

# **“A PRESCRIPTION FOR COMPETITION”: DOJ ANTITRUST DIVISION AFFIRMS ITS ENFORCEMENT FOCUS ON THE HEALTHCARE INDUSTRY**

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By: Michael E. Martinez, Lauren Norris Donahue, Brian J. Smith

The healthcare industry remains a "high enforcement priority" for the U.S. Department of Justice (DOJ) and the Federal Trade Commission, according to statements last week by a senior official in the DOJ's Antitrust Division.

In prepared remarks at the American Bar Association's Antitrust in Healthcare Conference,[1] Deputy Assistant Attorney General Barry Nigro outlined those "healthcare-related issues on which the Antitrust Division is focused," highlighting criminal enforcement against price fixing, market allocation, and employee no-poach agreements, as well as describing the government's willingness to bring civil actions against violators of U.S. antitrust laws to recover damages on behalf of taxpayers.

Because competition "keeps healthcare costs down," expands "access to healthcare products and services," and "results in more choices for consumers," Nigro said the Antitrust Division "takes very seriously" the responsibility to protect and foster competition in the healthcare industry, meaning "antitrust enforcement will continue to play an outsized role in healthcare."

## **CRIMINAL ENFORCEMENT**

Nigro said the Antitrust Division is "most concerned" with prosecuting criminal violations of the antitrust laws in the healthcare space. Describing criminal violations as "pernicious antitrust offenses," he noted that the government's investigation into "price fixing, bid rigging, and market allocation agreements" in the generic drug industry remains ongoing, having resulted in the guilty pleas of two generic pharmaceutical executives, both of whom have agreed to cooperate in the DOJ's continued investigation.

Nigro then announced that the Antitrust Division is currently investigating "other potential criminal antitrust violations" in the healthcare industry, including "market allocation agreements among healthcare providers and no-poach agreements restricting competition" for healthcare employees. This announcement marks the first occasion that the Antitrust Division has identified the healthcare industry as an area of focus for the policy shift it announced in late 2016, under which the Antitrust Division expressed the government's intent to criminally prosecute employers and individuals who enter into naked wage-fixing or no-poaching agreements with other employers.[2]

Under the Trump administration, "combatting rising healthcare prices" will continue to be a priority for the Antitrust Division, Nigro said. "We believe it is important that we use our criminal enforcement authority to police" markets and competition within the healthcare industry, he added.

## CIVIL ACTIONS TO PROTECT TAXPAYERS

Nigro also announced that the Antitrust Division intends to consider bringing civil actions against violators of U.S. antitrust laws to recover damages on behalf of taxpayers.

Because the federal government "spends a significant part of its budget on healthcare-related fees," Nigro explained, taxpayers are harmed when the government payee has been the victim of conduct that violates the antitrust laws. Under such circumstances, the government can pursue treble damages under Section 4A of the Clayton Act against companies and individuals alleged to have violated the antitrust laws.

Nigro added that pursuing treble damages through a civil action both "helps deter cartels and other anticompetitive conduct," and "compensates taxpayers for the harms the government suffers." As such, the Antitrust Division is "actively considering cases in [the healthcare] industry to bring," so that "healthcare providers will have even greater incentive to invest in vigorous and effective antitrust compliance."

## PRACTICAL TAKEAWAYS

In the recent past, the Antitrust Division has not brought many criminal prosecutions against corporations and individuals in the healthcare industry for antitrust violations, but Nigro's remarks suggest a renewed focus on the industry. These remarks serve as a reminder to those in the healthcare industry to remain vigilant in their compliance with U.S. antitrust laws. Failure to adhere to the antitrust laws can result in significant criminal penalties, such as multimillion-dollar fines for corporations and jail time for individuals, as well as substantial exposure to civil damages. Implementing an antitrust compliance program — or reviewing and revising a pre-existing one to ensure it is current and effective — can significantly reduce the risk of running afoul of the antitrust laws and facing criminal and civil exposure.

### Notes

[1] Bernard A. Nigro Jr., "A Prescription for Competition," Keynote Remarks at the American Bar Association's Antitrust in Healthcare Conference (May 17, 2018), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar>.

[2] See Lauren Norris Donahue, Brian J. Smith & Gina A. Jenero, *Assistant Attorney General Announces that DOJ Antitrust Division is Building Criminal Cases Against Companies for Anti-Poaching Agreements*, K&L GATES ALERT (Jan. 31, 2018), <http://www.klgates.com/assistant-attorney-general-announces-that-doj-antitrust-division-is-building-criminal-cases-against-companies-for-anti-poaching-agreements-01-31-2018/>.

## KEY CONTACTS



**MICHAEL E. MARTINEZ**  
PARTNER

CHICAGO  
+1.312.807.4404  
MICHAEL.MARTINEZ@KLGATES.COM



**LAUREN NORRIS DONAHUE**  
PARTNER

CHICAGO  
+1.312.807.4218  
LAUREN.DONAHUE@KLGATES.COM



**BRIAN J. SMITH**  
PARTNER

CHICAGO  
+1.312.807.4202  
BRIAN.J.SMITH@KLGATES.COM

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