LAW360

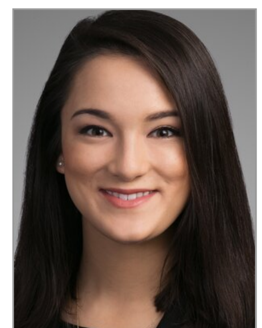
Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Labor Collusion Loss Will Shape DOJ's Case Strategy

By **Ann O'Brien, Leo Caseria and Joy Siu** (May 9, 2023, 1:40 PM EDT)

Ann O'Brien

Leo Caseria


Joy Siu

On March 22, the U.S. Department of Justice lost its third jury trial in its push to criminally prosecute labor-related antitrust violations when a jury in the U.S. District Court for the District of Maine **acquitted** four home health care staffing executives of violating Section 1 of the Sherman Antitrust Act.

In United States v. Manahe, the DOJ charged the defendants with entering into a conspiracy between April and May 2020 not to hire each other's caretakers and to fix caretaker wages in Maine.[1]

The district court declined to dismiss the indictment in August 2022, holding that the DOJ had successfully alleged a per se conspiracy to fix wages and allocate employees, after which the case proceeded to a two-week trial.

At trial, the defendants — all immigrants from Iraq, many of whom previously served as translators for U.S. forces there — admitted that they had discussed setting wage levels and refraining from hiring each other's employees, and even drafted an agreement with signature lines that outlined the terms of the defendants' discussions.

However, the defendants relied on the fact that the agreement was never signed to establish that they never actually reached an agreement.

In fact, defense counsel emphasized in opening statements that in the defendants' culture, "when dealing with business matters ... the only way to confirm a commitment is to put it into a formal written contract."

Given the verdict — reached after only a few hours of deliberation — it appears the jury agreed.

With the acquittals in Manahe, the DOJ has now failed to secure convictions on the antitrust counts in all three cases charging labor-side antitrust violations that the department has tried to jury verdict. This includes two additional losses from 2022 in United States v. Jindal and United States v. DaVita Inc.

In Jindal, a jury in the U.S. District Court for the Eastern District of Texas acquitted defendants on April 14, 2022, of charges that they conspired to fix the wages of physical therapy assistants in the Dallas area in 2017.[2]

Shortly after Jindal, on April 15, 2022, a separate jury in the U.S. District Court for the District of Colorado acquitted DaVita and its former executive of charges that they entered into an agreement with their competitor to allocate employee markets by agreeing to not solicit each other's senior-level employees.[3]

And just a month after Manahe, on April 28, the U.S. District Court for the District of Connecticut **granted** the defendants' motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 in United States v. Patel — the largest criminal labor collusion case brought by the DOJ to date — finding that no reasonable jury could convict the six aerospace and staffing company defendants there of entering into an employee allocation agreement

Indeed, the only labor collusion conviction the DOJ has secured came by way of plea in United States v. Hee in October 2022 in which defendants — a staffing company and its former manager — pled guilty to entering into a nonsolicitation agreement and agreement not to raise wages for school nurses in Clark County, Nevada, and agreed to pay $134,000 in fines and restitution and pretrial diversion.[4]

Given the government's stated priority to "aggressively prosecute antitrust violations that undermine competition in labor markets or otherwise harm workers," these losses and a lukewarm victory have been described as significant blows to the Biden administration's antitrust enforcement agenda.[5]

But despite the verdict, the DOJ secured some unique victories in Manahe that will be relevant as the DOJ continues to bring these cases.

Jury Instructions in Employee Allocation Cases

A key takeaway from the Manahe case relates to the jury instructions.

Disputes around jury instructions have been a focal point in labor collusion cases, particularly with respect to what the government must show to establish a per se illegal employee allocation conspiracy.

In a traditional market allocation case, the complainant is required to show an agreement between two or more competitors not to compete in territories or areas in which they would have otherwise competed.[6] In other words, the allocation agreement unto itself is a "naked restraint" that violates the antitrust laws, regardless of the purpose or effect of such restraint.

However, in a victory for the defense in DaVita, the District of Colorado instructed the jury that they had to find that the government proved "beyond a reasonable doubt that defendants entered into an agreement with the purpose of allocating the *market* for senior executives (Count 1) and other employees (Counts 2 and 3)."[7]

The court based such requirement on a survey of past cases that established "non-solicitation agreements" and "no-hire agreements are not themselves so pernicious that they would almost always be unreasonable restraints on trade," but "no-hire agreements that nakedly allocate the market are" because "they would almost always be an unreasonable restraint on trade."[8]

In reaching this conclusion, the court explicitly rejected the DOJ's "assertion that all non-solicitation agreements and all no-hire agreements are horizontal market allocation agreements and thus per se unreasonable."[9]

As discussed below, this finding opens the door to a host of evidence about the intent of a nonsolicit or no-hire agreement, but more importantly, it required the government to prove not just an agreement, but that the intent of the agreement was to suppress competition.

As the jury's verdict shows, the government was not able to meet that burden.

The DOJ was able to sidestep this issue in Manahe, in which the intent requirement for employee allocation agreements was not a focus of jury instruction briefing. As a result, the DOJ secured more favorable employee allocation instructions that held that the charged conspiracy to suppress and eliminate competition for employees was established by showing that the defendants "agree[d] not to hire other's PSS workers" — without regard to whether defendants entered into the agreement for the purpose of allocating employees.[10]

The instructions further provided that an employee allocation conspiracy exists "where two or more competitors agree to not solicit, make offers to, or hire each other's existing or prospective employees."[11] The DOJ used similar language in its plea agreement in Hee, stating that the defendants violated the Sherman Act by agreeing with their competitors not to recruit or hire each other's nurses — again, regardless of the purpose of such agreement.[12]

Going forward, the DOJ will certainly rely on the jury instructions approved in Manahe in attempting to secure jury instructions that do not require it to establish the parties' intent in entering a nonsolicit

or no-hire agreement.

Future defendants should bear this in mind and ensure that their proposed jury instructions align with the requirements set forth in DaVita, and require the government to show that the nonsolicit or no-hire agreement was in fact a naked restraint as a precursor to finding per se liability.

Given the conflicting and developing precedent on employee allocation instructions, defense counsel should also make sure they are laying the necessary groundwork before, during and after trial to preserve jury instruction issues for appeal.

Manahe Creates Split on the Admissibility of Ancillary Restraints Evidence

The ancillary restraints doctrine is a common defense to alleged per se violations of Section 1 of the Sherman Act, and applies when a restraint serves a legitimate purpose and is reasonably necessary to achieving that pro-competitive purpose.[13]

In Manahe, the defendants indicated that they planned to introduce evidence that there were pro-competitive and legitimate reasons for the alleged conspiracy, which the DOJ moved in limine to exclude.[14]

The court granted the DOJ's request, explaining that where a per se violation of the Sherman Act is charged, "the law is clear" that "the reasonableness of the Defendants' conduct in this case is not relevant to the issues before the jury."[15]

In DaVita, the District of Colorado found no such clarity. Instead, the court allowed the jury to consider evidence of pro-competitive benefits of the alleged nonsolicitation agreement, explaining that such evidence "might be relevant to determining whether defendants entered into an agreement with the purpose of allocating the market."[16]

In a separate order, the court reiterated that

> evidence of salary increases and other beneficial effects are relevant to disprove that the purpose of the agreement was to allocate a market. Such evidence might plausibly show an alternative purpose of the agreement, which would make it less likely that the defendants' purpose was to allocate the market.[17]

The District of Colorado's perspective in DaVita on ancillary evidence appears consistent with the DOJ's own guidance, which defined "naked wage-fixing or no-poaching agreements" as those agreements that are "separate from or not reasonably necessary to a larger legitimate collaboration between employers."[18] Under this definition, evidence of alternative justifications for alleged restraints would seem relevant to deciding whether a restraint is naked or not.

Separately, at a more fundamental level, the fact that pro-competitive justifications often exist for labor-related restraints raises the issue of whether restraints like nonsolicitation agreements "always or almost always tend to restrict competition and decrease output" such that per se treatment these agreements is appropriate — an issue that was heavily contested in DaVita.[19]

In any event, the DOJ's decision to double down on its request to exclude ancillary restraints evidence in Manahe and Patel — despite losing the issue in DaVita — shows the DOJ's commitment to eliminating this defense from defendants' arsenal in labor collusion cases.

Defense counsel must be prepared to argue that ancillary restraints evidence is not just relevant to establishing whether the government has shown a naked no-poach or wage-fixing agreement, but crucial to defendants' due process right to present a full defense.

More broadly, however, Manahe should be taken into account in evaluating antitrust risks implicated by labor-side agreements, and when counseling on compliance matters.

Quasi-Cultural Defense in Manahe

Separate from Manahe's implications for future labor collusion cases, Manahe also serves as a

reminder of the importance of sensitizing jurors to cultural issues that may shape how evidence is viewed.

As discussed above, at trial, the DOJ introduced a draft agreement put together by the defendants in May 2020, which stated that "All Parties understand and agree to not solicit clients or employees from other businesses," and "All Parties agree to maintain a maximum [Personal Support Specialist] rate of $16/hour for those with no PSS certification and a maximum PSS rate of $17/hour for those with PSS certification, effective 06/01/2020."[20]

The agreement was drafted after many discussions between the defendants, including text messages from April 2020, in which the defendants made statements such as "Brothers, everyone has agreed that the rate is from 15-16" and "Yes, this is the agreement ... I am still going with 15 and 16."[21]

Such evidence could have been problematic for the defendants, but by providing cultural context for the document, the defendants in Manahe were actually able to use the unsigned agreement to bolster their claim that there was no conspiracy.

While similar evidence and arguments have been offered in non-antitrust criminal conspiracy cases under the so-called cultural defense — in which defendants seek to introduce evidence of their culture to refute or mitigate criminal charges[22] — it is rarely invoked in antitrust cases.

Although the defendants in Manahe did not explicitly invoke a cultural defense, the case serves as a useful reminder to practitioners to consider how cultural context can be leveraged to support defendants' testimony or arguments about their intent and their actions.

This consideration is particularly important in antitrust cases, where the international reach of the Sherman Act and global competition laws often implicate business conducted in a speaker's non-native language and involves translated evidence where ambiguous statements may be interpreted in a manner inconsistent with the defendant's intent.

Conclusion

Despite the DOJ's setbacks to date, more labor collusion cases are in store.

Just two months ago, on March 15, the DOJ secured another indictment in United States v. Lopez from a federal grand jury in the U.S. District Court for the Distict of Nevada against health care staffing executive, Eduardo Lopez, alleging that he had conspired to fix the wages of Las Vegas nurses.

The DOJ will soon have another opportunity to test its theories before a jury in United States v. Surgical Care Affiliates LLC — which flows from the same conspiracy alleged in DaVita — in which the trial originally set for Jan. 9 has been continued.[23]

No doubt the lessons that the DOJ learned in Manahe will shape its strategy in these cases. At a minimum, we can expect going forward that the DOJ will try to build on the precedent it created in Manahe to exclude defense evidence and argue for more favorable jury instructions.

Ann O'Brien and Leo Caseria are partners, and Joy Siu is an associate, at Sheppard Mullin Richter & Hampton LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Indictment, United States v. Manahe et al., No. 2:22-cr-00013 (D. Me. Jan. 27, 2022), ECF No. 1.

[2] Verdict of the Jury, United States v. Jindal, No. 20-cr-0358 (E.D. Tex. Apr. 14, 2022), ECF No. 112.

[3] Judgment of Acquittal, United States v. DaVita, Inc., No. 21-cr-0229 (D. Colo. Apr. 20, 2022), ECF No. 266.

[4] Unopposed Mot. to Waive Presentence Investigation, United States v. Hee, No. 2:21-cr-00098 (D. Nev. Oct. 17, 2022).

[5] Attorney General Merrick B. Garland Delivers Remarks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy, U.S. Dep't of Justice (Mar. 7, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-white-house-roundtable-state-labor.

[6] ABA Section of Antitrust Law, Model Jury Instrs. in Civil Antitrust Cases 38 (2016 ed.).

[7] Order Resolving Disputes on Proposed Jury Instrs. 2, United States v. DaVita (Mar. 25, 2022), ECF No. 214 (emphasis added); Jury Instrs. 13, 16, 19 (Apr. 13, 2022), ECF No. 254.

[8] Order Denying Defs.' Mot. to Dismiss 15 (Jan. 28, 2022), ECF No. 132.

[9] Id. at 16-17.

[10] United States' Proposed Revisions to the Court's Draft Final Jury Instrs., Ex. A at 14-15, United States v. Manahe (Mar. 18, 2023), ECF No. 239-1.

[11] Id. at 22.

[12] Plea Agreement 3, United States v. Hee (Oct. 27, 2022), ECF No. 106.

[13] Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021).

[14] United States Trial Br. 18-19, United States v. Manahe (Feb. 24, 2023), ECF No. 170 (citing ECF Nos. 150, 151).

[15] Order on the Government's Mot. in Lim. to Exclude Evid. Irrelevant to a Per Se Conspiracy 12-13 (Feb. 27, 2022), ECF No. 182.

[16] Order on Pending Mots. 3, United States v. DaVita (Mar. 21, 2023), ECF No. 210.

[17] Order Resolving Disputes on Proposed Jury Instrs. 10 (Mar. 25, 2023), ECF No. 214.

[18] Federal Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidance for Human Resources Professionals 3-4 (Oct. 2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

[19] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

[20] See Trial Br. of Ammar Alkinani, Ex. A at 2, United States v. Manahe (Feb. 24, 2023), ECF No. 176-1; Court Ex. List 4 (Mar. 22, 2023), ECF No. 248.

[21] United States' Trial Br. 2 (Feb. 24, 2023), ECF No. 170.

[22] Cynthia Lee, Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense, 49 ARIZ. L. REV. 911, 915 (2007); see, e.g., United States v. Ifediba, 46 F.4th 1225, 1231 (11th Cir. 2022); United States v. Velasquez, No. CR 08-0730 WHA, 2011 WL 5573243, at *3 (N.D. Cal. Nov. 14, 2011), aff'd, 745 F. App'x 283 (9th Cir. 2018).

[23] Order Resetting Trial, United States v. Surgical Care Affiliates LLC, No. 3:21-cr-00011 (N.D. Tex. Nov. 11, 2022), ECF No. 173.

All Content © 2003-2023, Portfolio Media, Inc.