyer cartels differently — ranging from acceptance, to civil enforcement, to criminal enforcement — despite material similarities in the economic harm they cause. These differences are invitations for defendants to challenge how they are charged, how the case is tried, or otherwise to provide justifications for their conduct. It is not the type of clarity upon which criminal law thrives.[53]

But, in a world in which the Division successfully expands its prosecution of buyer cartels, it may be increasingly willing to consider stricter enforcement, including criminal prosecution, for other types of buyer arrangements. As explained previously, joint purchasing agreements have long been accepted in some form, but the underlying economics shows that the government could argue that they pose similar and possibly more risk of harm.[54]

This is a pivotal moment for enforcement against buyer cartels, and for businesses trying to understand and follow shifting policies in both the buying, labor, and human resources spaces. By expanding the scope of its prosecutorial gaze, the Division is inviting companies and courts to examine these issues more closely than they have in the past. In so doing, this extra scrutiny may have drastic consequences, not only for the future of Division's enforcement efforts in this area, but also for the companies and individuals the Division is seeking to hold criminally liable for their conduct. However, until the courts have spoken about whether this conduct is rightly the subject of criminal cartel enforcement, companies would be wise to err on the side of caution.

52 Mot. to Dismiss Indictment, *U.S. v. Surgical Care Affiliates LLC*, ECF No. 38-1 (N.D. Tex. Mar. 26, 2021).

53 *Id.* at 5 (arguing that a criminal rule-of-reason case would be anathema to bedrock principles of fair notice and due process).

54 Carstensen, *supra* note 26 at 7 (warning that the risks posed by "legitimate buying groups, [which] although efficient responses to the needs of their participants, can also pose real threats to the long-term competitiveness of both the supply and demand sides of the market"); *Id.* at 32 (noting that, once established, "a buying group [] provides a means to coordinate [sale] prices, create[s] a culture of price stability and avoidance of competition").

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