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## Health Care Is In DOJ's Criminal Antitrust Crosshairs

By **Dylan Carson and Antonio Pozos** (April 8, 2022, 4:39 PM EDT)

Criminal antitrust enforcement in health care has picked up significantly in recent years and remains in sharp focus for companies and executives today. The U.S. Department of Justice Antitrust Division has made enforcement in health care a top priority, as the prosecution of alleged conspiracies to fix the wages of health care workers and agreements not to compete for their services is playing out in courtrooms across the country.

For example, the trial in *U.S. v. DaVita*, the DOJ's prosecution of kidney dialysis company DaVita Inc. and its former CEO regarding an alleged no-poach agreement, began in the U.S. District Court for the District of Colorado on April 4.

All the available evidence indicates that the uptick in enforcement in health care is here to stay. In early March, U.S. Attorney General Merrick Garland[2] highlighted that the DOJ has the most antitrust grand jury investigations open in 30 years and that the DOJ is seeking funding to hire 120 additional attorneys and 900 FBI agents to support white collar criminal investigations and prosecutions.

A top Antitrust Division enforcer also indicated that the DOJ was prepared to bring criminal charges for monopolization under Section 2 of the Sherman Act. The DOJ's increase in enforcement resources is a reflection, as Garland noted, that "enforcement activity will only accelerate as we come out of the pandemic."

As a result, all participants in the health care industry, from hospitals and providers to insurers, as well as pharmaceutical companies and medical device manufacturers, should be on alert for conduct and agreements, which could lead to criminal antitrust scrutiny.

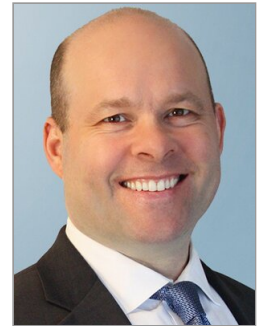
Beyond the common pitfalls of price-fixing, bid-rigging and market allocation, antitrust compliance efforts should include agreements not to compete for labor (i.e., no-poach), as well as awareness of the potential for monopolization of particular markets, which antitrust enforcers recently intimated could be ripe for criminal charges.

### Criminal Antitrust Enforcement in Health Care Back in Vogue in 2016

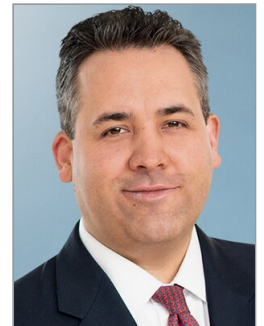
Starting with the first generic pharmaceutical price-fixing charges announced in 2016, criminal antitrust enforcement has affected a wide range of health care industry participants, including individual and regional providers, as the life sciences industry has developed into a major focus of the DOJ's criminal antitrust efforts.

In 2016, the DOJ began what would become a sprawling series of criminal prosecutions alleging price-fixing of generic pharmaceuticals. Those charges against two executives expanded with the 2019 deferred prosecution agreement of Heritage Pharmaceuticals[3] to resolve charges of price-fixing, bid-rigging and illegally allocating customers.

The Antitrust Division has now charged seven major manufacturers of generic pharmaceuticals, as well as at least four company executives, with offenses involving alleged price-fixing, market allocation and bid-rigging conspiracies. Five of those companies have reached deferred prosecution



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agreements and agreed to pay \$426.5 million in criminal penalties.[4]

Two companies — Teva Pharmaceuticals USA and Glenmark Pharmaceuticals Ltd. — are litigating the charges and have challenged both the scope of the charges and the DOJ's investigative tactics. In January, in *U.S. v. Teva Pharmaceuticals USA Inc. and Glenmark Pharmaceuticals USA*, the U.S. District Court for the Eastern District of Pennsylvania denied a motion to sever and held that a joint trial of both companies would not unfairly prejudice Glenmark.

In April 2020, the DOJ announced[5] a \$100 million deferred prosecution agreement with the Florida Cancer Specialists & Research Institute, or FCS, an oncology group based in Florida, in which FCS also agreed[6] to cooperate with the Antitrust Division and "implement a compliance program designed to prevent and detect criminal antitrust violation."

According to the DOJ, FCS improperly conspired with a competing oncology group to allocate medical and radiation oncology treatment for patients in Southwest Florida. Criminal charges against the founder and former president of FCS followed shortly thereafter, and a Q&A[7] released in parallel with the DPA warned that "FCS's charge and DPA are the first in an ongoing investigation."

As in the generic drug prosecutions, FCS also benefited from the Antitrust Division's July 2019 changes to the leniency program incentivizing antitrust compliance programs.

Specifically, in 2019, then-Assistant Attorney General Makan Delrahim[8] announced revisions to the leniency program that, while still disfavoring nonprosecution agreements, opened the door to deferred prosecution agreements for companies with effective compliance programs that did not qualify for immunity under the leniency program to negotiate a deferred prosecution agreement.

Absent those revisions, FCS likely would have been required to accept a guilty plea or litigate but was instead able to reach a deferred prosecution agreement based on its cooperation and compliance efforts. The FCS case emphasizes that the Antitrust Division's policy is not limited to the largest multinational organizations but is also available to regional health care providers.

Executives facing individual criminal liability, however, remain at risk and would be well-advised not to anticipate that they will be informally protected by a deferred prosecution agreement even under the Antitrust Division's broader leniency policy.

### **Labor Market Prosecutions in Health Care Start a Trend**

Although in October 2016 the DOJ warned that it might pursue criminal charges against both companies and individuals for no-poach agreements as per se antitrust violations, up to that point, no court had ever held that a naked no-poach agreement was a per se antitrust violation.

In 2019, the DOJ urged the U.S. District Court for the Middle District of North Carolina to reach that conclusion in *Seaman v. Duke University*, filing a statement of interest[9] in a private class action against Duke University and the University of North Carolina over an alleged no-poach agreement regarding medical school faculty members. Specifically, the DOJ argued that naked no-poach agreements allocating employees are akin to per se unlawful customer allocation agreements.

The lawsuit, however, settled before the court decided whether the rule of reason or per se rule applied to no-poach agreement. In a unique twist, however, the DOJ secured the right to enforce injunctive relief[10] provisions of the settlement prohibiting Duke and UNC from creating or enforcing no-poach agreements.

In late 2020, criminal antitrust enforcement in health care labor markets heated up.

First, in December 2020, the DOJ unveiled its first-ever wage-fixing prosecution[11] with an indictment against the former owner of a therapist staffing company alleged to have conspired to pay lower rates for physical therapists and physical therapist assistants and obstructed the Federal Trade Commission's investigation.

In November 2021, the U.S. District Court for the Eastern District of Texas held in *U.S. v. Jindal* that wage-fixing is a per se antitrust violation subject to criminal prosecution, denying the defendants'

motion to dismiss.

The DOJ announced its first corporate prosecution for a no-poach agreement in early 2021, filing an indictment[12] in Texas against an outpatient medical center operator, Surgical Care Affiliates, for agreeing with competitors not to solicit each other's senior employees. The case, U.S. v. Surgical Care Affiliates LLC, is set for trial next month, although the U.S. District Court for the Northern District of Texas has not yet ruled on a motion to dismiss.

In March 2021, a Las Vegas health care staffing company, VDA OC LLC, and its former manager were indicted[13] for agreeing not to poach school nurses from each other and to fix their wages. The case is U.S. v. Hee and VDA OC LLC in the U.S. District Court for the District of Nevada. The defendants' motion to dismiss is pending while a July 2022 trial date approaches.

Then in July 2021, the DOJ filed the companion case to the SCA prosecution, charging[14] kidney dialysis company DaVita and its former CEO with agreeing with SCA not to poach each other's senior executives.

In January, the District of Colorado denied the defendants' motion to dismiss, holding that nonsolicitation agreements may be horizontal market allocation agreements punishable as per se criminal antitrust violations. The trial began on April 4.

President Joe Biden's executive order[15] on promoting competition in the American economy, which rolled out a White House competition counsel in July 2021, reinforced that his administration's policy was to enforce the antitrust laws in labor markets and health care markets, "including insurance, hospital, and prescription drug markets."

Most recently, in January, four owners and managers of home health care agencies in Maine were indicted[16] on no-poach and wage-fixing of personal support specialists. The DOJ indicated the indictment was the first in an ongoing investigation into worker allocation and wage-fixing in the personal support specialists industry.

### **What Health Care Industry Participants Can Do**

Effective compliance programs remain the bedrock of corporate risk mitigation, and criminal antitrust is no exception.

As noted above, the July 2019 revisions to the Antitrust Division's leniency policy incentivize antitrust compliance — rather than simply the first person or entity to seek leniency — by directing Antitrust Division prosecutors to consider "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as the charging decision."

Under this approach, the Antitrust Division resisted creating a definitive list of the elements that must be included in an effective compliance program. Instead, prosecutors are directed[17] to "consider three 'fundamental' questions in their evaluation. Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? And does the corporation's compliance program work?"

Given the breadth of issues that must be considered when evaluating the effectiveness, the Antitrust Division also issued an accompanying guide,[18] "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," including specific antitrust risk assessment considerations, as well as training for company personnel and oversight mechanisms to ensure that personnel follow the compliance program.

In addition to ensuring that the company has a robust compliance program consistent with the Antitrust Division's guidance, the DOJ's willingness to use traditional criminal investigative tools in criminal antitrust investigations — including unannounced interviews, the grand jury and search warrants — underscores the importance of training company personnel to respond to unexpected attention from law enforcement.

Effective planning includes adopting a plan for responding to surprise contact with law enforcement, educating company personnel regarding their rights and necessary internal notifications that trigger

the company's response plans.

Assessing the effectiveness of a compliance program can benefit companies in high-risk areas such as joint ventures and other competitor collaborations, where contact with competitors is a daily reality of business. That assessment often takes the form of an antitrust audit, with a dive into company documents and targeted interviews.

Setting up firewalls and clean rooms to limit the sharing of competitively sensitive information and processes for counsel to monitor that sharing can also help ensure pro-competitive activities stay that way.

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[1] <https://www.justice.gov/atr/case/us-v-davita-inc-and-kent-thiry>.

[2] <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

[3] <https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false>.

[4] Rising Pharmaceuticals – \$1.5 million criminal; Heritage Pharmaceuticals – \$225,000 criminal (\$7 million with civil); Apotex – \$24.1 million; Taro – \$205.7 million; Sandoz – \$195 million.

[5] <https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal>.

[6] <https://www.justice.gov/opa/press-release/file/1272561/download>.

[7] <https://www.justice.gov/opa/press-release/file/1272556/download>.

[8] <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>.

[9] <https://www.justice.gov/atr/case-document/file/1141756/download>.

[10] <https://www.justice.gov/opa/pr/justice-department-comments-settlement-private-no-poach-class-action-allows-government>.

[11] <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

[12] <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>.

[13] <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses>.

[14] <https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care>.

[15] <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[16] <https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges>.

[17] <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0>.

[18] <https://www.justice.gov/atr/page/file/1182001/download>.

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