Criminal Monopolization Plea Fuels DOJ Antitrust Mandate

By **Tiffany Rider and Daniel Oakes** (November 1, 2022, 3:01 PM EDT)

About six months after senior officials in the Antitrust Division publicly acknowledged that the U.S. Department of Justice would consider bringing criminal charges for monopolization offenses, the government has now obtained its first win on that front.

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On Oct. 31, the U.S. District Court for the District of Montana **adopted findings** of a magistrate judge accepting a plea agreement between the DOJ and an asphalt company executive for attempting to monopolize the highway crack-sealing services markets in Montana and Wyoming.

Crucially, though the defendant's attempt to allocate markets was rebuffed by the solicited competitor, the government still brought charges and secured a guilty plea for a stand-alone attempted monopolization claim.

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This case represents the first successful criminal prosecution under Section 2 of the Sherman Act in decades, and a major development for a DOJ that has shown a willingness to eschew historical precedent to expand its antitrust enforcement mandate.

United States v. Zito

In March 2022, practitioners speculated about the import of DOJ comments signaling the revival of Section 2 criminal enforcement and whether it portended a genuine policy shift or were merely posturing words designed to deter rather than punish monopolization.

On September 19, we received at least a partial answer. The DOJ filed a criminal information in the U.S. District Court for the District of Montana, against an executive of a western U.S. asphalt and surface paving company charging a stand-alone violation of Sherman Act Section 2 for attempted monopolization.[1]

Then, on October 14, a magistrate judge signed off on a plea agreement in which the defendant admitted to the substance of the allegation.[2] On October 31, the district court adopted those findings, and set sentencing for February 2023.

The charging document in United States v. Zito alleges that the defendant, Nathan Zito, the owner and president of Montana-based "Company A", unsuccessfully solicited a strategic market-allocation partnership with its only major rival, "Company B," which was based in another state.[3]

According to the offer of proof, both Company A and Company B competed against each other for the same publicly funded highway crack sealing projects and were often the only two companies that bid for projects administered by the Wyoming Department of Transportation and state departments of transportation in neighboring states.[4]

Beginning in January 2020, the defendant called an employee of Company B to propose a "strategic partnership" under which Company B would stop bidding for publicly funded highway paving projects in Montana and Wyoming, while Company A would refrain from

bidding in South Dakota and Nebraska.[5]

The defendant made an additional promise of $100,000 to compensate for Company B's lost business. Importantly, after the first outreach by Zito, Company B reported the defendant's contact to the Federal Highway Administration and cooperated with the U.S. Department of Transportation Office of Inspector General to record a series of telephone calls between the defendant and an employee of Company B from March to October 2020.[6]

The Information alleged that Zito intended to eliminate Company B as a competitor, and he sought to memorialize the market allocation in a written contract that obscured its intent.

The government charged one count against the defendant under Section 2 of the Sherman Act for "knowingly engag[ing] in anticompetitive conduct with the intent to gain monopoly power in the markets for highway crack sealing services in Montana and Wyoming."[7]

The government alleged that the defendant's intent was to enter an agreement to eliminate Company B as a competitor in Montana and Wyoming, which would result in stabilizing Company A's revenue streams and increasing its margins. Because the market for highway crack sealing services was consolidated, the government alleged a "dangerous probability" that, if successful, the company "would have gained monopoly power in those markets."[8]

But an agreement never came to fruition, as Company B rejected the market allocation offer. Thus, the government could not bring a count under Section 1 for a bona fide collusive agreement. Rather, the crux of the offense was the invitation to collude — instead of an actual agreement — which DOJ successfully charged under Section 2 alone.

DOJ Makes Good on its Promise to Prosecute Section 2

In March, speaking on a panel at the American Bar Association's White Collar Crime Conference in San Francisco, then-Assistant Attorney General for Criminal Enforcement Richard Powers first suggested that the DOJ was preparing to bring criminal charges against individual executives and companies for violating Section 2 of the Sherman Act.[9]

In his remarks, Powers reiterated Assistant Attorney General Jonathan Kanter's promise that DOJ would use "all available tools" to enforce U.S. antitrust laws, including criminally prosecuting Section 2 violations.

At that time, Powers' statements conflicted with the DOJ's then-existing policy of only pursuing civil process for Section 2 cases, with Powers arguing that

- "Section 2 is a felony just like Section 1"; and
- "If the law and facts lead us to the conclusion that a criminal charge based on a Section 2 violation is warranted, then that's what we'll do, we'll charge it."[10]

Then in April, speaking at the Spring Enforcers Summit, Kanter emphasized that the DOJ "will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers and businesses harmed by unlawful collusion and monopolization."[11]

Kanter reiterated the DOJ would "not hesitate to enforce law" the Sherman Act, including Section 2's statutory criminality. Those remarks have since been repeatedly echoed by similar statements by several other high-ranking DOJ officials.

This policy shift stands in contrast to decades of practical enforcement. Criminal prosecutions under the Sherman Act have generally been limited to hardcore violations of Section 1: price fixing, bid rigging and market allocation agreements, and more recently no-poach and wage-fixing conduct.

Although the text of Section 2 classifies monopolization, attempted monopolization, and conspiracy to monopolize as felony offenses punishable to the same extent as violations under Section 1, Section 2 has fallen into disuse as a criminal charging tool.

Accordingly, for the past several decades, Section 2 violations have been pursued almost exclusively civilly, as reflected in the DOJ's policy guidelines even as recently as early March 2022.

Notably, even as the first criminal prosecution wraps up, the DOJ has not published any formal documents outlining its enforcement priorities or providing guidance to companies concerned about criminal enforcement.

Defendants in future criminal actions are likely to raise constitutional challenges to having charges brought under a disused criminal statute and without guidance from the DOJ as to which types of conduct rise to the level of criminality.

And it is difficult to discern at this point how courts will respond to criminal prosecutions that do not end in guilty pleas and are instead tried before a jury.

Key Takeaways

Now that the DOJ has forged ahead with its plan to criminally charge Section 2, what can practitioners learn from the government's first successful case?

First, the conduct charged in United States v. Zito appears similar to bid rigging and market allocation conduct that has traditionally been charged criminally under Section 1 — but without an ultimate agreement between competitors.

Many of the historical criminal Section 2 cases have included concurrent Section 1 charges, such as the 1978 United States v. Braniff Airways Inc. decision in the U.S. District Court for the Western District of Texas and the 1974 United States v. General Motors Corp. decision in the U.S. District Court for the Eastern District of Michigan.

Here, even where the Section 2 charge stands alone, the conduct amounts to an attempt to engage in market allocation, which is traditional per se illegal collusion of the type that criminal enforcers routinely investigate and prosecute.

Thus, companies and counsel looking for criminally chargeable Section 2 conduct would be wise to continue focusing on the identification of direct competitor contacts, offers, and agreements to engage in per se illegal conduct, particularly in concentrated markets.

Second, this development shows that companies and counsel should be even more vigilant regarding antitrust compliance because the current, aggressive Antitrust Division will find a way to criminally charge even unsuccessful attempts to collude in concentrated markets.

In recent years, collusion attempts that failed to reach the level of agreement may have caused the DOJ to simply drop the case — but no longer.

The opportunity to expand Section 2 that the facts in Zito presented appear to have been too tempting for the government to pass up. Investigators secured the cooperation of Company B to record phone calls that likely gave the DOJ overpowering leverage against the defendant in obtaining a plea agreement.

Both Company A and Company B appear to be relatively small concerns, operating in a service market — public highway crack sealing projects — with only two bidding competitors in many cases.

These facts simplified the inherent difficulty of proving, beyond a reasonable doubt, the defendant's intent to gain monopoly power and the existence of a dangerous probability that Company A would have gained monopoly power in the local markets at issue.

Third, practitioners need to continue to be mindful of the possibility of criminal conduct outside of the antitrust context. Here, the government may have been able to charge other criminal conduct, such as wire fraud, either in addition to or instead of the Section 2 count. Non-antitrust criminal conduct was common in historical criminal Section 2 cases.

In cases like the 1973 United States v. Dunham Concrete Products decision in the U.S. Court of Appeals for the Fifth Circuit[12] and the 1975 United States v. Empire Gas Corp. decision in the U.S. District Court for the Western District of Montana,[13] defendants were accused of conduct including threats of physical violence, extortion, or damaging property.

And while those sorts of specific threats do not appear to be in play here, the defendant's outreach to a competitor across state lines to solicit a market-allocation scheme at least suggests the government could have charged some type of fraud, had it not opted to break new antitrust ground.

Finally, given the 50-year absence of criminal prosecution and the numerous policy statements indicating the DOJ would not prosecute Section 2 criminally, the recent United States v. Zito decision demonstrates why the Antitrust Division ought to provide further guidance on its intentions going forward.

The conduct alleged in United States v. Zito occurred in calendar year 2020, a time when Antitrust Division policy manuals declared Section 2 only chargeable civilly, and at least a year before the DOJ made any public overture that it would charge Section 2 as a criminal offense.

Put simply, it is far from clear that the defendant had fair notice that the conduct could amount to a criminal Section 2 violation. Now that the DOJ has taken action to begin charging Section 2 criminally, potential defendants ought to be given formal guidance on the contours of a criminal violation of Section 2.

Though it is just one data point, the court's acceptance of a guilty plea in United States v. Zito portends more criminal monopolization enforcement measures to come, at least in scenarios where a competitor fails in an attempt to allocate highly concentrated markets.

Ultimately, we will have to await future charges to see how a criminal prosecution of Section 2 will fare in court.

A previous version of the article incorrectly identified the district court that adopted the judge's findings. The error has been corrected.

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[1] Information, United States v. Zito, No. 1:22-cr-00113-SPW (D. Mont. Sept. 19, 2022), ECF No. 1.

[2] Findings & Recommendations, ECF No. 13.

[3] Information, ECF No. 1.

[4] Offer of Proof, ECF No. 7.

[5] Information at 4-5, ECF No. 1.

[6] See Paving and Asphalt Company Owner Charged in Attempted Monopolization Scheme, U.S. Dep't of Transp., Off. of Inspector Gen. (Sept. 19, 2022), https://www.oig.dot.gov/library-item/39138.

[7] Information at 5, ECF No. 1.

[8] Id.

[9] Michael Acton, US DOJ Stands Ready to Bring Criminal Charges in Section 2 Monopolization Cases, Powers Says, mlex (Mar. 2, 2022), https://content.mlex.com/#/content/1363181.

[10] Id.

[11] Press Release, U.S. Dep't of Justice, Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers.

[12] United States v. Dunham Concrete Products , 475 F.2d 1241, 1242 (5th Cir. 1973).

[13] United States v. Empire Gas Corp. , 393 F. Supp. 903, 907 (W.D. Mo. 1975).