Articles + Publications | December 9, 2022

DOJ Making Good on Section 2 Monopolization Enforcement Promises With Latest Criminal Indictment

WRITTEN BY

Megan Conway Rahman | Barbara T. Sicalides | Laura Anne Kuykendall

On Tuesday, December 6, the U.S. Department of Justice (DOJ), Antitrust Division, announced the unsealing of criminal charges against 12 individuals in the Southern District of Texas as part of an 11-year price fixing and market allocation conspiracy. The 11-count indictment, which also includes charges of extortion and money laundering, alleges that eight of the 12 defendants conspired to fix prices and allocate the market for transmigrante services in and around the Los Indios Texas Port of Entry and Brownsville-Harlingen, TX metropolitan area, in violation of Section 1 of the Sherman Act. The defendants also allegedly conspired to monopolize the same market in violation of Section 2 of the Sherman Act.

The Section 2 prosecution is the first for the Division since the late 1970s, although this fall, the Division obtained a guilty plea in *United States v. Zito.* In *Zito,* the president of a Montana paving and asphalt company (Zito) called the owner of its competitor to propose a "strategic partnership" in which they would divide up highway projects for crack-sealing services. Specifically, Zito proposed that its competitor stop competing with Zito's company in Montana and Wyoming and, in exchange, Zito would not compete for projects in South Dakota and Nebraska. After receiving the call, the competitor reported it to the Federal Highway Administration and then cooperated with the investigation, including recording phone calls. Sentencing in *Zito* is set for February 2023.

According to the transmigrante indictment, several of the charged individuals controlled and/or operated transmigrante forwarding agencies operating in the Los Indios area. Transmigrante forwarding agencies provide services to transmigrantes, who are transporting goods from the U.S. through Mexico, for resale elsewhere in Central America. These services include assistance with completing customs paperwork and paying fees required by the Mexican government. Transmigrante forwarding agencies also typically hold exclusive relationships with registered patentes, who are licensed, registered brokers bonded and authorized by the Mexican government to process transmigrante paperwork.

The transmigrante indictment alleges that the defendants implemented price-fixing agreements and created a centralized entity known as "The Pool" to collect and divide revenues among the conspirators. Transmigrante agency owners and industry participants who refused to charge the prices, pay into the pool, or pay an extortion tax were allegedly subjected to threats, intimidation, and acts of violence against themselves and their families, employees, associates, and businesses. Four individuals not charged with the Sherman Act violations were charged with extortion and money laundering-related offenses.

When announcing the indictment, Assistant Attorney General Jonathan Kanter, head of the DOJ's Antitrust Division, said, "The indictment charges that defendants monopolized an industry through horrific violence and

threats of violence," and that "the department will use all the tools at its disposal — including Section 2 of the Sherman Act — to target anticompetitive conduct that undermines our country's economic vitality and freedom." Kanter's comments echo similar statements he made to Congress in September regarding Section 2 enforcement. Former Deputy Assistant Attorney General Richard A. Powers made similar comments about the use of Section 2 in April during the American Bar Association's Spring Antitrust Meeting.

Both *Zito* and the recent indictment in the Texas transmigrante industry case demonstrate that the Division is attempting to make good on its recent promises to utilize Section 2's criminal enforcement potential. But given the violent conspiracy at issue in the indictment and the myriad other charges against the defendants, including a Section 1 violation, whether the Section 2 count sticks, or is even needed in the first place, will certainly be the subject of debate. Additionally, it remains unclear whether the Antitrust Division will attempt to utilize Section 2 to prosecute criminally more traditional exclusionary conduct, such as predatory pricing, or whether Section 2 will be used only to seek criminal sanctions for unsuccessful attempts to reach agreements proscribed under Section 1, or where violence and threats of violence are associated with the monopolistic behavior.

Importantly, the DOJ's antitrust leniency program does not apply to Section 2 of the Sherman Act. Accordingly, if a company finds evidence of employees seeking to reach an agreement with competitors that includes conduct that might be prohibited by Section 2, such as manipulation of bids or allocation of markets, before seeking leniency, counsel will need to carefully evaluate the evidence and address the risk of disclosing activity that the Antitrust Division might categorize as a Section 2 violation.

Troutman Pepper's nationally recognized White Collar + Government Investigations and Antitrust practices include former government prosecutors, in-house compliance counsel, and seasoned litigators with extensive experience handling high-stakes civil and criminal government investigations, including advising companies and individuals on issues relating to criminal and civil antitrust issues. Our attorneys have represented clients in a multitude of high-profile cases with the DOJ Antitrust Division and have also advised clients with respect to the DOJ Antitrust Division's leniency program, and have negotiated several amnesty deals where our clients have avoided all criminal prosecution.

RELATED INDUSTRIES + PRACTICES

- Antitrust
- White Collar Litigation + Investigations