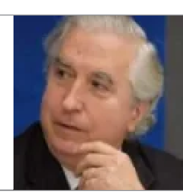
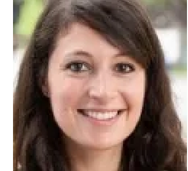

Proxy Tactics Are Changing: Can Advance Notice Bylaws Do What Poison Pills Cannot?
By John C. Coffee, Jr.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1 By Dorothy S. Lund

Reforming the Macroprudential Regulatory Architecture in the United States
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Skadden Discusses DOJ's First Criminal Monopolization Case in Decades

By Matthew M. Martino, Tara L. Reinhart, David P. Wales and Julia K. York November 30, 2022

Comment

Last month, the Department of Justice Antitrust Division announced its first criminal attempted monopolization charges in more than 40 years. In the case, *U.S. v. Zito*, Nathan Nephi Zito, the owner of a Montana paving company, pleaded guilty to a violation of Section 2 of the Sherman Act after allegedly attempting to allocate geographic markets per the terms of a proposed agreement with his only rival. The guilty plea came about after the rival blew the whistle on the attempt and cooperated with the Antitrust Division by recording phone calls with Mr. Zito. The guilty plea is notable because, since the 1980s, attempts to collude, such as efforts to allocate markets or rig bids, have been prosecuted civilly through Section 5 of the Federal Trade Commission Act or not prosecuted at all.

The resurrection of criminal prosecution of attempted monopolization raises the question of whether the DOJ will expand the use of Section 2 of the Sherman Act going forward. The Biden administration DOJ and Federal Trade Commission have both advocated the use of all of their statutory tools to enforce antitrust laws. As a result, it would not be surprising for the DOJ to seek to prosecute similar attempts to collude criminally under Section 2, especially because only completed agreements to collude can be prosecuted criminally under Section 1 of the Sherman Act. It is unlikely, however, that the DOJ will expand application of criminal Section 2 to exclusionary conduct typically addressed civilly.

For the past several decades, the DOJ has pursued violations of Section 2 civilly under an analytical framework that painstakingly defines the relevant market in which the conduct is occurring, assesses market power, determines harm to competition and weighs procompetitive justifications for the conduct. The last time the DOJ brought a criminal Section 2 case was in 1977, in *U.S. v. Braniff Airways*, for alleged coordination between two airlines to block the entry of new competitors. The indictment in *Braniff Airways* charged criminal conspiracy under Section 1 as well. Even before that, criminal Section 2 charges were rare, with most also alleging horizontal conspiracy under Section 1. Of the four instances of standalone Section 2 indictments, the conduct alleged included exclusive contracts and tying,[1] predatory pricing,[2] an acquisition of a failing competitor (which was dismissed by the court)[3] and attempted market allocation that would have violated Section 1 if successful.[4]

In remarks at the 2022 Spring Enforcers Summit in April, Assistant Attorney General (AAG) Jonathan Kanter said the Antitrust Division is committed to using "the whole legislative toolbox that Congress has given us" and identified the long-ignored part of Section 2 that, like Section 1, provides for criminal penalties.[5] He noted that, in the criminal code, fine and prison-term levels for Section 2 violations have kept pace with increases in Section 1 penalties, suggesting that criminal enforcement of Section 2 is intended to be on par with that of Section 1. He added that, going forward, the DOJ would not hesitate to enforce Section 2 criminally if the facts and law warrant, though he did not offer specifics. Although it is possible the DOJ is contemplating expanding criminal Section 2 enforcement to conduct that historically has been addressed civilly, it is unlikely. Monopolization claims require determination of relevant market and market power as well as consideration of procompetitive justifications for the alleged conduct. The weighing of facts and circumstances that courts typically require in Section 2 cases is much closer to the Section 1 rule-of-reason standard (which the DOJ historically has not enforced criminally) than it is to the automatic *per se* condemnation reserved for specific categories of "manifestly anticompetitive" horizontal agreements, like price fixing, bid rigging and market allocation.[6]

In remarks in June 2022, Deputy Assistant Attorney General Richard Powers, who oversees criminal antitrust enforcement, echoed AAG Kanter's comment that criminal enforcement of Section 2 is a statutory tool the DOJ had previously utilized: "Historically, the division didn't shy away from bringing criminal monopolization charges, frequently alongside Section 1 charges, when companies and executives committed flagrant offenses intended

to monopolize markets."[7] The alleged facts underlying the Zito guilty plea fit this description: The defendant proposed a market allocation agreement, that, if accepted by Mr. Zito's sole competitor, would have been chargeable criminally under Section 1.

Moreover, the fact that the DOJ did not issue guidance on the scope going forward of criminal enforcement of Section 2 strongly suggests the agency will not prosecute expansively. In comparison, in 2016 the DOJ issued Antitrust Guidance for Human Resources Professionals to caution the public that no-poach and wage-fixing agreements that historically had been addressed civilly under Section 1 would thereafter be prosecuted criminally, like price-fixing, bid-rigging and market allocation. No such guidance accompanied the Zito guilty plea, and expanding the scope of culpability without guidance is inconsistent with the DOJ's long history of transparency in criminal enforcement. In all likelihood, use of the criminal Section 2 "tool in the toolbox" will be limited.

ENDNOTES

1 *See Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957).

2 *See United States v. Safeway Stores, Inc.*, 20 F.R.D. 451 (N.D. Tex. 1957).

3 *See United States v. Harte-Hanks Newspapers, Inc*., 170 F. Supp. 227 (N.D. Tex. 1959).

4 *See United States v. Molasky*, 1974 WL 970 (E.D. La. Nov. 6, 1974).

5 Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit, April 4, 2022.

6 *Bus. Elecs. Corp. v. Sharp Elecs. Corp*., 485 U.S. 717, 723 (1988).

7 Deputy Assistant Attorney General Richard A. Powers Delivers Keynote at the University of Southern California Global Competition Thought Leadership Conference, June 3, 2022.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "Is the DOJ's First Criminal Monopolization Case in Decades More Bark Than Bite?" dated November 22, 2022, and available here.