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DOJ Antitrust Secures Conviction for Criminal Monopolization

Client Alert | November 9, 2022

On October 31, 2022, the president and owner of a paving and asphalt contractor pleaded guilty to attempting to monopolize the market for highway crack-sealing services in Montana and Wyoming in violation of Section 2 of the Sherman Act.[1] This is the U.S. Department of Justice's ("DOJ") first criminal prosecution of a Section 2 violation in over forty years, following Assistant Attorney General Jonathan Kanter's announcement in April that the DOJ would "vigorously enforce Section 2 of the Sherman Act" after its "very near death."[2]

The DOJ typically charges market allocation conspiracies, such as the one proposed by the defendant in this case, under Section 1 of the Sherman Act. However, the indictment describes a "proposed market allocation agreement" that was never accepted.[3] According to the indictment, Nathan Nephi Zito, the president and owner of unnamed "Company A," contacted his counterpart at "Company B" in January 2020 to propose a "strategic partnership" to divide regional markets for highway repairs.[4] Under the terms of the proposed agreement, Company B would no longer bid for publicly-funded highway crack sealing projects in Montana and Wyoming, while Company A would no longer bid for such projects in South Dakota and Nebraska.[5] Zito further offered to pay Company B $100,000 in compensation for its lost business and to prepare a "sham agreement" to conceal the anti-competitive purpose of the arrangement.[6] Zito allegedly said that "their companies' revenue streams would be more stable and their margins would be higher" if they implemented the proposed agreement.[7] The president and owner of Company B rejected the invitation and reported it to the government, cooperating with the DOJ to record calls with Zito.[8]

Although attempts to enter anticompetitive agreements are not actionable under Section 1 of the Sherman Act, the DOJ has stated that attempts to collude may be prosecuted under the mail and wire fraud statutes.[9] Individuals charged with attempted mail or wire fraud may be imprisoned for up to 20 years and fined up to $250,000—potentially harsher sanctions than are available for the Sherman Act itself.[10] While the DOJ has prevailed in charging attempts to collude as wire fraud,[11] it has a mixed track record of success in prosecuting those cases. The DOJ last indicted an attempt to collude under the wire fraud statute in 2007 after a nearly five-year investigation into suspected price-fixing.[12] The DOJ voluntarily dismissed the indictment in 2010 after Gibson Dunn filed a motion to dismiss on behalf of the defendant, arguing that "the wire fraud statute is not—and may not constitutionally be interpreted as—a 'catch-all' criminal statute that fills a prosecutor's perceived gaps in other statutory schemes."[13]

This newly announced plea, which successfully uses Section 2 to prosecute an attempted market allocation, appears to open another path to prosecuting attempted but not consummated agreements. Whether the DOJ can prove such a claim at trial remains to be seen. Section 2 presents several challenges that both limit its application and create a high evidentiary burden. As a threshold matter, Section 2 is applicable only when an attempt to collude would have resulted in a party securing or preserving monopoly power in a defined market. This may be possible in the context of a certain attempted market allocation agreement affecting distinct product and geographic markets, but will not reach most *per se* unlawful agreements that are offered and declined. At trial, the DOJ would

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need to prove a distinct market and, *inter alia*, that the defendant had the specific intent to achieve monopoly power and that the proposed agreement would have created a "dangerous probability" of achieving monopoly power, such as the ability to raise prices or exclude competitors.[14] The DOJ has not met this burden in a civil case for a number of years, much less in a criminal prosecution where the government will be required to prove its case beyond a reasonable doubt.

In this case, the parties entered a plea agreement that is favorable to Zito and may have incentivized him to plead guilty to a relatively novel Section 2 charge. The DOJ made the rare decision not to recommend detention for a crime that is otherwise subject to a maximum sentence of 10 years' imprisonment.[15] The DOJ also agreed to a fine of only $27,000—one percent of the affected volume of commerce, which the parties agreed amounted to $2.7 million.[16] The fine represents the bottom of the range in the U.S. Sentencing Guidelines, which recommends that individuals be fined "one to five percent of the volume of commerce" and not "less than $20,000."[17] Notably, there is no indication in the agreement that the low criminal fine was based on Zito's inability to pay or substantial assistance to the investigation. If the DOJ had instead sought to indict Zito under the wire fraud statute, he would have faced a significantly higher sentencing range.

Zito's sentencing is scheduled for February 2023. The DOJ has not publicly indicted his company to date, nor is it included in the proposed plea agreement.

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[1] Plea Agreement at ¶ 4, *United States v. Zito*, No. CR 22-113 (D. Mont. Sep. 19, 2022).

[2] Jonathan Kanter, Assistant Attorney General, DOJ Antitrust Div., Antitrust Enforcement: The Road to Recovery, Keynote at the University of Chicago Stigler Center (Apr. 21, 2022), available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

[3] Indictment at ¶ 9, *United States v. Zito*, No. CR 22-113 (D. Mont. Sep. 19, 2022).

[4] *Id.* at ¶ 8.

[5] *Id.* at ¶ 9.

[6] *Id.* at ¶¶ 9, 11.

[7] *Id.* at ¶ 10.

[8] *Id.* at ¶¶ 8, 12.

[9] 18 U.S.C. §§ 1341, 1343, 1349; *see* DOJ Antitrust Div., An Antitrust Primer for Federal Law Enforcement Personnel at 8 (Apr. 2022), available at https://www.justice.gov/atr/page/file/1091651/download.

[10] *Id.* §§ 1341, 1343, 1349, 3571(b)(3).

[11] *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990).

[12] Indictment at 2, *United States v. Cadorette*, No. 4:07-cr-00144-1 (S.D. Tex. Apr. 17, 2007).

[13] Motion to Dismiss at 10-11, *United States v. Cadorette*, No. 4:07-cr-00144-1 (S.D. Tex. Nov. 6, 2007).

[14] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

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[15] Plea Agreement at ¶ 10, *United States v. Zito*, No. CR 22-113 (D. Mont. Sep. 19, 2022).

[16] *Id.* at ¶ 3. Neither the indictment nor Zito's plea agreement specifies how the parties arrived at $2,700,000 for the relevant volume of commerce.

[17] USSG § 2R1.1(c)(1).

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Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's Antitrust and Competition practice group:

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