

DOJ Antitrust Trial Setbacks Could Prompt Soul-Searching

By Jack Queen

Law360 (April 14, 2022, 9:47 PM EDT) -- The government's near-total loss Thursday in a first-of-its-kind criminal wage-fixing trial is the latest blow to the U.S. Department of Justice's aggressive antitrust enforcement push, leaving some experts questioning whether the feds are overstretched.

A Texas jury cleared physical therapy staffing company operators Neeraj Jindal and John Rodgers of charges that they conspired with a competitor to fix compensation rates, although Jindal was convicted of obstructing a Federal Trade Commission probe. The verdict is the latest setback for the DOJ's Antitrust Division, which is saddled with nearly 20 pending criminal cases and bold legal theories to prove.

Last week, prosecutors suffered a second consecutive mistrial in a closely watched price-fixing case against 10 poultry executives, prompting a Colorado judge to take the unusual step of summoning Antitrust Division chief Jonathan Kanter on Thursday to explain why a virtually unheard of third trial wouldn't be a waste of time.

A high-stakes verdict is also pending in a novel no-poach case alleging dialysis provider DaVita and its former CEO struck secret nonsolicitation deals with three competitors. A loss could prompt officials to reconsider their strategy of prosecuting conduct typically handled by the civil wing of the DOJ's Antitrust Division.

"They may be out over their skis in terms of the number of trials going on at the same time," Morrison & Foerster LLP partner and former DOJ Antitrust Division official Lisa M. Phelan told Law360.

"Unfortunately, some less experienced folks may be in over their heads at times. I think they need to pause and reflect on that."

Prosecutors alleged that Jindal and Rodgers reached out to five competitors in the Dallas-Fort Worth area and struck a deal with one of them to mutually lower their pay rates. They were among a flurry of defendants indicted under the novel theory that colluding to tamp down wages is a criminal offense akin to price-fixing.

The case may have foundered on the quality of evidence rather than legal questions. The government's lone cooperator initially told the FTC she didn't think Jindal and Rodgers were serious when they reached out, but she reversed herself on the stand. The defense hammered her credibility, saying prosecutors had coached her.

But the government notched a critical pretrial win in November, and experts say it's likely to give the government a boost in similar prosecutions. U.S. District Judge Amos L. Mazzant ruled that the definition of price-fixing "cuts broadly" and includes both buyers and sellers, rejecting the defendants' claim that there was no precedent for charging them.

"Just because this is the first time the government has prosecuted for this type of offense does not mean that the conduct at issue has not been illegal until now," Judge Mazzant said. "Rather, as these cases indicate, price-fixing agreements — even among buyers in the labor market — have been per se illegal for years."

Internally, the DOJ views the case as a win because of that ruling, according to an official who was not authorized to speak publicly. The government is "not going to back down from prosecuting wage-fixing cases," the official added.

Two wage-fixing cases are pending in Maine and Nevada federal courts, and the DOJ has said similar allegations can be found among its roughly 140 pending grand jury probes.

The government also notched a key pretrial win in the DaVita no-poach case in January, when a Colorado federal judge rejected the defendants' argument that the case should be tossed for lack of precedent showing that non-solicitation agreements are illegal. U.S. District Judge R. Brooke Jackson ruled that the absence of a "perfectly analogous case" doesn't mean DaVita's conduct was legal.

Prosecutors cited the decision in a similar case against a health care staffing company in Nevada, saying it showed "no-hire agreements that nakedly allocate the market ... would almost always be an unreasonable restraint of trade" under the Sherman Act.

Evidence in the DaVita trial cut both ways. Prosecutors alleged DaVita and former CEO Kent Thiry — who left the company in 2019 before the indictments — made secret deals with three competitors to prevent them from soliciting DaVita's people. While a government cooperator's testimony backed this up, prosecutors acknowledged that the alleged agreements weren't airtight.

The verdict could be a bellwether for criminal no-poach cases, according to Faegre Drinker Biddle & Reath LLP partner Antonio M. Pozos. It's unusual for companies to roll the dice on a criminal trial, and if DaVita prevails, employers will surely take notice, he said.

"Seeing DaVita go to trial in a criminal case could encourage more companies to take a harder line, especially if DaVita ends up winning."

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