Business & Practice

Lessons From the First Criminal No-Poach Trial

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May 9, 2022, 4:00 AM

The McDermott Will & Emery trial team that represented former DaVita CEO Kent Thiry in the DOJ's first criminal prosecution over no-poach agreements discuss takeaways from the trial and acquittal. The DOJ is taking an aggressive stance in criminal antitrust prosecutions and executives involved in hiring and compensation-related decisions need to be aware, they say.

In one of the first criminal trials over claims tied to companies' hiring practices, the Department of Justice's Antitrust Division recently indicted and brought to trial a federal prosecution alleging agreements between DaVita Inc., its former CEO Kent Thiry, and other companies not to solicit each other's employees.

This case kicked off the DOJ's campaign to expand Section 1 of the Sherman Act 1 to cover no-poach and non-solicit agreements. Following an eight-day jury trial and two days of deliberation, a federal jury in Denver acquitted Thiry and DaVita on all counts of the unprecedented "no-poach" conspiracy.

In bringing this case, the DOJ tried to use the per se standard of liability—a standard that dramatically reduces the defenses available to the accused and one that makes it much easier for the DOJ to secure a conviction. The acquittal, coupled with the district court's pre-trial rulings, cast serious doubt on whether the per se standard is appropriate at all for "no-poach" agreements and whether such agreements should ever be prosecuted criminally.

But the issue remains unsettled and there is serious risk that the DOJ intends to continue its efforts in this area. As such, there are several important takeaways from this case that counsel can use to mitigate this risk.

Three Takeaways to Mitigate Risk

1. Stick to your core theme and narrow the issues for the jury.
As is the case in most criminal jury trials, articulating a clear core theme for the jury is critical.

Here, the court had decided pre-trial that only those naked agreements that "allocate the market" qualified for per se treatment. The court added in a order denying the defendant's motion to dismiss that it "does not follow that every non-solicitation agreement or even every no-hire agreement would allocate the market and be subject to per se treatment."

Importantly—and recognizing the draconian nature of the per se standard in a criminal case—the court ruled that the DOJ would "not merely need to show that the defendants entered the non-solicitation agreement and what the terms of the agreement were. It will have to prove beyond a reasonable doubt that the defendants entered into an agreement with the purpose of allocating the market" and that the defendants "intended to allocate the market as charged in the indictment," the court said in the order.

The court's ruling is inconsistent with the DOJ's aggressive attempts to expand the traditional per se standard in the labor markets.

This ruling created a narrow pathway to victory. It became the road map for our core and consistent defense theme at trial: did any of the charged agreements have the purpose or intent of allocating the relevant employment market? This simple, straightforward and common-sense theme—expressed at the outset of the case during jury selection and continuing through cross-examination of every witness and right through closing arguments—led the jury to conclude that the DOJ had not met its burden of proof.

2. Even if the case proceeds on a per se standard, develop the factual record that establishes that the per se standard is not appropriate.
Despite the DOJ's insistence—bolstered to a minimal degree by surviving a motion to dismiss—that certain alleged no-poach agreements could be considered under the per se standard, continue to develop the factual record that demonstrates that the per se standard is inappropriate.

The core tenet of this argument is that labor is fundamentally different from markets for customers/goods/services. Because agreements that affect the labor market can and do have inherent procompetitive benefits, traditional market allocation cases are not sufficiently analogous to condemn all labor market allocation agreements as per se illegal.

Based on the record we developed, our judge ultimately instructed the jury that "evidence of lack of harm or procompetitive benefits might be relevant to determining whether defendants entered into an agreement with the purpose of allocating the market." This instruction to consider the pro-competitive benefits of the charged agreement is a critical instruction to seek in similar cases and is inconsistent with the DOJ's asserted view of the per se standard in the labor markets.

A carefully curated factual record can demonstrate that the actual conduct at issue is not so thoroughly pernicious as to merit per se treatment. Here, creativity and collaboration led to an instruction that the jury had to find that the defendants intended to end meaningful competition. Through ingenuity and consistent pressing of case themes, the defense obtained that vital jury instruction; again, an instruction at odds with the DOJ's purist view of per se.

3. The DOJ remains committed to criminalizing certain labor market practices.

While the full acquittal in the DaVita case undoubtedly represents a major setback for the DOJ's aggressive stance on criminalizing certain labor market practices, this result is unlikely to end DOJ's policy agenda. Notwithstanding losing this case before a jury, the DOJ appears steadfastly committed to prosecuting these labor cases.

When clients consider typical antitrust cartel investigations, the focus has traditionally been on alleged conspiracies relating to pricing, sales and/or bidding of certain products or in certain geographic areas. The DOJ is expanding this landscape and is directing its criminal focus to the labor markets.

To address the DOJ's approach, executives involved in hiring and compensation-related decisions should monitor developments in this space, and pay careful attention to the aggressive posture adopted by DOJ in the labor and employment area.

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The authors represented former DaVita CEO Kent Thiry in the above-referenced case.

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