pillsbury

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Cartel Enforcement

TRENDS AND DEVELOPMENTS

Monitoring and updating recent key announcements, cases and other developments involving antitrust cartel enforcement.

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Welcome to the inaugural edition of ***Cartel Enforcement Trends and Developments***.

We are witnessing a significant shift toward aggressive enforcement and changing priorities at the Antitrust Division of the Department of Justice and the Federal Trade Commission, often in cooperation with state Attorneys General. DOJ reports more than 150 criminal grand juries pending, many with international nexus (p. 7). Calls for legislative changes in antitrust laws are more frequent. Meanwhile, the DOJ and FTC have withdrawn antitrust guidelines that long provided predictability to businesses. Faced with nearly daily headlines about antitrust actions, it can be challenging for even the most sophisticated companies, trade associations and non-governmental organizations (NGOs) to understand how these changes may impact their goals and operations.

To provide perspective, Pillsbury identifies important trends and developments in government cartel investigations, prosecutions, and related significant enforcement actions. While criminal antitrust enforcement has long focused on offenses such as price fixing, bid rigging or market allocation agreements, DOJ has sought to widen the net of antitrust violations it has pursued through the criminal justice system. At the same time, both the FTC and DOJ have more aggressively pursued a variety of antitrust theories challenging other cartel-like agreements in civil or administrative contexts.

In this issue, we explore recent trends, including:

- **Investigative techniques.** The Antitrust Division is highlighting its use of covert techniques to conduct investigations including wiretaps and undercover agents (p. 6). At the same time, both the DOJ and the FTC are investing substantial resources into detecting and challenging the use of algorithms to set pricing and facilitate collusion (p. 3) and warning companies that their duty to preserve documents reaches "ephemeral" messaging systems. Meanwhile, the DOJ Procurement Collusion Strike Force reports investigating and prosecuting "over 65 companies and individuals involving over $500 million worth of government contracts" in less than five years. (p. 11)
- **Novel criminal remedies.** In addition to fines and other traditional remedies for criminal violations, DOJ recently required two pharmaceutical companies accused of price fixing and bid rigging to divest a line of business that was central to the alleged misconduct. (p. 4) Historically, partial divestitures were remedies used to resolve challenges to unlawful mergers. Ironically, the current administration strongly disfavors divestiture remedies for unlawful mergers, preferring an "all or nothing" approach to challenges such as seen in the pending high-profile challenge to the Albertsons/Kroger merger.
- **Labor markets and efforts to expand the scope of criminal liability.** Despite a series of high-profile losses, the Antitrust Division continues to confirm its focus on criminal prosecutions of so-called "no poach" agreements. (p. 8) Similarly, a DOJ effort to impose criminal liability in a case where the alleged conspirators were simultaneously in a vertical (supplier/customer) as well as a horizontal relationship was recently reversed by the Fourth Circuit. (p. 5)

We hope you will enjoy this issue. As always, we appreciate hearing from you on these and related cartel enforcement issues.

Mark L. Krotoski **Michael L. Sibarium**

Algorithmic Collusion under Scrutiny

There is increased scrutiny of the use of algorithms to determine pricing and potential collusion. The focus is based on the litigation, enforcement and legislative fronts.

The Antitrust Division is focusing more resources on algorithmic collusion. In January, an Antitrust Division official noted that it is "building out a more robust data analytics and data science practice to address those sorts of AI and pricing algorithm issues and also build out some of our market intelligence tools."[1] In related news, on February 22, 2024, the Attorney General announced the first **Chief Science and Technology Advisor and Chief Artificial Intelligence (AI) Officer** in the Office of Legal Policy as part of an effort to "keep pace with rapidly evolving scientific and technological developments in order to fulfill our mission to uphold the rule of law, keep our country safe, and protect civil rights."[2]

On the enforcement side, the Antitrust Division obtained a criminal conviction involving an agreement "with the goal of coordinating changes to their respective [competitor] prices" based on "computer code that instructed algorithm-based software to set prices in conformity with this agreement."[3] In another case, the Antitrust Division filed a Statement of Interest stating their position that "it is per se unlawful when … competitors knowingly combine their sensitive, nonpublic pricing and supply information in an algorithm that they rely upon in making pricing decisions, with the knowledge and expectation that other competitors will do the same."[4]

The Federal Trade Commission (FTC) has also been active in policing the anticompetitive use of pricing algorithms. On March 1, 2024, the DOJ and FTC filed a joint Statement of Interest in the highly publicized RealPage action alleging the use of "pricing algorithms to artificially inflate multifamily rental prices." In this case, the agencies also note, "competitors may not agree to fix the starting point of pricing (e.g., agree to fix advertised list prices) even if the actual charged prices vary from the starting point."[5] The FTC Office of Policy and Planning Director and Deputy Assistant Director of the Anticompetitive Practices II Division provided further guidance, "Price fixing by algorithm is still price fixing," noting that "Agreeing to use an algorithm is an agreement."[6] The District of Columbia Office of the Attorney General filed a complaint "for unlawfully colluding to raise rents by collectively adopting the rents set by RealPage's technology and unlawfully agreeing to exchange competitively sensitive data."

Congress is also focusing on algorithmic collusion. On Jan. 30, 2024, Senator Amy Klobuchar (D-MN) introduced the **Preventing Algorithmic Collusion Act** (S. 3686), which would:

- Close a loophole in current law by presuming a price-fixing "agreement," when direct competitors share competitively sensitive information through a pricing algorithm to raise prices;
- Increase transparency by requiring companies that use algorithms to set prices to disclose that fact and give antitrust enforcers the ability to audit the pricing algorithm when there are concerns it may be harming consumers;
- Ban companies from using competitively sensitive information from their direct competitors to inform or train a pricing algorithm; and
- Direct the FTC to study the impact of pricing algorithms on competition.[7]

Companies using algorithms to determine price should assess the antitrust risk in the design and implementation and address the legal issues that may arise.

"Extraordinary Remedy" in Criminal Deferred Prosecution Agreements

Two recent criminal deferred prosecution agreements (DPAs) contained what the DOJ described as an "extraordinary remedy" which "forces the companies to **divest a business line** that was central to the misconduct."[8] These novel terms along with large criminal fines raise questions about whether similar provisions may be imposed in future Antitrust Division cases.

Normally criminal charges are resolved at trial or by plea agreement. Occasionally, the Department of Justice may resolve a criminal investigation by a deferred or non-prosecution agreement, both of which are "an important middle ground between declining prosecution and obtaining the conviction of a corporation."[9] If specific terms included in a deferred prosecution agreement are completed, the government will dismiss charges. If the terms are not satisfied, the company has usually agreed to the facts to support a conviction.

Two pharmaceutical companies admitted on August 21, 2023, to a Statement of Facts which confirmed agreements to suppress and eliminate competition (a) "for certain drugs by agreeing with competitors to refrain from submitting bids and offers to sell to certain customers" and (b) "by agreeing to increase and maintain the price of" a certain drug.

The first company agreed to pay a **$225 million criminal fine** and to **donate** certain products to humanitarian organizations valuing at least **$50 million**. The second company agreed to pay a **$30 million criminal fine**. Both companies agreed to certain Cooperation Obligations in the ongoing investigations, recognizing that the failure to do so would void the agreements.

The first company also agreed to a corporate monitor, and both companies agreed to modify and report on their compliance programs. If convicted on the charges, including if the DPAs are breached, the companies risk possible mandatory debarment from federal health care programs.

These cases raise important questions and highlight key takeaways:

- Prior to 2019, the Antitrust Division rarely entered into a DPA. The first occurred in 2013 as part of the LIBOR investigation.[10] In 2019, the Antitrust Division announced a "new approach" to allow DPAs "when the relevant factors, including the adequacy and effectiveness of the corporation's compliance program, weigh in favor of doing so" as part of "an important middle ground between declining prosecution and obtaining the conviction of a corporation."[11] Under this "new approach," an increasing number of DPAs have been granted.
- These cases raise questions about whether divestiture or other "extraordinary" remedies may be imposed in future cases. By avoiding a criminal conviction and possible debarment, each company was asked to admit to the conduct, pay a large fine, and agree to novel and strict terms.
- There are implementation questions in accomplishing the divestiture. For example, one of the DPAs notes that a divestiture trustee may be appointed based on the failure to timely divest. The divestiture may include the sale of the divested assets. The terms may restrict any contractual relationship with other companies engaged in the conspiracy. It will be important to monitor these and other divestiture issues raised by these novel cases.
- In prior cases, DPAs were negotiated before charges were filed. In these cases, DPAs were reached after charges were filed. Does this signal an opening to negotiate DPAs post-charging?

Reversal of Sherman Act Criminal Bid-Rigging Conviction Involving "Hybrid" Vertical and Horizontal Components

In a significant ruling, the Fourth Circuit reversed a Sherman Act criminal bid-rigging conviction involving "a hybrid relationship with both vertical and horizontal components." See *United States v. Brewbaker,* 87 F.4th 563 (4th Cir. 2023).

An executive was convicted by a jury of conspiracy to rig bids under Section 1 of the Sherman Act and five counts of mail and wire fraud concerning "more than 300 aluminum structure projects" involving the North Carolina Department of Transportation (NCDOT) between 2009 and 2018.[12] He was sentenced to 18 months and ordered to pay a $111,000 criminal fine. His company pled guilty to one count of bid rigging and one count of conspiracy to commit mail and wire fraud and agreed to a criminal fine of $7 million and restitution or more than $1.5 million.

The Fourth Circuit held that the district court should have granted a motion to dismiss the Sherman Act count, as "caselaw and economics show that the indictment failed to state a *per se* antitrust offense as it purported to do." *Id*. at 569. On the horizontal level, two companies were competitors in submitting bids in the aluminum-project market. On the vertical level, one company supplied the other with aluminum that was "used to compete against 'others' in NCDOT aluminum-structure projects." *Id*. at 576. This structure created the "hybrid" relationship.

The Fourth Circuit noted that lower courts "have adjudged hybrid restraints with vertical and horizontal aspects under the rule of reason" and not the *per se* rule. While the Sherman Act conviction was reversed, the fraud convictions were affirmed on appeal.

The ruling may narrow the application of the *per se* rule under Section 1 involving similar vertical and horizontal relationships in other cases. This case is another example of the courts reconsidering the scope of the *per se* rule in criminal antitrust cases.

The Antitrust Division strongly opposed the appellate opinion and filed a petition for rehearing and rehearing *en banc.* On February 15, 2024, the Fourth Circuit denied the petition. Whether the Solicitor General will seek a petition for certiorari review in the Supreme Court remains to be seen. ■

Using Title III Wiretaps, Recorded Conversations and Other Investigation Tools in Cartel Investigations

The Antitrust Division has emphasized that it is using a broad set of investigative tools in its cartel investigations. For example, in October, the Director of Criminal Enforcement highlighted a variety of tools, including those used to obtain recorded conversations:

> So we are using all tools at our disposal—not just grand jury process and premises warrants, but methods to conduct longer-running covert investigations. That includes **search warrants for electronic evidence**, but it also includes things like **consensually recorded communications** (including those being captured by a non-leniency cooperator), **undercover agents**, and **Title III wiretaps**. We are also thinking broadly about the types of confidential sources and cooperators best positioned to notice potential crime—not just coconspirators but also whistleblowers not directly involved in the conduct, as well as victims.[13]

The Antitrust Division has a history of obtaining recorded conversations. For example, in the lysine cartel investigation in the 1990s, "the FBI directed the covert recording of conspiratorial meetings on audiotapes and videotapes" which "were important evidence in obtaining guilty verdicts at trial against three" executives.[14] The lysine investigation was used in the popular 2009 movie, *The Informant!*, starring Matt Damon, which portrayed many of the video and audio recordings.

In a recent prosecution, the Antitrust Division noted the use of court-authorized Title III wiretap recordings. Two executives were charged with conspiring to rig bids and allocate territories, conspiring to commit wire fraud and committing wire fraud in contracts for forest-firefighting services.[15] The indictment refers to several phone calls and reproduced text communications, which have been a common feature the past several years in antitrust prosecutions.

The speeches and cases provide insight into how the Antitrust Division uses investigative tools to build their cases. The use of court-authorized wire taps is not limited to drug and gang prosecutions but is being used in white collar cases. ■

Updated Preservation Obligations for Collaboration Tools and Ephemeral Messaging

On January 26, 2024, the Antitrust Division and FTC jointly announced that they were updating their preservation letters concerning the "increased use of collaboration tools and ephemeral messaging platforms in the modern workplace."[16] Ephemeral communications typically involve mobile to mobile app communications that are automatically deleted once reviewed. Given the increasing popularity and use of these applications, unique preservation issues arise. The preservation letters apply "during the pendency of government investigations and litigation" grand jury subpoenas, compulsory process and second request letters. The DOJ warned that the failure to produce ephemeral messages "may result in obstruction of justice charges."

Companies should review their preservation policies and seek legal guidance to mitigate risks that could arise in advance of an antitrust government investigation. ■

Pending Uptick in International Cartel Enforcement Investigations and Cases?

In the past several years, much of the cartel enforcement has focused on domestic companies and executives. Many have asked whether and when international cartel enforcement may pick up.

In January 2024, the highest-ranking criminal enforcement officer in the Antitrust Division reported that:

> the Antitrust Division has over 150 grand jury investigations open across its five criminal offices. **Over one third** of those investigations **have an international angle**. This reflects the fact that globalization has led to an increase in sophisticated international cartels that threaten markets for key products and services, including our supply chain.[17]

Whether a return to international cartel enforcement occurs remains to be seen. A large number of active investigations with "an international angle" suggests more cases may be on the way. ■

Reviewing Recent Labor Market Prosecutions

The Antitrust Division continues to maintain its focus on labor market prosecutions. A "no poach" agreement involves an agreement "to refuse to solicit or hire that other company's employees." Key questions have arisen based on its enforcement efforts and cases, including:

- What lessons can be drawn from the jury acquittals and dismissals in the recent no-poaching and wage-fixing agreements prosecuted under Section 1 of the Sherman Act?
- Should cases focused on these types of agreements return to civil enforcement?
- Under what circumstances should the rule of reason apply instead of the *per se* rule?

The Antitrust Division traditionally resolved these issues in civil cases until 2016 when the DOJ and the FTC announced for the first time that, "Going forward, the DOJ intends to proceed criminally against naked wagefixing or no-poaching agreements" and "bring criminal, felony charges against the culpable participants … including both individuals and by companies."[18]

Since 2016, five no-poaching and wage-fixing agreements charged under the Sherman Act have been dismissed by three juries, one court at the close of the government's trial case, and by the DOJ. (See Table Summarizing Antitrust "No Poach" and Wage-Fixing Agreement Acquittals and Dismissed Cases, p. 9.)

During the ABA National Institute on White Collar Crime in San Francisco on March 6, 2024, Director of Criminal Enforcement Emma Burnham confirmed that the Antitrust Division remains focused on criminal enforcement on labor market issues, including no-poach agreements.

Antitrust Division leaders continue to confirm their intent to bring criminal investigations and prosecutions involving labor markets. In December, the Principal Deputy Assistant Attorney General in the Antitrust Division confirmed to the Women's White Collar Defense Association, "We look forward to charging more no-poach and wage-fixing cases"[19]

Table Summarizing Antitrust "No Poach" and Wage-Fixing Agreement Acquittals and Dismissed Cases

No.	Case	Allegations	Result
1.	*United States v. Jindal, et al.,* No. 4:20-cr-00358 (E.D. Tex.)	Alleged "conspiracy to fix prices by lowering the rates paid to physical therapists and physical therapist assistants in north Texas"; first ever criminal wage-fixing case.[20] Three-year term of probation and $10,000 criminal fine imposed on obstruction conviction.	**Jury acquittal** on wage-fixing count; conviction on unrelated obstruction count based on making false and misleading statements to the FTC (April 14, 2022) (Doc. No. 112)
2.	*United States v. Davita, Inc.,* No. 1:21-cr-00229-RBJ, 2022 WL 1288585 (D. Colo. Mar. 25, 2022)	Alleged conspiracy "to allocate senior-level employees by agreeing not to solicit each other's senior-level employees from as early as February 2012 until as late as July 2017" and "conspiring with another health care company from as early as April 2017 until as late as June 2019 to allocate employees by agreeing that the other health care company would not solicit DaVita's employees."[21]	**Jury acquittal** of all defendants on all counts (April 15, 2022) (Doc. No. 264)
3.	*United States v. Manahe,* 2:22-cr-13 (D. Me.)	Alleged conspiracy among "owners and/or managers of home health care agencies" to "eliminate competition for the services of Personal Support Specialist (PSS) workers by agreeing to fix the rates paid to these workers and by agreeing not to hire each other's workers." First case involving "wage fixing and worker allocation schemes in the PSS industry."[22]	**Jury acquittal** of all four defendants (March 22, 2023) (Doc. No. 251)
4.	*United States v. Patel,* 3:21-cr-220 (D. Conn.)	Alleged conspiracy "to allocate employees by agreeing not to hire or solicit employees from each other's companies." First case involving "labor market allocation in the aerospace engineering services industry."[23]	**District Court granted Rule 29 Motion for Judgment of Acquittal** prior to defense case presentation and jury deliberation (April 28, 2023) (Doc. No. 599)
5.	*United States v. Surgical Care Affiliates LLC,* 3:21-cr-11 (N.D. Tex.)	Two separate conspiracies alleged in Texas and Colorado "to allocate senior-level employees by agreeing not to solicit each other's senior-level employees."[24]	**DOJ motion to dismiss case** without explanation (Nov. 13, 2023) (Doc. No. 203)

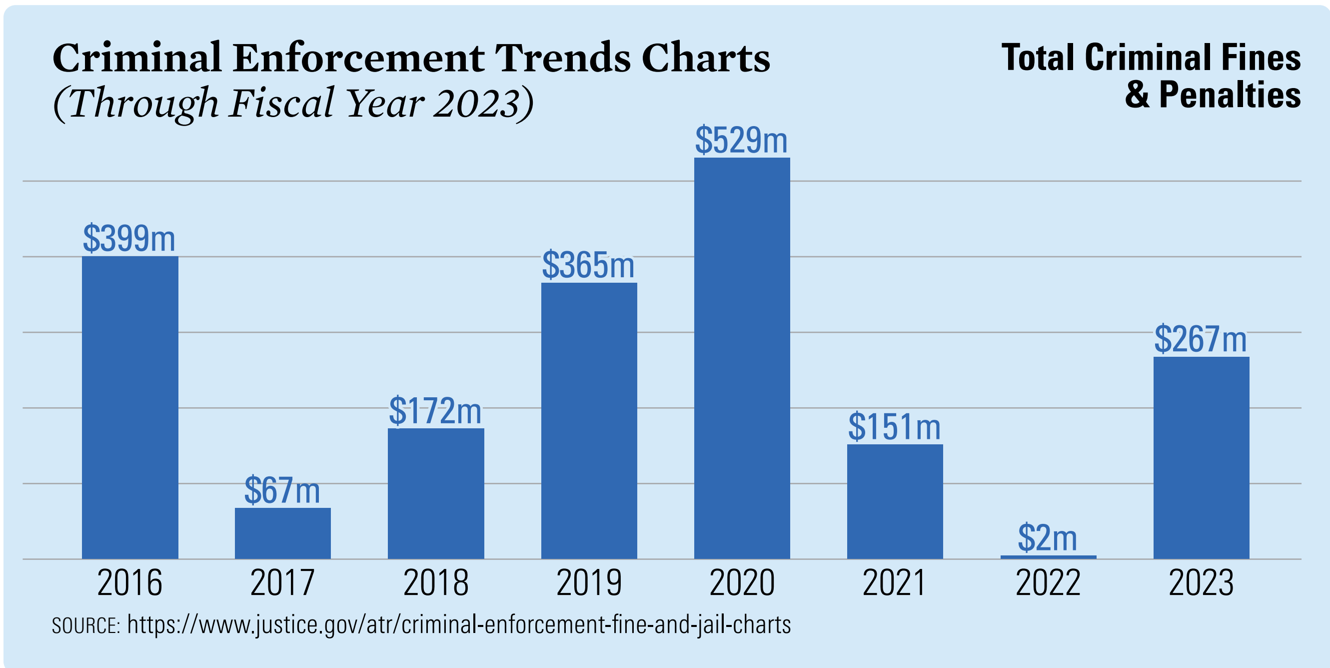
The sole conviction in a no-poach case to date came from a plea agreement with a health care staffing company for a relatively low criminal fine of $62,000 and restitution of $72,000.[25] The fine and restitution were a fraction of the litigation costs that would have resulted had the case proceeded to trial. Of note, the plea agreement was reached after two motions to dismiss the indictment were filed based on alleged government misconduct and the district court set an evidentiary hearing with witnesses.[26] The parties then asked the court to continue the hearing and negotiated a resolution. In the same case, an individual entered into a pretrial diversion agreement—understood to be the first one for the Antitrust Division—and the indictment was dismissed upon the prompt completion of community service.[27]

In continuing developments on no poach issues, on March 18, 2024, the U.S. Supreme Court denied certiorari review on a case asking whether per se analysis or the rule of reason should apply to intrabrand restraints and to no-hire agreements. As the questions were presented, "(1) Whether intrabrand hiring restraints are presumptively subject to per se Sherman Act analysis whenever they have a horizontal component; and (2) whether courts assessing a restraint under the Sherman Act must ignore procompetitive effects in related markets."[28] The case returns for further proceedings to the Seventh Circuit and district court.

DOJ Report on Criminal Fines and Prosecutions

The Antitrust Division reported criminal fines and penalties for the last fiscal year.

The reported criminal fines and penalties totaled $267 million. This total was the highest since FY 2020. However, most of this amount came from the two deferred prosecution agreements (reported above).



Downtown Los Angeles

Procurement Collusion Strike Force (PCSF) Continues Active Enforcement and Hosts Los Angeles Summit

Many of the Antitrust Division prosecutions and investigations in recent years have been pursued and supported by the Procurement Collusion Strike Force (PCSF), which focuses on antitrust and other crimes involved in government procurement, grant and program funding. For example, the PCSF was involved in the *Brewbaker* trial conviction and wire tap case, noted above. (See p. 5 and p. 6.) On another PCSF case, on February 27, 2024, the Antitrust Division announced the fourth executive conviction among erosion control company owners or managers in a conspiracy to rig bids and fix prices "targeting a total of over $100 million in publicly funded transportation construction contracts across Oklahoma."[29]

On February 8, 2024, the PCSF hosted a summit in Los Angeles which brought together federal, state and local leaders in Southern California.[30] The PCSF reported:

> Since its inception in November 2019, the PCSF has opened more than 100 criminal investigations and trained more than 31,000 people. In that time, the PCSF and Antitrust Division have investigated and prosecuted over 65 companies and individuals involving over $500 million worth of government contracts.

Given the PCSF track record, more cases are anticipated.

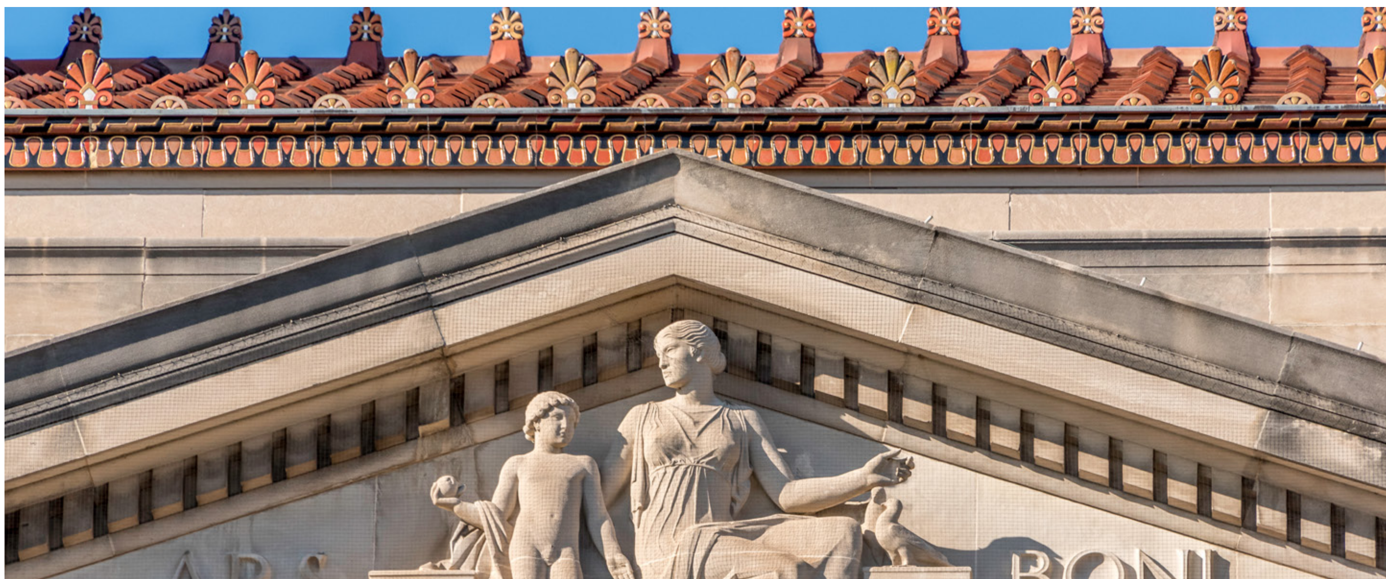
California to Focus on Criminal Antitrust Enforcement

On March 6, 2024, the highest-ranking antitrust enforcer in the California Attorney General's Office confirmed the office is "reinvigorating criminal prosecutions under the Cartwright Act."

While the Carwright Act has civil and criminal provisions,[31] it has been more than 25 years since a criminal prosecution has been pursued. The statement was made at the ABA National Institute on White Collar Crime in San Francisco by Senior Assistant Attorney General Paula Blizzard.

Generally, courts consider the Carwright Act to mirror the Sherman Act[32] since it was modeled on the Sherman Act. However, the state considers its statute to be "broader" than the Sherman Act. Criminal convictions may result in a fine up to $1 million for a corporation, or up to three years in prison and a fine up to $250,000; however, the fine may be higher if twice the pecuniary gain or loss is greater.[33]

Based on this heightened focus, companies conducting business in California should ensure their compliance programs address this new development.



Cartel Enforcement Legal Services

Pillsbury's Antitrust & Competition Team has defended corporations and senior executives in some of the most significant criminal and international cartel investigations in recent years. The team has a long history and experience handling complex cartel enforcement investigations and litigation and a track record securing favorable resolutions in investigations, negotiated resolutions, litigation and jury trials. The Cartel Enforcement Team assists clients on a number of key cartel enforcement areas and issues, including:

- Evaluating and obtaining leniency applications;
- Responding to DOJ Antitrust Division grand jury subpoenas;
- Responding to FTC and State AG subpoenas and civil investigative demands;
- Defending companies, executives, trade associations and NGOs in investigations and litigation with DOJ, FTC, and state AGs.
- Representing companies and executives on parallel civil or administrative cases;
- Conducting privileged internal investigations to assess and identify antitrust risk;
- Reviewing, assessing and updating antitrust compliance programs consistent with Antitrust Division requirements; and
- Preparing and training for dawn raids and providing guidelines in the event of search warrants, interviews and legal process.

In addition to cartel enforcement-related services, the broader Pillsbury Antitrust and Competition team provides a full range of services to support our clients, including the following:

- Private civil and class action litigation;
- Analysis of competitive issues in mergers, acquisitions and joint ventures;
- HSR filings and global merger control filing analysis;
- Defending companies and representing third parties in DOJ, FTC and state AG conduct and merger investigations;
- Advising clients on distribution issues and other vertical restraints;
- Creating and operating joint purchasing groups; and
- Developing creative solutions to achieve business goals consistent with antitrust laws.

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28 Petition For a Writ of Certiorari, *McDonald's USA, LLC, et al. v. Leinani Deslandes* (No. 23-562).

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30 Readout of Justice Department's Procurement Collusion Strike Force's Summit in Los Angeles (Feb. 8, 2024), https://www.justice.gov/opa/pr/readout-justice-departments-procurement-collusion-strike-forces-summit-los-angeles

31 Cal. Bus. & Prof. Code§ 16754.

32 See, e.g., *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

33 Cal. Bus. & Prof. Code § 16755.

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