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BLOG

DOJ Secures Guilty Plea for Attempted Monopolization

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On October 31, the Department of Justice (DOJ) fulfilled its recent promise to "vigorously enforce Section 2 of the Sherman Act" by securing the first guilty plea in a criminal monopolization case since the 1970s. Nathan Zito, the president of a Montana-based paving and asphalt company, admitted to one count of attempted monopolization of the market for highway crack-sealing services in Montana and Wyoming.[1] According to the charging document, Zito solicited his company's sole competitor in the highway crack-sealing services market and offered to form a "strategic partnership." Under the terms of this partnership, the two competitors would divide the territory that they covered—with Zito's company being allocated Montana and Wyoming—and stop bidding against the other for projects outside their respective geographic regions. To sweeten the deal, Zito offered his competitor $100,000 to compensate it for business opportunities lost due to this market allocation scheme. Nevertheless, the competitor declined, the DOJ investigated, and charges were successfully brought against Zito.

As we previously noted here at the Competition Corner, the DOJ's decision to pursue criminal charges in a monopolization case—after decades of relative inaction—is of little surprise. Over the past year, the Antitrust Division has signaled its intent to pursue charges where the "facts and law lead [the DOJ] to the conclusion that a criminal charge based on a Section 2 violation is warranted." In *Zito*, the DOJ has made clear its commitment to this policy. But it is yet to be determined whether the DOJ's statements and the *Zito* action reflect a sea change in criminal antitrust enforcement or a limited broadening of the scope of illicit anticompetitive activity the DOJ has consistently pursued over the past decades.

While the DOJ has refrained from pursuing Section 2 criminal actions of late, it has had no such hesitation with respect to *per se* violations of Section 1 of the Sherman Act: price fixing, bid rigging, and market allocation agreements are all common targets of criminal DOJ enforcement actions. But such cases require (at least) one willing counterpart to effectuate the illegal agreement; whereas here, Zito's efforts to form a conspiracy went unrequited. Through this lens, the case against Zito reflects a creative use of Section 2 to criminalize failed attempts to enter into a Section 1 conspiracy, rather than an effort to criminally pursue traditional monopolies.

Admittedly, one data point does not make a trend, and the DOJ has also indicated that its ambitions extend beyond conspiracy-related actions. In March 2022, Assistant Attorney General Jonathan Kanter pointedly referred to monopoly maintenance as an area of focus for the DOJ, as discussed in a previous post. Whether this manifests itself in criminal actions remains to be seen. But regardless of what the future holds, *Zito* reflects an innovative

approach to criminal antitrust enforcement and stands as a pointed reminder of the necessity of a strong antitrust compliance program.

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[1] *United States v. Zito* Press Release, Dep't of Just., Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022), *available at* https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization.

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