Antitrust, Vol. 38, No. 2, Spring 2024. © 2024 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Why Does the Antitrust Division Keep Losing Criminal Trials?

MICHAEL TUBACH, ANNA PLETCHER, AND KELSE MOEN

THE ANTITRUST DIVISION OF THE U.S. Department of Justice, under President Biden, is widely recognized for taking a more aggressive approach to enforcing the nation's antitrust laws—a development well documented in both the trade and popular press.[1] But this approach has garnered mixed results.[2] While the Division[3] has earned some high-profile wins on the civil side, those courtroom victories have been outnumbered by high-profile losses on the criminal side.

The Division's struggle to bring successful criminal cases for alleged violations of Section 1 of the Sherman Act, its bread-and-butter of criminal enforcement, is especially illustrative. Since January 2020, the Division has brought 30 defendants to trial in eight Section 1 cases and has secured a conviction against just a single defendant[4]—and even that conviction was recently reversed on appeal.[5]

Why does the Division keep losing these cases? This article attempts to answer that question. To do so, we draw on our experience as trial counsel for Jayson Penn, an individual defendant in the government's three unsuccessful trials for alleged price-fixing in the broiler chicken market. We also spoke with more than 30 lawyers—including former Antitrust Division prosecutors and defense attorneys involved in all of these trials. Based on this, and notwithstanding our position on the opposite side of the "v" from the Antitrust Division, we conclude by offering some modest suggestions.

Contextualizing the Division's Recent Struggles

The Department's own published data on conviction rates sheds some light on the Division's performance.[6] The Division's recent conviction trends, compared to the rest of DOJ, paint a mixed picture. At least before 2020, the Division had a conviction rate on par with or slightly higher than the rest of the Department. From 2012 to 2019, the average conviction rate for antitrust defendants was 92.2% compared to 91.4% for all criminal defendants. But this data includes both guilty pleas and trial convictions. When we strip out the guilty pleas and look at the trial conviction rate alone, the numbers tell a different story. In pre-2020 criminal antitrust trials, 14 of 27 defendants were acquitted, a trial conviction rate that lagged behind the rest of the Department every year during this period.

In the last four years, the Antitrust Division's conviction rate for Section 1 crimes has plummeted. The Division secured a Section 1 conviction in just one of the eight such cases it has taken to trial since January 2020—and that sole conviction was fleeting.[7] In the Division's only conviction (*United States v. Brewbaker*), a jury found former Contech Engineering Solutions executive Brent Brewbaker guilty of conspiring to rig bids for certain construction projects in North Carolina. The Fourth Circuit overturned the Sherman Act conviction on appeal, holding that the district court should have dismissed that charge for failure to state a *per se* offense.[8]

The Division's other cases resulted in acquittals on the Section 1 charges:

- *United States v. Jindal*.[9] In April 2022, Neeraj Jindal, the former owner of a physical therapist staffing company, and John Rodgers, the company's former clinical director, were acquitted after a jury trial of conspiracy to fix wages for physical therapists in Texas.[10]
- *United States v. DaVita, Inc.*[11] Also in April 2022, a jury acquitted leading dialysis provider DaVita, Inc., and its former chief executive Kent Thiry, of conspiracy charges stemming from alleged agreements with competitors to not poach each other's employees. This was the first no-poach criminal trial brought under the Sherman Act, and it came in the wake of the DOJ's 2016 guidance that it would seek to prosecute such no-poach agreements as market allocation agreements.[12]
- *United States v. Penn, et al.*[13] The government tried its case against executives of leading poultry processing

Mr. Tubach and Ms. Pletcher are partners, and Mr. Moen is Counsel, at O'Melveny & Myers LLP. *They served as trial counsel for Jayson Penn (former CEO of Pilgrim's Pride Corp.) in one of the cases discussed in this article. The authors wish to thank their O'Melveny colleagues Julia Schiller, Brian Quinn, and Daniel Lautzenheiser for their substantial contributions to this article.*

companies, including our client Jayson Penn, three times, alleging a conspiracy to fix prices and rig bids for broiler chickens. The first two trials ended in hung juries against all 10 defendants. In the spring of 2022, the government dropped charges against five defendants and pursued an unprecedented third trial against the remaining five. In July 2022, the third jury acquitted the five remaining defendants of all charges.

- *United States v. Manahe*.[14] In March 2023, a jury acquitted business managers of four Maine in-home healthcare agencies on wage-fixing and no-poach charges stemming from allegations that the managers conspired to fix the hourly rates for home healthcare workers and agreed to refrain from hiring each other's workers.
- *United States v. Patel*.[15] In April 2023, at the end of the government's case, the District Court granted a Rule 29 motion to acquit in this no-poach case that alleged that the six defendants, who worked for staffing companies in the aerospace industry, conspired to restrict the hiring of engineers and other skilled workers. In particular, the court ruled that "[a]s a matter of law," the alleged no-poach agreement in the case "does not involve a market allocation under the *per se* rule."[16] *Patel* is a rare example of a case where criminal antitrust charges were thrown out at the Rule 29 stage.
- *United States v. Dornsbach*.[17] In May 2023, a jury acquitted Steven Dornsbach and his business, a concrete repair and construction company, of conspiring to rig bids on construction projects in Minnesota.
- *United States v. O'Brien*.[18] In September 2023, a jury acquitted Lawrence O'Brien, Bruce LaRoche, and Thomas Dailey—owners of companies that sold customized promotional products such as backpacks, water bottles, and hats to the U.S. Army—of conspiring to rig bids for such products.

To be sure, the Division has also achieved some notable guilty pleas in Section 1 criminal cases. According to data from the Administrative Office of the U.S. Courts, antitrust criminal defendants entered 31 guilty pleas between 2020 and 2022.[19] Noteworthy among these is *United States v. VDA OC, LLC*, in which a healthcare staffing company in Nevada pleaded guilty to conspiring with a competitor to allocate nurses and to fix wages.[20] The plea marked the DOJ's first conviction in a criminal no-poach case and came in the wake of the losses in *DaVita* and *Jindal*. But even this win was tempered by the case's size: It garnered only $72,000 in restitution to victim nurses and a $62,000 criminal fine.[21]

Explaining The Trend: What Attorneys in the Trenches Say

To attempt to explain this trend, we interviewed more than 30 lawyers, including former Antitrust Division prosecutors and defense attorneys involved in all eight of the trials mentioned above. This diverse group across the country included solo practitioners, lawyers at big and small firms, criminal defense attorneys who do not specialize in antitrust cases, and antitrust specialists, many of whom have decades of experience. A few common themes emerged:

An overly expansive interpretation of criminal conduct. Even in the best of circumstances, prosecuting criminal antitrust cases can be challenging. They require a deep understanding of a particular market and proof beyond a reasonable doubt that the defendants entered into an illegal agreement. Historically, the Division relied on multiple witnesses to testify that an agreement, or "meeting of the minds," existed. There is often a thin line between lawful information-gathering and unlawful price-fixing, making it difficult for jurors to understand what, exactly, constitutes criminal conduct. One former Antitrust Division attorney went so far as to say that juries "don't like to convict in antitrust cases" because they view violations as "technical." Another recalled seeing jurors appear shocked when they learned during trial testimony that an antitrust conviction carries a maximum sentence of 10 years in federal prison. An attorney who interviewed jurors after one trial said that some jurors expressed anger that the Division was expending resources to prosecute these cases at all.

Jurors' general reluctance to convict on Section 1 charges may partially explain the Division's relative success in charging fraud rather than Section 1 violations. As multiple interviewees noted, fraud is easier to understand: It seems more inherently "criminal" to jurors. In contrast, as one attorney bluntly concluded: "Antitrust cases have no jury appeal. These cases are boring." (We, of course, disagree.)

This already difficult exercise becomes even more challenging when the Division brings a case at the margins of existing law.

Consider no-poach cases. Despite the Division's recent decision to treat these cases like traditional market allocation cases, juries do not appear to see them that way. In fact, no jury has convicted any defendant of a criminal no-poach charge, even though the jurors (unlike the lawyers and the judges) likely do not know that this is a new criminal enforcement effort by the Division.

No-poach cases present several challenges. First, until the current round of cases, the Division had no experience prosecuting no-poach cases criminally; the Division announced in 2016 for the first time that it would treat stand-alone no-poach agreements as criminal.[22] No-poach agreements that are ancillary to legitimate business relationships continue to be treated as potential civil violations and evaluated under the rule of reason. Moreover, agreements not to recruit or hire employees are common components of legitimate business relationships. These factors may make it harder for jurors to see stand-alone no-poach agreements as criminal.

Second, the Division has elected to bring cases with complex facts. In some cases, for example, alleged conspirators

had existing, legitimate commercial relationships, muddying the line between a civil and a potential criminal violation. The Division has also struggled to identify victims who can serve as government witnesses and to find evidence that the alleged agreement was implemented (i.e., that the no-poach agreement, not other factors, drove hiring decisions).[23]

The *Patel* case is illustrative. The case involved multiple aerospace engineering companies that often collaborated. In a pretrial ruling on motions in limine, the District Court permitted the defendants to put on evidence showing that any restraint did not harm employees and may even have been pro-competitive. The court held that such evidence was relevant both to the existence of a conspiracy and to defendants' arguments that any no-poach agreement was ancillary to a legitimate business arrangement.[24] It found that the government failed to put forth strong evidence of harm to the workers allegedly subject to the agreement. One attorney in the *Patel* trial concluded that the DOJ's strategy "backfired badly" when the government's witnesses, rather than having their careers stymied by the alleged no-hire agreements, testified at trial that they were, in fact, able to move between companies.

The district judge in *Patel* denied the defendants' motion to dismiss, finding that a standalone no-poach agreement could be subject to *per se* treatment as a form of market allocation.[25] This was a win for the DOJ. But after the prosecution had presented its case-in-chief, the court ruled that "[a]s a matter of law," the alleged no-poach agreement in the case "does not involve a market allocation under the *per se* rule" because workers' movement between the companies had not been meaningfully affected.[26]

As in *Patel*, the indictments in *Jindal, Manahe*, and *DaVita* survived motions to dismiss, with each court confirming that stand-alone no-poach agreements may be market allocation agreements and potential *per se* violations. But each defendant was acquitted after trial. And the *DaVita* indictment survived with a significant caveat. While the court confirmed that stand-alone no-poach agreements can be *per se* violations, to win a conviction, the government was also required to prove that the defendants intended to allocate the labor market for employees. These outcomes mirror the view of one former DOJ prosecutor, who concluded that no-poach cases are "theoretically possible," so the indictment survives a motion to dismiss—but when the facts come out at trial, the case is shown to be much more complex, and so is less susceptible to a straightforward guilty verdict.

Poor investigations before filing charges. Another theme, echoed consistently by virtually every attorney we interviewed, was that the Division had failed to thoroughly investigate the facts of each case before filing charges.

One common theme was the Division's overreliance on documents rather than taking the time to understand the business and industry context. One participant in the *Penn* trial concluded that the case lacked a cogent story; the government's case was "all documents and charts" and felt "disjointed." Another chalked up the Division's string of trial losses to the Division not "really understand[ing] the industries" and trying to find "hot docs" without "bother[ing] to get the context." And a third concluded that the prosecutors who indicted in *Penn* "siloed themselves off" from understanding the context and failed to engage with defense counsel to better understand the broiler chicken market.

Another investigative failure that our interviewees raised was that the Division files indictments before developing the strong supporting evidence that it has traditionally insisted on obtaining before bringing charges. Multiple former Division and other Department prosecutors said that the Division is "rushing to charge sooner" than it should be and assuming (often wrongly) that a co-defendant will flip or evidence will later develop.

In addition, multiple defense attorneys lamented that they were unable to meet with the Division before indictment.[27] This is a break from longstanding Division practice of sending target letters and offering reverse proffers and meaningful pre-indictment meetings. While some defendants were given the opportunity to meet with the Division prior to charging, many attorneys described those meetings as only allowing the defendants a chance to admit to the Division's case, not to present countervailing evidence. Several attorneys, including former Division prosecutors, believe that having a more robust dialogue at these meetings would benefit the Division and could even help prosecutors adjust their theories in response to defendants' arguments.

A final investigative shortcoming frequently raised was the Division's failure to develop a truly credible cooperating witness or identify a sympathetic "victim" witness. Take the *O'Brien* case, which involved alleged bid-rigging between companies that sold products to the U.S. Army. A common refrain from defense counsel who observed the trial was that the government never explained why the case *mattered*. The defense presented their clients as small business owners charged with a technical violation, and the government apparently was unable to find a compelling witness harmed by the alleged conspiracy; in fact, multiple customers testified positively about the companies and their products. One defense attorney concluded: "When you're prosecuting small businessmen whose customers really love them and come back to them repeatedly, you need to show the jury why it should care."

The *Penn* case is another example of a poor pre-indictment investigation. Most of the defendants in *Penn* were not given the opportunity to meet with the Division prior to charging. As a result, the Division lost the opportunity to learn critical facts about the industry, the defendants, the business models, and the alleged victims. For instance, alleged "victims" (who purchased chicken from the defendants on behalf of companies such as KFC) ended up testifying on behalf of the *defense*. Perhaps with a better understanding of the case prior to indictment, the Division would not have brought

charges at all or, if it did, it would have been able to present a more compelling case at trial.

A number of former Division prosecutors noted that, historically, the Division required that prosecutors have at least two witnesses who were personally involved in an alleged conspiracy, corroborated by documentary evidence, before charging a case. That standard seems to have been discarded. In *Penn*, the supposed insider testimony was weak, and the case was almost entirely circumstantial. "They used to not be able to get a case like that through the front office," one attorney concluded. Other former prosecutors had similar observations, noting that several high-profile losses including *Jindal* and *Manahe* lacked multiple insider witnesses. One participant in the *Manahe* trial said that while the Division presented decent documentary evidence, the Division lacked a true conspiracy "insider," relying instead on the testimony of a cooperator who was a competitor of the defendants, which gave the defense team plenty of opportunity for cross-examination.

Changes to the leniency program. Historically, when a company became the first to report a price-fixing conspiracy to the government, the company could rely on the promise that it and its employees would be safe from prosecution. But now, the benefits are much less clear, because the Division has begun carving out more employees from leniency protection and imposing greater cooperation requirements on applicants. One former DOJ attorney said that the Division has shifted from making it easy for an applicant to seek leniency (the Division "never wanted an applicant to regret coming in") to sending the message "you'll be lucky if you get leniency."

Such uncertainty is anathema to a successful leniency program and bucks a longstanding Division trend favoring transparency. As Scott Hammond, former head of the Division's criminal enforcement, said in a 2004 speech, "Uncertainty in the qualification process will kill an amnesty program."[28] Rather, Hammond continued, "[p]rospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program."[29] The current uncertainty means that allegedly conspiring companies are less likely to apply for leniency or be able to offer the full cooperation of all of their employees, making it difficult to find strong trial witnesses.

Internal training and culture. Finally, multiple attorneys noted the Division attorneys' relative lack of trial experience.

The Division's prosecutors have historically tried few cases—just a handful go to trial each year—which leaves a thin bench of seasoned trial lawyers to take criminal cases before judges and juries. The Division's Honors Program also hires many attorneys straight from law school or clerkships, which means that the Division must develop its own bench. This has always been the case. But more recently, the Division experienced an exodus of seasoned trial attorneys, contributing, in the words of one former Division official, to a "huge loss of institutional knowledge." Not only does this leave the Division short on experienced trial lawyers, but it also means less institutional memory on how investigations were conducted, how cases were built, and why certain matters were charged when others were not.

Several of our interviewees also mentioned the need to make better use of local U.S. Attorney's Offices. Local AUSAs can help Division lawyers understand the legal culture of the district where the case is being tried and may enjoy more trust from the judges due to their years of practice in that district. They often have more, and more varied, trial experience, which can reduce risk by providing an outsider's perspective on the case's legal theory.

Looking Ahead: Suggestions for Reform

Fully recognizing that advice from an "opponent" may fall on deaf ears, we nevertheless conclude by offering a few modest suggestions for the Antitrust Division.

Improve pre-filing investigation. The Division's track record will likely improve through better pre-indictment investigation, more pressure-testing of cases, and better preparation of cooperating witnesses. The Division might even consider putting witnesses before the grand jury to lock in sworn testimony and test the witnesses, a practice on which other federal prosecutors commonly rely.

Several attorneys said the Division failed to truly wrestle with evidence that ran counter to its case theories or to identify gaps in their cases. The Division may want to review its internal processes for screening cases and deciding which ones to advance. In addition, the Division could consider how to better engage with defense counsel during the pre-indictment process, a practice that defense attorneys said has become rare.

Charge cases with stronger facts. As one former Division prosecutor said, oftentimes "less is more." This attorney encouraged the Division to "wait for your best facts" and be selective about the cases it brings. Other suggestions include looking for cases with more jury appeal (e.g., those with evidence of defendants' consciousness of guilt) and focusing on identifying better witnesses, both sympathetic "victim" witnesses and "insider" cooperating witnesses.

This lesson to charge only strong cases is particularly salient in the case of individuals. One attorney argued that the government should not "expand the law on the backs of people," distinguishing between criminal cases against individuals and those against corporations or civil cases. Aside from the moral implications of the Division's expansive approach, there is a practical consideration: Juries typically dislike it. One *Jindal* observer noted that the Division charged only two individuals, while the staffing company, which the jurors viewed as more culpable, received leniency.

The Division appears to be internalizing this lesson with the recent dismissal of its last remaining no-poach case.[30] It remains to be seen whether the government is reevaluating its strategy or simply waiting to find stronger cases.

Increase incentives to cooperators. Finally, the Division should consider changing its leniency program to give greater incentives to actual cooperators. As discussed above, the Division's new approach to leniency, which imposes more employee carve-outs and greater cooperation requirements, has resulted in uncertain benefits to cooperators. Securing strong trial witnesses is easier if cooperators are encouraged to come forward early in the investigation.

Conclusion

Despite its recent losses, the Division has not signaled any intention to abandon its approach. Division leaders speak about taking the "long view" and posit that "aggressive antitrust enforcement means the Division will not secure convictions in every case."[31] The suggestion is that the DOJ's aggressive stance may have a deterrent effect, even if it does not result in a conviction in any particular trial. As former Deputy Assistant Attorney General Richard Powers said in 2022, if the Division had a perfect record, that would mean that the Division "wouldn't be enforcing the antitrust laws forcefully enough, and anticompetitive conduct would go undeterred."[32] More recently, Assistant Attorney General Jonathan Kanter stated that the Division remains "just as committed as ever" to prosecuting Sherman Act violations in labor markets.[33] Nevertheless, it appears that new criminal leadership at the Division is taking a fresh look, as suggested by the recent dismissal of two cases indicted under prior leadership.

The nation's antitrust laws exist for a reason. In an appropriate case, criminal prosecution can vindicate the public interest and deter future unlawful behavior. An argument can even be made for pushing the law in new directions. But there is real risk in doing so in criminal cases, especially against individuals. Improved investigation (including better consultation with defense counsel), a careful appraisal of which cases are truly worthy of bringing, and patience to wait for the right case—especially if it involves an expansion of the law—may go a long way to helping the Division recover from its recent struggles in Section 1 criminal trials. ■

---

[1] *See, e.g.*, Jim Tankersley & Cecilia Kang, *Biden's Antitrust Team Signals a Big Swing at Corporate Titans*, N.Y. Times, July 24, 2021 ("President Biden has assembled the most aggressive antitrust team in decades"); Bryan Koenig, *In Kanter, DOJ Would Get An Aggressive Antitrust Enforcer*, Law360, July 22, 2021 (concluding that the nomination of Jonathan Kanter to lead the Division "put[s] to rest any lingering doubts about just how aggressively [the Biden] administration will ramp up antitrust enforcement and crack down on corporate concentration.").

[2] *See* Josh Sisco, *The top Biden lawyer with his sights on Apple and Google*, Politico, Jan. 18, 2023 (concluding that the Division "has so far seen more setbacks than wins.").

[3] Because this article draws some comparisons between the Antitrust Division and the rest of the Department of Justice, we will refer to the Antitrust Division as "the Division" and use "the Department" when referring to the entire Department of Justice.

[4] The cases are: *United States v. Jindal, et al.*, No. 20-cr-00358 (E.D. Tex.); *United States v. Brewbaker*, No. 20-cr-481 (E.D.N.C.); *United States v. Penn, et al.*, No. 20-cr-00152 (D. Colo.); *United States v. DaVita, Inc., et al.*, No. 21-cr-00229 (D. Colo.); *United States v. Patel, et al.*, No. 21-cr-220 (D. Conn.); *United States v. Manahe, et al.*, No. 22-cr-00013 (D. Me.); *United States v. Dornsbach, et al.*, No. 22-cr-00048 (D. Minn.); *United States v. O'Brien, et al.*, No. 22-cr-130 (M.D. Fla.).

[5] *United States v. Brewbaker*, 87 F.4th 563, 569 (4th Cir. 2023).

[6] Numbers from authors' calculations based on data provided by the Administrative Office of the U.S. Courts, Table D-4 "U.S. District Courts - Criminal Defendants Terminated, by Type of Disposition and Offense," for reporting periods ending December 31 of each calendar year, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

[7] We do not include *United States v. Harwin*, No. 20-cr-00115 (M.D. Fla.) in these statistics. That case involved allegations that a doctor conspired to allocate chemotherapy and radiation treatments for cancer patients. Although it is a Section 1 criminal case that went to trial in 2022, the court declared a mistrial as a result of Hurricane Ian and the case was not re-tried. Harwin eventually pleaded guilty and received a sentence of three years' probation and a $50,000 fine.

[8] *United States v. Brewbaker*, No. 20-cr-481 (E.D.N.C.); *see Brewbaker*, 87 F.4th at 569. The Fourth Circuit affirmed Brewbaker's convictions for mail and wire fraud. *Id.* The government petitioned the Fourth Circuit for rehearing and rehearing en banc, Doc. 60, *United States v. Brewbaker*, No. 22-4544 (4th Cir. Jan. 16, 2024), which the Fourth Circuit denied. *Id.*, Doc. 68 (Feb. 15, 2024)

[9] *United States v. Jindal, et al.*, No. 20-cr-00358 (E.D. Tex.).

[10] Jindal was convicted for obstruction of justice for misleading the FTC during a civil investigation into the alleged antitrust violations and was sentenced to probation.

[11] *United States v. DaVita, Inc., et al.*, No. 21-cr-00229 (D. Colo.).

[12] *See* U.S. Dep't. of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016) at 4, https://www.justice.gov/atr/file/903511/download (noting that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.").

[13] *United States v. Penn, et al.*, No. 20-cr-00152 (D. Colo.).

[14] *United States v. Manahe, et al.*, No. 22-cr-00013 (D. Me.).

[15] *United States v. Patel, et al.*, No. 21-cr-220 (D. Conn.).

[16] Doc. 599, *United States v. Patel, et al.*, No. 21-cr-220 (D. Conn. Apr. 28, 2023).

[17] *United States v. Dornsbach, et al.*, No. 22-cr-00048 (D. Minn.).

[18] *United States v. O'Brien, et al.*, No. 22-cr-130 (M.D. Fla.).

[19] *See* sources cited *supra* note 6.

[20] *United States v. VDA OC, LLC*, No. 21-cr-00098 (D. Nev.).

[21] *See* Press Release, U.S. Dep't of Justice, Office of Public Affairs, *Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses*, Oct. 27, 2022, https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

Nor is the modest monetary penalty an aberration: The Division's criminal fines have also plummeted recently. After obtaining criminal fines and penalties in the billions of dollars in 2014 and 2015, that figure has not topped $529 million since, and in 2022 was a mere $2 million. U.S. Dep't of Justice, Antitrust Division, *Criminal Enforcement Trends Charts*, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts. In 2023, the amount of fines rebounded to $267 million. *Id.*

[22] *Antitrust Guidance for Human Resource Professionals*, *supra* note 13.

[23] *See* Mark Rosman, *Why Criminal No-Poach Cases Can Be Deceptively Complex*, Law360, Nov. 27, 2023. To be sure, the Division is not required to prove that defendants implemented a per se agreement or that the agreement caused harm. But realistically, an agreement with no impact has little jury appeal.

[24] Bryan Koenig, *Raytheon Manager, Hiring Execs Can Try To Justify No-Poach*, Law360, March 27, 2023.

[25] *See* Doc. 257, *United States v. Patel, et al.*, No. 21-cr-220 (D. Conn. Dec. 2, 2022), at 17–22.

[26] Doc. 599, *United States v. Patel, et al.*, No. 21-cr-220 (D. Conn. Apr. 28, 2023), at 11.

[27] While Division policy has always held that a criminal target has no right to a meeting with Division staff before indictment, the long-standing practice of the Division was to grant requests for such meetings. *See* DEPARTMENT OF JUSTICE MANUAL, § 7-3.200, https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.200. These meetings at least permitted the target to explain his or her understanding of the case before charges were filed. Since 2020, however, the Division has routinely denied requests for pre-indictment meetings.

[28] Scott D. Hammond, Dir. of Crim. Enf't, Antitrust Div., Cornerstones of an Effective Leniency Program (Nov. 22-23, 2004) https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program.

[29] *Id.*

[30] Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution*, Law360, Nov. 14, 2023.

[31] *See* Deputy Assistant Att'y Gen. Richard A. Powers, Keynote at the University of Southern California Global Competition Thought Leadership Conference (June 3, 2022) https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern.

[32] *Id.*

[33] Assistant Att'y Gen. Jonathan Kanter, Remarks at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference (Sept. 22, 2023) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law.