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DOJ Dusts Off Criminal Antitrust Charges To Send A Message

By **Matthew Perlman**

Law360 (November 2, 2022, 6:35 PM EDT) -- The U.S. Department of Justice secured a guilty plea this week in the first criminal monopolization case in decades, as the agency continues its efforts to push antitrust enforcement into new and forgotten areas, but not everyone is impressed.

The Biden administration has argued repeatedly that under-enforcement of the antitrust laws has led to high concentration and competition problems across many parts of the economy, and Assistant Attorney General Jonathan Kanter has pushed the DOJ's Antitrust Division to address that perceived shortcoming.

In his public speeches, Kanter has pointed to a dearth in monopolization cases in recent years, and he has noted that violating the law against monopolization, Section 2 of the Sherman Act, is a criminal offense that carries the possibility of jail time and higher penalties than a civil violation.

The statements caught the antitrust bar's attention because there has not been a criminal Section 2 case since the late 1970s. Also, the most recent major monopolization cases, against Google Inc. **in 2020** and against Microsoft Corp. in the late 1990s, focussed on conduct that has never been treated criminally before.

Criminal antitrust enforcement generally focuses on Section 1 of the Sherman Act, the prong barring agreements that restrain trade, such as price fixing and bid-rigging.

"I think many observers were waiting to see what type of case the government would consider prosecuting criminally," David W. Kesselman, a partner at Kesselman Brantly Stockinger LLP, told Law360.

The agency made good on its promise with a guilty plea revealed this week from the president of a Montana paving and asphalt contractor on attempted monopolization charges. Nathan Nephi Zito pled guilty to a single count over allegations that he tried, but failed, to cut a deal with a rival to divide the market for highway crack-sealing services in South Dakota, Nebraska, Montana and Wyoming.

Zito agreed to a $27,000 criminal fine and is set to be sentenced in February.

Some antitrust experts, however, were underwhelmed.

"The presumption was that perhaps they were looking at a very large company that was dominating a

critical market with unusual and aggressive behavior," said Lisa M. Phelan, a partner at Morrison Foerster LLP and a former chief of the Antitrust Division's National Criminal Enforcement Section. "The case they brought ... was none of those things."

Kesselman said that while the case is significant, it also involves allegations of a market allocation scheme, which is the type of activity that could be prosecuted under Section 1 as a criminal matter in certain circumstances. Dividing markets, along with price fixing and bid-rigging, are all considered "hardcore" antitrust violations for which prosecutors frequently file criminal charges.

What sets the crack-sealing case apart from the more common Section 1 cases, he said, is that there never appears to have been an actual agreement. Prosecutors said the rival Zito approached about forming the scheme turned to the government and became an informant.

"If there had been an actual agreement or conspiracy ... prosecution under Section 1 in that circumstance would certainly have been within the norm," Kesselman said. "Without an actual agreement, the government decided to prosecute the defendant under an attempted monopolization claim under Section 2."

Eric Grannon, a former counsel with the DOJ's Antitrust Division who is now a partner at White & Case LLP, told Law360 the conduct described appears to be a classic allegation of market allocation and said the agency has prosecuted similar conduct under Section 1 for decades. He also said cases are brought all the time where one of the alleged co-conspirators is a cooperating witness, adding that is the "underpinning" of the DOJ's amnesty program.

"This case easily could have been brought under Section 1, but the DOJ apparently proceeded otherwise to get on some hoped-for scoreboard for criminal enforcement of Section 2," Grannon said. "It will be interesting to see if the DOJ returns the favor to this defendant in its sentencing recommendation. I don't recall any guinea-pig downward departure in the sentencing guidelines."

Morrison Foerster's Phelan also said the DOJ has prosecuted and investigated this type of conduct many times in the past, even in the paving industry. If an agreement was reached, she said, enforcers would charge under Section 1. If no agreement was actually reached, they would bring a wire fraud charge, rather than an antitrust charge.

The fraud statute covers attempted activity and the allocation of markets could be alleged to defraud buyers of the services.

Enforcers could almost always add monopolization or attempted monopolization charges to a market allocation case, Phelan said, but they usually don't because that would require more evidence if the case went to trial. Monopolization claims require a showing of market power and anti-competitive effects, unlike claims under Section 1 or the fraud statute, which would only require an agreement or an attempted agreement.

Phelan said the guilty plea in the crack-sealing case means enforcers won't have to prove the charges to a jury beyond a reasonable doubt.

"That would presumably be very challenging in the context of today's sophisticated battles of the experts on these issues when monopolization is litigated in a civil case," she said. "The DOJ is anxious to demonstrate that it is being aggressive and using statutes and tools not frequently or recently used."

Erik Koons, a partner with Baker Botts LLP, told Law360 that, in general, the agency bringing a criminal case for attempted monopolization represents a "pretty substantial policy shift" that's in line with what Kanter has been saying publicly. Koons also said the case fits with the Antitrust Division's work on government contracting through its Procurement Collusion Strike Force, which works with other agencies to root out anti-competitive conduct in the procurement process.

The crack-sealing case deals with state highway contracts partly funded by the U.S. Department of Transportation.

Koons said prosecutors appear to have had some stark evidence in the case, since the rival recorded phone conversations, making a plea deal likely. He also said the industry at issue is concentrated and that similar road contracts have been implicated in bid-rigging schemes in the past, both of which provide leverage for a plea.

"This case seems to kind of perfectly fit what the DOJ was looking for," Koons said.

Steven E. Bizar, co-chair of the global antitrust practice at Dechert LLP, said the crack-sealing case shows the DOJ is making good on its promises, and that enforcers are signaling they'll look for indictments and pleas where they have not traditionally.

"Pursuing these types of claims is really new," Bizar told Law360. "It's a statistic they're happy to have. They're happy to be able to tout it as evidence of their enhanced enforcement efforts."

Koons said the case and the forecasting about criminal monopolization charges have taken many companies and executives by surprise, but the reality is, criminalizing monopolization charges is now a tool in the DOJ's toolbox.

"Make no mistake about it, they forecasted it and here it is," Koons said. "And I think it's here to stay, at least under this administration."

Substantively, Phelan said, there's not much for companies to learn from the crack-sealing case that enforcement and compliance efforts covering Section 1 of the Sherman Act don't already cover and noted that there's no additional penalties because of the unique charge.

"Don't agree or attempt to reach an agreement with a competitor on which clients or areas you will service," Phelan said. "Doing so is a violation of multiple statutes you could be charged with, and one of them now is Section 2."

--Editing by Lakshna Mehta.
