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Juries Not Buying DOJ Antitrust Labor Push As Losses Mount

By **Bryan Koenig**

Law360 (March 23, 2023, 8:28 PM EDT) -- The U.S. Department of Justice's third trial loss in a criminal case alleging employers agreed to fix wages or not hire each other's workers shows that prosecutors continue to be haunted by dubious jurors and ambiguous facts, experts say.

The clean acquittal Wednesday of four operators of home health agencies accused of conspiring to fix caretakers' wages in Maine means that of the three cases to reach juries so far in the still-nascent field of criminal wage-fixing and no-poach charges, the DOJ's Antitrust Division has won a conviction on only a single count, lying to investigators, and none for competition law violations.

Prosecutors in Maine appear to have run into the factual limits of their case, which depended on showing a conspiracy to suppress wages but was undermined by the fact that while an agreement was drafted with the defendants' names on it, it was never signed. And prosecutors couldn't show wages were actually suppressed to $15 or $16 an hour because the agencies were actually paying $18 to $19 per hour.

"Criminal antitrust enforcement is supposed to be for clear per se offenses. Part of that determination includes whether the evidence of agreement is clear or ambiguous," said Eric Grannon, a former counsel with the Antitrust Division who is now a partner at White & Case LLP. "The evidence here necessarily was ambiguous as the DOJ apparently had no evidence of any allegedly agreed-to wage ever actually being paid."

Several defense attorneys also suggested something more fundamental might be underway: Juries may be hesitant to treat wage-fixing and no-poach deals as criminal prosecutions worthy of prison time, especially when antitrust enforcers only signaled they would start bringing criminal charges **in 2016** and started filing such cases **in 2020**, after previously pursuing only civil liability.

"Criminal means people go to jail and bad things happen," said Carl Hittinger, the national team leader of BakerHostetler's antitrust and competition practice. "If it was a civil prosecution… the jury might feel different about it."

The DOJ's only antitrust law victory in such cases came not from trial but from a pair of deals struck ahead of one. Health care staffing company VDA OC LLC agreed in October to pay a criminal fine of $62,000 and restitution of $72,000 for affected victims in a wage-fixing case. Former VDA manager Ryan Hee in turn cut a pretrial diversion agreement in January, which came with 180 hours of community service, to avoid trial on charges he suppressed the wages of nurses working in Las Vegas schools.

Experts say those wins are a paltry showing for a major priority for the Antitrust Division, one that's now spanned three presidential administrations. That priority is to make clear that criminal liability covers not just agreements to carve up markets, rig contract bidding and hike prices, but also deals that suppress wages and hurt employees' ability to seek work with rival companies.

"DOJ is trying hard to establish this conduct as per se criminal conduct, and they have been successful from a legal perspective," said Lisa Phelan, global co-chair of Morrison Foerster LLP's antitrust practice and a former chief of the Antitrust Division's National Criminal Enforcement Section. "So far, they have won every motion to dismiss, having courts conclude that wage-fixing and no-poach agreements can be pursued as per se criminal offenses. However, their case selection criteria may be too aggressive, as juries keep rejecting their evidence."

Attorneys for the newly acquitted home health operators told Law360 that in this case, prosecutors just didn't have the evidence, despite treating the allegations as a "slam dunk."

Jonathan Goodman of Troubh Heisler LLC, who represents defendant Yaser Aali, said the unsigned agreement, left that way because negotiations broke down, was crucial for what he asserted was a verdict rooted in the facts of the case.

"They didn't sign because they didn't agree," Goodman said.

An attorney for defendant Faysal Kalayaf Manahe, Thomas Marjerison of Norman Hanson & DeTroy, argued that the jury wasn't willing to convict on "a pure technical violation" in a case he said was premised on a misunderstanding of industry rules, regulations and norms.

In addition, Marjerison said the prosecution was dependent on star witness Mustafa Kadhim, who had bowed out from cooperation overtures with the other home health agency operators but who, according to Marjerison, had an ax to grind against the defendants after trying to steal away workers and especially clients. "Ultimately, he was preying upon other companies at the beginning of the pandemic," Marjerison said.

Phelan of Morrison Foerster also argued that juries like to see "impact on real people," even if it's not required by law.

"Here, where only a one-month conspiracy period was alleged, and the defense offered evidence that no employee actually received the lower wage level being talked about, the jury could have concluded this was much ado about nothing. No harm, no foul," she said.

In addition, the defendants, who are Iraqi immigrants, "had fairly sympathetic stories," Phelan said, noting their service alongside U.S. troops during the Iraq War. "In a case like a Sherman Act case, where there is no personal enrichment of the defendants, jurors can be reluctant to put someone in jail for what may seem to them like a 'technical' offense," she said in an email.

Even if the facts are unique to this case, the outcome was not. The division has also suffered a series of high-profile losses in both merger challenges and more traditional criminal cases.

In April 2022, a Texas jury acquitted the former owner and the former clinical director of a physical therapist staffing company of charges of orchestrating a wage-fixing scheme, although the panel did convict the owner of obstructing the government's investigation. The same week, a Colorado

jury acquitted the kidney dialysis company DaVita and its former chief executive in a case alleging they conspired with three other companies not to hire each other's senior-level employees.

Thomas M. Melsheimer, a Winston & Strawn LLP partner and former federal prosecutor who successfully represented former DaVita CEO Kent Thiry against the criminal no-poach charges, said Wednesday's loss may not fit into any kind of pattern.

"It seems that this case failed on the most basic element of any [Sherman Act] Section 1 case. The government could not prove an agreement between two or more defendants beyond a reasonable doubt," Melsheimer said. "So I don't see this result as necessarily saying a whole lot about the DOJ's focus on the labor markets. It just seems like they picked a bad case to try because, without proof of an agreement, this case would have failed even if it had involved traditional price-fixing."

A key architect of the current enforcement push told Law360 that he expects the losses to prompt "a hard look at what didn't work" as the prosecutions continue.

"Antitrust criminal cases are difficult to prove if you don't have a strong inside witness who can explain how the conspiracy operated. That's an area where we've already seen the Division take steps to shore up its investigative efforts with the recent leniency policy and practice changes," Richard A. Powers, a Fried Frank Harris Shriver & Jacobson LLP partner and the head of criminal enforcement at the Antitrust Division from 2018 to 2022, said in email.

Without addressing any particular cases, Powers said he expects the division to continue to look for "strong insider witnesses earlier in the investigations, especially from leniency applicants."

"The Division also faces challenges in any case where the agreement wasn't implemented or where the impact is difficult to assess (an issue in no-poach cases). A related challenge for the Division is balancing its efforts to limit effects evidence while also trying to put on victim-witness testimony, which is important for jury appeal from the government's perspective," he wrote. "Finally, I expect that the outcomes in the recent trials will inform the types of cases that are brought moving forward."

For all its setbacks, the Antitrust Division has shown no sign of backing down in pursuing criminal labor-side cases. Just next week, it goes to trial in Connecticut federal court against a former Raytheon manager and executives at outsourced engineering service providers accused of agreeing to not hire workers from one another. The DOJ also has criminal charges pending against UnitedHealth Group's Surgical Care Affiliates over an alleged agreement with DaVita.

"I suspect DOJ will continue to bring no-poach and wage-fixing cases, given the importance of labor issues to this administration, regardless of the outcome of this trial," said Robin Adelstein, global head of antitrust and competition at Norton Rose Fulbright.

The DOJ has also continued to announce new charges. On March 16, the agency detailed the latest such indictment, against a health care staffing executive accused of conspiring with others to fix the wages of Las Vegas nurses.

"The charges in this case were brought in connection with the Antitrust Division's ongoing commitment to prosecute anticompetitive conduct affecting American labor markets," the DOJ said at the time.

For Arindam Kar, a shareholder at Polsinelli PC who specializes in antitrust matters, the latest indictment

shows the DOJ still has the "commitment and persistence" it needs to continue pushing criminal liability for labor-side antitrust violations.

Division leadership has argued for many months that it's committed to bringing the difficult cases, focusing on decisions holding its criminal charges to be valid while writing off jury losses as one-offs. And Kar noted that the DOJ can argue its batting average isn't zero, thanks to the guilty pleas.

"This means that the legal theory is being accepted (as noted by the DOJ's success against motions to dismiss in a number of these cases); the challenge for the Division is that it still needs to educate (and ultimately prove) [to] juries that the alleged conduct does indeed violate the antitrust laws," Kar said in an email. "I suspect obtaining a guilty verdict is just a matter of time as the trial attorneys learn from prior cases and apply them to new ones, including the upcoming wage-fixing and no poach trials later this year."

The case is U.S. v. Manahe et al., case number 2:22-cr-00013, in the U.S. District Court for the District of Maine.

--Additional reporting by Cara Salvatore, Piper Hudspeth Blackburn, Kelly Lienhard, Irene Spezzamonte and Matthew Perlman. Editing by Jill Coffey.
