

Podcast Transcript – Government Litigation

Charles Peeler: Hello, my name is Charlie Peeler, and I'm a partner in the Troutman Pepper White Collar and Government Investigation Practice Group. And I want to welcome you to this podcast. I'm here with my partner Megan Rahman, who's also a partner in Troutman Pepper's White Collar and Government Investigations and Practice Group.

There are few things more exciting to white collar lawyers than the Department of Justice Criminal Antitrust Division enforcement efforts. And by that I'm talking about price fixing and bid rigging and exciting things like that. And we are so lucky to have Megan here with us today because she has had a front row seat to DOJ'S enforcement efforts. She recently defended an individual indicted in Colorado for criminal antitrust price fixing in the poultry industry. Megan tried that case not once, not twice, but three times before she obtained a full acquittal.

In this podcast, Megan and I are going to talk about that case and talk about some of the lessons learned over the three trials. And then we're going to spend a few minutes looking forward to discuss antitrust enforcement trends. So a little about me. Prior to joining Troutman Pepper's Atlanta office, I served as the United States Attorney in the Middle District of Georgia, where I led an office of 100 individuals responsible for prosecuting all federal crimes across 70 of Georgia's counties. At Troutman, I defend corporations and executives in white collar criminal matters, in civil investigations, and I conduct internal investigations. Megan?

Megan Rahman: As Charlie said, I'm Megan Rahman. And I'm a partner in the White Collar and Government Investigations Practice Group in the firm's Richmond, Virginia office. And similar to Charlie's practice, I conduct internal investigations and represent clients in civil and criminal investigations brought by regulatory agencies across the country.

Charles Peeler: Megan, in your case, executives from five suppliers of chicken products to restaurants and grocery stores were accused of price fixing for almost a decade. Any idea what started that investigation?

Megan Rahman: We're not entirely sure, but there were multiple civil class actions filed, which we understand DOJ was monitoring. Our best guess is that DOJ read something in a deposition or saw some communications that were produced in discovery that sparked their own investigation. Those class actions were actually filed in 2016, and DOJ started their investigation in 2019. It also probably helps further efforts when there was a leniency application around that same time. And then Pilgrim's pled guilty right before our trial commenced in 2022.

But this case is sort of unusual because usually the class actions come after the indictments, and here the indictments came after the class actions. Charlie, let me ask you, based on your experience in the Justice Department, what do you think? How did your investigations typically start?

Charles Peeler: Really any number of ways. Sometimes it's a victim that goes to a local law enforcement, and local law enforcement contacts federal law enforcement or a United States Attorney's office directly. Sometimes it's federal law enforcements who are monitoring data like government contracts and healthcare payments or stock prices.

And from that data they see anomalies, and they want to take a deeper look. And then sometimes it's just the old-fashioned way and that an AUSA or a federal law enforcement officer is reading an article in the paper about a lawsuit or a piece of investigative journalism and decides that they want to look into the matter more.

Given your investigation was going on for a year or two prior to indictment, did you have discussions with the DOJ about this case prior to it being indicted?

Megan Rahman: No, and that was something really strange about this case. DOJ rebuffed all of our efforts to speak with them before the indictment, after the indictment, and even after the mistrials, unless we were essentially willing to come in, plead guilty, and cooperate. At the start of the case pre indictment, DOJ essentially sent us five text messages involving our client and told us, he knows what he did, talk to him. Scott actually found out he was indicted from one of his customers who read about it online because the press release about the indictment went out before we as Scott's lawyers were even sent the indictment by DOJ.

Charles Peeler: Yeah, that really surprises me. There are times when we would indict white collar cases without meeting with defense counsel, but that was the exception, not the rule, particularly when there were corporate defendants involved as well, and you didn't have a risk of violence or fleeing. My view was always, hey, best case scenario, you work it out. And you're able to come to a resolution that everyone can live with. And worst case scenario is you learn more about your case moving forward. I still can't get over that you tried this case three times. That's got to be a world record.

Megan Rahman: Yes. I'm not sure I know anyone, at least on the defense team who had tried the case three times. But we, Bryan Lavine, LA Kuykendall, Tiffany Bracewell, who were on the trial team with me, we tried this case three times in Denver over the course of 10 months. The first trial started in September of 2021, and we got the not guilty verdicts by the end of the third trial in July of 2022.

After the first two hung trials, the government dismissed five of the 10 defendants, and we went back a third time where the defense teams achieved not guilty verdicts across the board for all of the clients. It was a great result and absolutely the right result.

It was so tough on our clients who had to sit through three trials. That takes an emotional and physical toll, but they hung in there, they maintained their innocence. And were all able to finally walk out of the courtroom for the last time. But let me ask you, Charlie, have you ever tried the same case three times in government or private practice?

Charles Peeler: In private practice, I've tried all kinds of cases, business cases, employment cases, IP cases, injury cases, and of course white collar cases. I've never even tried the same case twice, much less three times.

At the United States Attorney's Office, we certainly had matters that resulted after first trial in hung juries, and we would all sit down and there's a lot of factors that we would consider in deciding whether to try the case again. We would look at what's the strength of our proof? What may have gone wrong? How would we do something different? We would consult with the victims as well, and we would try to find a way to resolve the case very frequently, whether through a lesser charge or even through a misdemeanor.

Megan Rahman: Well, I'll tell you here, our judge was not happy the case was going to trial a third time. In another sort of unprecedented thing about this case, Judge Brimmer actually required the Assistant Attorney General Kanter who heads the antitrust division to come to Denver and appear before him in court and justify a third trial. Judge Brimmer wanted to know why Kanter thought a third trial would result in a different outcome and how it actually complied with DOJ'S policies and procedures. I don't think the not guilty verdict was the different outcome Kanter had in mind when he stood before Judge Brimmer and attempted to justify DOJ'S third bite at the apple. But here we are.

Charles Peeler: Did your trial strategy change over the course of the three trials?

Megan Rahman: Oh, definitely. One thing about having three trials is we were able to take advantage of the limits of DOJ's evidence because we saw it repeatedly over the course of the three trials. We also, having

heard the witnesses, were better able to craft our examinations and arguments because we knew what they were going to say. And the defense team as a whole was able to alter its presentation through, for instance, summary charts of all the pricing and bidding and volume in order to help the jury better understand the negotiations at issue over the course of the alleged conspiracy.

Charles Peeler: So why do you think you got a different result that third time?

Megan Rahman: For the third trial, DOJ brought in a different trial team. They cut the number of defendants in half, and they did try to streamline the evidence and witnesses, so they called less witnesses in the third trial. That sort of worked against them. For instance, the defense team was then able to call some of those witnesses who were alleged victims of the conspiracy in our defense case. And those witnesses testified that they controlled the price of the chicken.

We also did a better job of embracing the sharing of information and the talking that went on among our clients that it happened, but there was no agreement. And we relied on our knowledge of the industry in presenting the case.

The government also didn't have a very good cooperating witness, and by the third trial, their star witness had already testified twice before and had been interviewed over 30 times. And he actually lied to the FBI during those interviews. So he just wasn't very convincing. And by the third trial, there were so many inconsistencies in his testimony that we were able to take advantage of, and he was really all the government had in addition to some circumstantial evidence, which just didn't add up to a meeting of the minds between any of the defendants.

And after two mistrials, we leaned heavily on the burden of proof and the government's inability to prove beyond a reasonable doubt that any of the defendants were guilty. We really hammered that home in closing. But one of the big things is we really believed a government's lack of knowledge about how the industry worked was a big hole in their case. We're firmly convinced that knowing our industry and what our clients did and how they did it was a huge benefit to the defense.

Charles Peeler: Yeah, I agree. I think that is so true, particularly in white collar cases. Whether conduct is a custom or a crime is always going to be viewed through the lens of the industry norms. The people on the jury, they all have jobs, and they're going to want to know what's customary in the industry, what's the norm, how have things worked in the past and is this something that is usual or is it unusual? And your team and you did your client a great service by really getting to know the industry.

Megan Rahman: We were really lucky. We had the benefit of our clients who were all industry experts in their own rights to really teach us about the poultry industry and the ins and outs of the sale of boiler chickens to fast food customers and fast food restaurants. So we were able to understand the product that was being sold. We learned how the negotiations worked between the producers and their customers, how chicken was priced, and the impact of the market fluctuations on that pricing. And that, like I said, was a huge benefit to the defense. And the government for whatever reason, didn't rely as heavily on that piece of the case. Let me ask you. We've been talking a lot about the DOJ Antitrust group. How is DOJ Antitrust different from other groups in the Department of Justice?

Charles Peeler: The Antitrust Division, it's a little bit different and it's kind of its own animal. At main Justice, there's the Criminal Division, which of course handles criminal matters and the Civil Division, which handles civil matters, and those divisions both report up to the Deputy Attorney General. The Antitrust Division handles all antitrust matters, whether civil or criminal.

So at intake in that division, there has to be a decision made. Is this a criminal matter or is this a civil matter? And in making that decision, the Antitrust Division trial attorneys, they'll consider factors like the intentional nature of the conduct, whether there is a non-criminal resolution that will appropriately address

the conduct, whether it's likely that a noncriminal penalty will actually be assessed, and then of course, they'll also consider the interest of any victims. So it's a little bit different.

Megan Rahman: Well, what do you see as some enforcement trends coming down the road now that we've ended 2022 and are looking ahead to 2023?

Charles Peeler: Well, if history is an indicator, then I anticipate that the antitrust criminal enforcement will remain very active. In addition to your three trials in the price fixing area, the antitrust division has really stepped it up in criminal enforcement and no poach cases where competitors agree not to hire each other's employees. Those cases are important to the antitrust division because they restrict job opportunities for workers, and they can suppress wages.

And in a real headline, the DOJ just in the last month obtained a guilty plea in the first criminal monopolization case that it has brought in more than 40 years, and that case dealt with unlawful territorial market allegations.

Megan Rahman: I totally agree. I don't see the Antitrust Division slowing down in 2023, and I know they have several cases, especially in the new poach and wage fixing arena that are set for trial in the first quarter of 2023, which will be interesting to watch.

Also on the monopolization issue, an indictment was just unsealed in the last two days where they've brought another section two case, and that'll be interesting because they've also have allegations of section one, price fixing and extortion and money laundering. It's a very violent conspiracy, so it'll be interesting to see whether that section two count actually sticks. I know that the antitrust division has been very vocal about wanting to use Section 2 more than it has done in the past, so it'd be interesting to see what that looks like in 2023.

Charles Peeler: And we'll see if you can beat your record and try a case four times next year.

Megan Rahman: No, no, no. Three is it. I am good with three. No more than three.

Charlie, it's been great to have this conversation with you today. Getting to share our perspectives on this case, you as a former prosecutor and me always being on the defense side, is really emblematic of Troutman Pepper's White Collar practice as a whole. Our team is made up of former prosecutors, government enforcement attorneys, and career private practice lawyers who are able to share their experiences and perspectives to develop holistic strategies for our clients. We are then able to draw upon these experiences and perspectives when we're handling investigations, compliance work, and litigation, and it's so helpful.

Charles Peeler: I'm so glad that you brought up the strategy of getting to know our clients' business. That's really a hallmark of our group, whether it's healthcare, private equity, energy infrastructure, manufacturing. I know that I rely on the other lawyers in our group and our clients to make sure that I know exactly what's going on in the industry when I handle a case. And I don't think I'm unique at all in that regard. Thanks to everyone for listening. Please check back frequently for new Troutman Pepper podcasts, and you can check us out on Spotify or Apple or wherever you get your podcast.

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