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After Nearly Fifty Years of Dormancy, Criminal Monopolization Charges Have Returned

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For nearly 50 years, the Antitrust Division of the United States Department of Justice (DOJ) has brought federal criminal charges only for allegations of illegal coordinated behavior among competitors in violation of the antitrust laws under Section 1 of the Sherman Act, while restricting its enforcement of illegal monopolization under Section 2 of the Sherman Act to civil matters only. So it is noteworthy that, in the last seven weeks, DOJ has *twice* obtained federal criminal charges under Section 2.

Like Section 1 of the Sherman Act—which prohibits every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade"—Section 2 provides for criminal penalties: "Every person who shall monopolize, or attempt to monopolize…shall be deemed guilty of a felony…." Following adoption of the Sherman Act in 1890, the DOJ brought many criminal Section 2 cases. In 1946, in *American Tobacco Co. v. United States*,[1] the United States Supreme Court upheld DOJ's criminal enforcement authority under Section 2, and the DOJ continued to bring such cases and to obtain convictions for three more decades. But after the late 1970s,[2] the DOJ's enforcement priorities shifted, and for the next 44 years, no Section 2 charges were brought. Since then, DOJ sought criminal penalties only for Section 1 violations for price-fixing, bid-rigging, group boycott, and market allocation schemes between competitors. Allegations of monopolization, attempted monopolization, and conspiracy to monopolize were brought only civilly.

Then, on October 31, 2022, the DOJ announced that it had obtained a guilty plea from the owner of a Wyoming pavement and asphalt company to an attempted monopolization charge brought under Section 2 of the Sherman Act.[3] According to the criminal information filed in that case, the owner proposed to a competing company that the two entities enter into a "strategic partnership" to divide highway sealing projects in Montana, Wyoming, South Dakota, and Nebraska. According to the information and accompanying plea agreement, the owner suggested that the two companies could collaborate to jointly force another competitor out of the market, and he recommended that the plan be memorialized in a contract written to conceal the actual nature of the agreement. The competitor declined the proposal and reported the asphalt company owner's efforts to the DOJ, providing among other things recordings of phone calls placed by the owner. The owner pled guilty to a one-count felony charge for attempted monopolization.

More recently, on December 6, 2022, the DOJ unsealed an 11-count indictment charging 12 individuals with violations of both Section 1 and Section 2.[4] The indictment charges 12 individuals with allocating customers, conspiring to monopolize, and engaging in price-fixing in the *transmigrante* forwarding industry, which transports cars from the United States through Mexico to South America. The indictment alleges that the defendants, through violence, threats, and intimidation, forced transmigrantes to participate in the alleged illegal activities, and that the defendants, operating as a single entity and engaging in various anticompetitive acts, conspired to control the market of transmigrante agency services by fixing prices and by pooling and dividing their revenues according to pre-negotiated agreements.[5] In addition to the alleged antitrust violations, the indictment alleges extortion and money laundering.

The recent criminal charges and guilty plea procured by the DOJ did not come as a total surprise. In March 2022, at an American Bar Association conference on white collar crime, Deputy Assistant Attorney General Richard Powers asserted that "market concentration and consolidation is not only a civil antitrust issue." One month later, in April 2022, the top antitrust enforcer at DOJ, Assistant Attorney General Jonathan Kanter, remarked: "So if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, [DOJ] will not hesitate to enforce the law."[6]

The DOJ's recent actions illustrate the aggressive stance outlined by the Antitrust Division enforcers last spring. Further, the Antitrust Division has made clear that these two cases are not anomalies. In the October announcement related to the *Vito* matter, Assistant Attorney General Kanter stated: "Congress criminalized monopolization and attempted monopolization…The Justice Department will continue to prosecute blatant and illegitimate monopoly behavior that subjects the American public to harm.[7] And in the December announcement related to the *Martinez* indictment, Mr. Kanter stated: "The indictment charges that defendants monopolized an industry through horrific violence and threats of violence…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."[8]

The first criminal enforcement action under Section 2 of the Sherman Act in nearly 50 years was interesting and important but in isolation, could have been explained away as an aberration. Two such actions in less than two months suggest otherwise, particularly in light of the public statements by Antitrust Division enforcers. Those actions, along with those statements, point to reinvigoration of criminal Section 2 enforcement. Companies should review their compliance materials to account for the fact that the DOJ once again appears to be much more interested in investigating and prosecuting monopolization and other Section 2 violations, in addition to traditional cartel conspiracies that suppress competition in the United States.

[1] 328 U.S. 781 (1946).

[2] Before 2022, the last case in which the DOJ brought criminal charges for a violation of Section 2 was United States v. Braniff Airways, Inc., 453 F. Supp. 724 (W.D. Tex. 1978).

[3] United States v. Vito, Crim. No. 1:22-cr-00113 (D. Mont. Oct. 31, 2022).

[4] United States v. Martinez, Crim. No. 4:22-cr-00560 (S.D. Tex. Nov. 9, 2022).

[5] Press Release, Dep't of Just., Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0.

[6] https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[7] Press Release, Dep't of Just., Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022), https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

8 See supra at n.5.