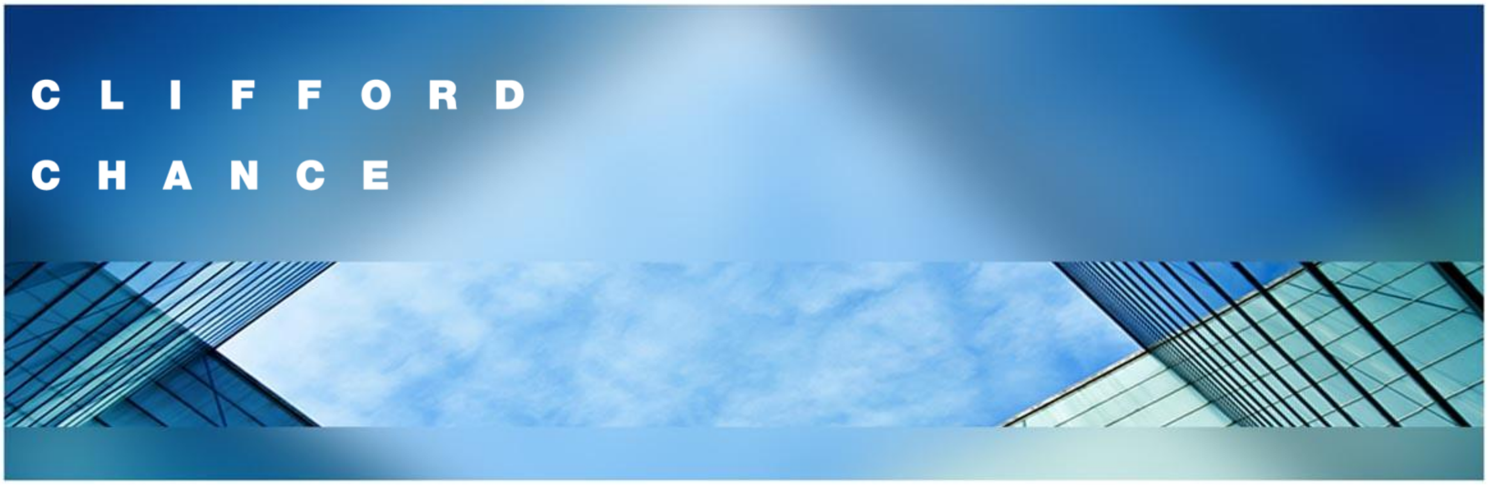

FEDERAL COURT HOLDS NO-POACH AGREEMENT CAN CONSTITUTE CRIMINAL VIOLATION OF SHERMAN ACT

A federal court recently upheld the Department of Justice's ongoing criminal antitrust case against a dialysis company and its CEO, in which the defendants allegedly agreed with other employers not to solicit each other's employees. The decision marked the first time that a court has held that employee non-solicitation agreements can be per se, criminal violations of the Sherman Act. The decision will be an important precedent in other no-poach prosecutions.

On January 28, 2022, a federal judge in the United States District Court for the District of Colorado denied a motion filed by two antitrust defendants to dismiss the criminal indictment brought against them by the Antitrust Division of the U.S. Department of Justice ("DOJ"). The indictment alleges that DaVita, one of the nation's largest dialysis providers, agreed with several other employers not to solicit each other's employees. In denying the motion to dismiss, Senior Judge R. Brooke Jackson held that an employee non-solicitation agreement that allocates a horizontal market is per se illegal under the federal antitrust laws. The decision marks the first time that a federal court has held in a criminal case that such an agreement constitutes a per se violation of the Sherman Act.[1] The decision also marks a victory for the DOJ in one of its first-ever criminal prosecutions for entering into no-poach agreements.

Section 1 of the Sherman Act prohibits unreasonable restraints of trade.[2] Some practices are so "manifestly anticompetitive" and "lacking in any redeeming virtue" that courts have deemed them "per se illegal" under Section 1, obviating the need for the plaintiff to establish that the conduct harmed the competitive process and precluding the defendant from defending on the basis that the practice's benefits

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[1] Other courts have found civil complaints alleging an agreement between employers not to solicit each other's employees to have properly stated a violation of the Sherman Act. *See Hunter v. Booz Allen Hamilton, Inc.*, 418 F. Supp. 3d 214 (S.D. Ohio 2019) (holding that plaintiffs had properly pleaded both a per se violation and rule of reason violation); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013) (holding that violation had been adequately pleaded under both per se and quick-look standards).

[2] See 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . ").

to competition exceeded its harms.[3] Instead of such a "rule of reason" analysis, the plaintiff in a per se rule case need only show that the defendant engaged in the alleged conduct. Per se illegal practices include price fixing, bid rigging, and market allocation.

As a policy matter, the DOJ limits criminal prosecution to practices governed by the per se rule.[4] In its indictment against DaVita, the government alleged that the defendants had agreed with their co-conspirators to "allocate senior-level employees by not soliciting each other's senior-level employees across the United States."[5] The indictment charged the defendants with a "conspiracy in restraint of trade to allocate employees" as a per se violation of Section 1 of the Sherman Act. The defendants posited several reasons why the indictment should be dismissed, including that (1) the agreement did not fall into a traditional category of per se treatment, (2) a new category of per se treatment for non-solicitation agreements was unwarranted, and (3) allowing the case to proceed under a per se theory would violate their constitutional rights to due process by denying them fair notice of the per se illegality of such agreements.

In rejecting the first argument, the district court held that the indictment had properly alleged that the agreements were "horizontal market allocation agreements," which are "traditionally subject to per se treatment under Section 1 of the Sherman Act."[6] The court defined a "horizontal market allocation agreement" as "an agreement between competitors at the same level of the market structure to allocate a market order to minimize competition," which "can be accomplished by dividing geographic territory between competitors . . . or by allocating or dividing an employment market," and noted that "anticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services."[7]

In addressing the defendants' arguments that the prior cases were far afield, the court stated that the indictment had properly alleged a per se illegal horizontal market allocation "[e]ven if there were no prior cases finding that a non-solicitation agreement had violated Section 1."[8] The court acknowledged that "there are no cases perfectly analogous to this case," but stated that "that is the nature of Section 1 of the Sherman Act: as violators use new methods to suppress competition by allocating the market or fixing prices these new methods will have to be prosecuted for a first time."[9] Although the court agreed with the defendants that a new category of per se treatment specific to non-solicitation agreements was not warranted, given the lack of precedent showing that such agreements were manifestly anticompetitive, its conclusion that the alleged agreements already fell into a traditional category of per se treatment (i.e., horizontal market allocation) rendered this argument unavailing. Finally, the court rejected the defendants' constitutional argument, stating that the "conduct proscribed by

3 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotation marks omitted).
4 *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 7-2.200 (Feb. 2020).
5 Superseding Indictment, *United States v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo. Nov. 3, 2021).
6 *United States v. DaVita Inc*., No. 21-cr-00229-RBJ, 2022 WL 266759, at *5 (D. Colo. Jan. 28, 2022).
7 *Id*.
8 *Id*. at *14.
9 *Id*. at *10.

Section 1 is allocating the market, an action that defendants knew or should have known was illegal," even if the method of allocation was "novel."[10]

Notably, the court highlighted that no-hire and non-solicitation agreements would be subject to the per se rule if and only if they were in fact agreements to allocate a market. Indeed, the court noted, some no-hire agreements do not allocate a market, and the court "assume[d] the same is true of non-solicitation agreements."[11] In addition, even an agreement that initially falls into a traditional per se category will still receive per se treatment only if it is a "naked" agreement rather than "ancillary to a legitimate procompetitive business purpose."[12] The court observed that the defendants could challenge this issue at a later stage of the criminal proceeding,[13] although the court did not address how and when this would occur as a procedural matter.

The decision is a victory for both the DOJ, which is simultaneously prosecuting several other no-poach cases around the country,[14] and for private plaintiffs, who have filed follow-on suits in the DOJ's wake.[15] Judges deciding similar issues in these cases may find the district court's opinion to be persuasive precedent. Moreover, in future no-poach cases, courts may cite this opinion as having put defendants on notice of the per se illegality of naked employee non-solicitation agreements.

10 *Id*. at *18.
11 *Id*. at *16-17.
12 *Id*. at *5.
13 *Id*. at *13.
14 *See*, e.g., Superseding Indictment, *United States v. Surgical Care Affiliates*, LLC, No. 3:21-CR-011-L (N.D. Tex. Jul. 8, 2021); Indictment, *United States v. Manahe*, 2:22-cr-18 (D. Me. Jan. 27, 2022).
15 *See*, e.g., Complaint, *In re Outpatient Medical Center Employee Antitrust Litigation*, No. 1:21-cv-00305 (N.D. Ill. Jan. 19, 2021).

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