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ALERTS

DOJ Obtains First Guilty Plea For Criminal Monopolization In Decades

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Highlights

A Montana District Court accepted the guilty plea of an asphalt and paving contractor accused of attempted monopolization

The case is the DOJ's first successful criminal prosecution for monopolization under Section 2 of the Sherman Act in over 40 years

The DOJ brought criminal antitrust charges even though the defendant did not succeed in conspiring to allocate markets, signaling a new strategy and possibly more aggressive criminal enforcement of the Sherman Act

The U.S. District Court for the District of Montana accepted the guilty plea of an asphalt and paving contractor accused of illegal collusion with his main competitor. The government prosecutors' plea agreement represents the first successful criminal prosecution for attempted monopolization since the middle of the last century, and the plea suggests a new enforcement strategy by the U.S. Department of Justice (DOJ) Antitrust Division.

The contractor, Nathan Nephi Zito, pled guilty to one count of attempted

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monopolization and agreed to a criminal fine under the federal sentencing guidelines of $27,000.

According to the information filed in the District Court, Zito attempted to enter into a market-allocation conspiracy with his main competitor for crack-sealing highway projects. If he had reached an agreement with his competitor not to bid on projects in certain states – the alleged allocation scheme would have given projects in South Dakota and Nebraska to the competitor and projects in Montana and Wyoming to Zito's company – the government likely would have brought a traditional Section 1 conspiracy claim. However, before Zito and his competitor agreed to the alleged market allocation, an individual at the competitor began cooperating with the government to expose the market-allocation scheme.

The Antitrust Division encourages companies and individuals to report antitrust conspiracies involving price fixing, bid rigging, or market allocation through its leniency policy. When that happens, the DOJ does not bring criminal charges against the first organization or individual that reports its involvement in such a conspiracy to the government. In this case, though, the government's informant reported the market allocation discussions to the government before the competitor had actually entered into an agreement with Zito's company. This put the government in an interesting position.

The Antitrust Division could not bring criminal charges against Zito under Section 1 of the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of trade, because Zito's competitor was already cooperating with the government at the time the alleged market allocation was proposed. There was no illegal agreement between competitors. However, Section 2 of the Sherman Act is more expansive than Section 1. It prohibits both monopolization and attempted monopolization, and it declares that both are felonies.

For over 40 years, the Antitrust Division has declined to bring criminal antitrust charges under Section 2 of the Sherman Act as a matter of policy. Instead, it has focused on what it terms "hardcore" antitrust violations – namely, conspiracies that violate Section 1 of the Sherman Act. If successful, Zito's alleged market-allocation proposal would have constituted such a hardcore conspiracy subject to criminal prosecution, but it was not. Nonetheless, the government broke with decades of internal policy and elected to bring criminal antitrust charges against Zito for attempted monopolization under Section 2 of the Sherman Act.

The successful criminal prosecution for attempted monopolization in this case could signal a larger change in DOJ antitrust policy, but the unique facts of the case make its significance unclear. At a minimum, the criminal charge and guilty plea show that the DOJ can and will use Section 2 as a stopgap for attempted price-fixing, bid-rigging or market-allocation conspiracies that fall short of the necessary agreement to violate Section 1 of the Sherman Act.

Whether the DOJ would bring criminal monopolization claims in other instances, though, remains an open question. If this case represents the government testing the water in a less controversial way before bringing criminal charges under Section 2 for non-conspiratorial exclusionary conduct, that would constitute a dramatic shift in criminal enforcement of the nation's antitrust laws.

To obtain more information please contact the Barnes & Thornburg

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