ALERT MEMORANDUM

Court Ends Antitrust No-Poach Trial in *U.S. v. Patel* with Judgment of Acquittal

May 1, 2023

On April 28, 2023, U.S. District Court Judge Victor A. Bolden entered an Order under Criminal Procedure Rule 29 acquitting the defendants in *United States v. Patel*, a federal criminal prosecution claiming that individuals employed by an aerospace company and its suppliers of outsourced labor entered into a per se illegal conspiracy under Section 1 of the Sherman Act to restrict hiring.

The Court's Order came at the close of the Antitrust Division's case-in-chief – before the defense put on any evidence – and held that no reasonable jury could convict on the case presented by the government. The Antitrust Division had prosecuted the case on the theory that the hiring restrictions allegedly agreed among the defendants (a so-called "no-poach agreement") were a per se illegal labor market allocation. The Court, however, held that the alleged no-poach agreement did not restrict competition to a "meaningful extent" and declined to apply the per se rule.

The Court's Order provides important guidance on the application of the per se rule to no-poach agreements, which remain a top enforcement priority for the Antitrust Division and foreign and local authorities, and will likely have implications on Antitrust Division criminal prosecutions under Section 1 more broadly if followed by other courts. Although the DOJ continues to focus resources on labor market cases, this decision and the success of defendants in every other litigated criminal labor antitrust case underscores the importance of choosing cases with clear evidence of an agreement between competitors that is not ancillary to a legitimate procompetitive business collaboration and that otherwise lacks potential procompetitive benefits and has had an actual effect.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or to the Cleary authors below.

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I. Background

Over the last decade, the Antitrust Division has increasingly focused on alleged collusion in labor markets. In 2016, the Antitrust Division and the Federal Trade Commission jointly released guidance for Human Resource professionals warning that the Antitrust Division would begin criminally prosecuting no-poach and wage-fixing agreements for the first time.[1] The Antitrust Division brought its first criminal labor market case in December 2020, and additional indictments in other cases soon followed.

In December 2021, the Antitrust Division indicted six individuals who were employed by a major aerospace company and its outsourcing suppliers.[2] The Indictment (*U.S. v. Patel, et al.*) alleged that the defendants engaged in a years-long conspiracy to "suppress competition by allocating employees in the aerospace industry working on projects" for the aerospace company, "specifically by agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees between and among" their employers.[3] The Indictment claimed that the purpose of the conspiracy was to help "prevent wages and labor costs from rising and otherwise financially benefit[] co-conspirators."[4]

The following year, defendants moved to dismiss the Indictment. That motion was denied by the Court in December 2022. In its opinion, the Court rejected the Antitrust Division's argument that all no-poach agreements were per se illegal market allocation agreements, but concluded that a no-poach agreement could be a market allocation depending on the factual circumstances.[5] The Court held that the Indictment sufficiently pled a market allocation agreement to survive a criminal motion to dismiss, and left development of the factual record for trial.[6]

In the months that followed, the Court resolved a number of other pre-trial motions that set the scope of trial. In particular, over the government's objection, the Court permitted defendants to put on expert and lay evidence showing that any restraint agreed among defendants did not suppress wages, that employee mobility remained high throughout the alleged conspiracy period, and that the restraints may have had procompetitive benefits.[7] The Court explained that the evidence was relevant to whether the defendants "joined the charged conspiracy," "whether the conspiracy existed as alleged," whether defendants "had the requisite intent to join such a conspiracy," and whether the defendants had a motive to suppress wages as suggested by the government.[8] The Court also held that the evidence could be relevant to defendants' arguments that any no-poach agreement was ancillary to other legitimate collaborations, which is an antitrust concept that applies the more generous rule of reason standard (as compared to the per se standard) to restraints that further procompetitive business relationships among companies.[9]

In a separate decision on the eve of trial, the Court announced jury instructions that resolved disputes among the parties on the allocation of the burden of proof on certain key issues. Most notably, the jury instructions placed the burden of disproving the application of the ancillary restraints doctrine on the

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1 U.S. Department of Justice, Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

2 Indictment, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Dec. 15, 2021), Dkt. No. 20 (the "Indictment").

3 *Id.* ¶19.

4 *Id.* ¶27.

5 *United States v. Patel*, 2022 WL 17404509, at *10-11 (D. Conn. Dec. 2, 2022) (Bolden, J.).

6 *Id.* at 8 ("While the no-poach agreement alleged in the Indictment does not qualify as a new category of restraint subject to per se treatment, the alleged conduct is subject to per se treatment because it is properly pled as a market allocation.").

7 Ruling and Order on Pretrial Motions at 17-18, 65, 71-74, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Mar. 27, 2023), Dkt. No. 457.

8 *Id.*

9 *Id.* at 17

government beyond a reasonable doubt.[10] The decision adopted defendants' argument that the government had the burden to prove both that defendants entered into a labor market allocation agreement and that the agreement was not ancillary, because only naked restraints are per se illegal.[11] The Court is one of only a few courts to have addressed this issue in a criminal case.

II. *Patel* Criminal Trial and Acquittal

The *Patel* criminal trial began on March 27, 2023 and ran for a little over four weeks until April 24 when the government rested its case. The defendants moved under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal at the close of the government's case. On April 28, before the defense rebuttal began, the Court granted the defendants' motion and ordered that they be acquitted.

The Court assumed that the Antitrust Division had proven some form of agreement to restrict hiring among the defendants at trial, but ordered a judgment of acquittal because the government had failed to prove that any hiring restriction was a per se illegal market allocation agreement.[12] Because the no-poach agreement was not a market allocation agreement, the Antitrust Division had not proven that the per se rule applied and no reasonable jury could convict.

The Court held that the evidence at trial showed that any agreement entered into among the defendants did not allocate the alleged market to a "meaningful extent" and, for that reason, was not a market allocation agreement.[13] The Court noted that, at the motion to dismiss stage, it had declined to dismiss the Indictment because "[t]here were no facts in the Indictment that would have suggested that the alleged agreement did not actually allocate the market to a meaningful extent."[14] However, on "a full factual record," the government failed to meet its burden.[15] Application of the per se rule to the no-poach agreement at-issue would "expand the common and accepted definition of market allocation in a way not clearly used before."[16]

The Court relied on a controlling Second Circuit decision, *Bogan v. Hodgkins*, that declined to apply the per se rule to a hiring restriction among independent contractors selling insurance under a single brand.[17] The Court explained that the hiring restriction in *Bogan* was not a per se illegal market allocation because it permitted employees to transfer among employers with permission from their employer, and permitted employees to switch employers when they were terminated without cause.[18]

The Court found no "meaningful difference between" the facts presented at the *Patel* trial and *Bogan*.[19] As with *Bogan*, the evidence in *Patel* proved that "the alleged agreement itself had so many exceptions that it could not be said to meaningfully allocate the labor market of engineers from the supplier companies working on" the aerospace company's projects.[20] Instead, even if there were an overarching agreement among the defendants, the Court concluded that "hiring was permitted, sometimes on a broad scale,"[21] and job switching between companies was not simply "theoretically possible" but "commonplace" throughout the alleged period of the agreement.[22] As the Court explained, the agreement may "'constrain' the [job] applicants 'to some degree'" but did not "allocate" a

[10] Annotated Post-Trial Jury Instructions at 50-52, *United States. v. Patel*, 3:21-cr-220-VAB (D. Conn. Mar. 27, 2023), Dkt. No. 456.

[11] *Id.* at 50 n.24 (citing *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) for proposition that it is plaintiff's burden to prove application of the per se rule).

[12] Ruling and Order on Defendants' Motions for Judgment of Acquittal at 11, *United States v. Patel*, No. 3:21-cr-220 (D. Conn. Apr. 28, 2023), Dkt. No. 599 ("Rule 29 Order") ("As a matter of law, this case does not involve a market allocation under the *per se* rule.").

[13] *Id.* at 12 & n.2, 13, 18 (citing *Bogan v. Hodgkins*, 166 F.3d 509, 514 (2d Cir. 1999)).

[14] *Id.* at 12 n.2.

[15] *Id.*

[16] *Id.* at 18 n.7.

[17] 166 F.3d 509, 514 (2d Cir. 1999)).

[18] Rule 29 Order at 11-12.

[19] *Id.* at 12.

[20] *Id.* at 17.

[21] *Id.* at 15.

[22] *Id.* at 18 (quoting *United States v. DaVita*, 2022 WL 1288585, at *3 (D. Colo. Mar. 25, 2022)).

market.[23] The Court held that based on those facts, no reasonable juror could conclude that there was an agreement for the "cessation of 'meaningful competition,'" and ordered acquittal.[24]

III. Key Takeaways

The per se rule remains a powerful tool, but the Antitrust Division first has to show that it applies. The Court's opinion is premised on the foundational concept that the per se rule is the exception, and not the default mode of analysis in antitrust law. The Antitrust Division benefits from the per se rule only if the challenged restriction falls into one of several narrow categories of restraint, which includes naked market allocations. The Antitrust Division's case failed for lack of evidence that the no-poach agreement at-issue met the criteria of a market allocation agreement. In other words, the government never proved that the agreement shown at trial was the type of agreement where harm should be irrebuttably presumed; rather, it "'constrain[ed]' the [job] applicants 'to some degree'" without allocating a market.

Even under the Court's reasoning, blanket no-hire agreements carry significant risk. The Court's analysis discusses the many exceptions to the no-poach agreement at-issue in *Patel* in explaining that it is not subject to the per se rule. The Court's analysis suggests that it may have analyzed a blanket no-hire agreement without exception as a per se market allocation agreement, although it did not need to reach that issue.

It remains possible for defendants to argue that a restraint is ancillary to a legitimate, pro-competitive business collaboration. In the Rule 29 Order, the Court did not have to reach ancillarity because it concluded that the Antitrust Division had failed to prove a market allocation agreement. However, the Court's jury instructions made clear that the government has the burden to prove beyond a reasonable doubt that any market allocation was not ancillary. In the context of the *Patel* case – where the defendants worked for companies that were collaborating with one another to produce complex aerospace engines – the prospect that the government could meet its burden of disproving ancillarity appeared unlikely from the start of trial. In addition, the Court found that the same evidence relevant to ancillarity was relevant to whether the defendants intended to allocate a market or were motivated to enter an agreement to suppress wages, which was the motive alleged by the Antitrust Division. The Court's decisions on these evidentiary issues highlight that the ancillary restraints doctrine and related arguments about lack of harm and procompetitive rationales remain important potential arguments to defend no-poach agreements that further a collaborative relationship among business partners.

IV. Conclusion

While labor market enforcement will likely remain a top enforcement priority for the Antitrust Division and other foreign and local authorities, the *Patel* decision provides important guidance on the application of the per se rule to no-poach agreements, and that guidance is not favorable to the Antitrust Division.

The Antitrust Division's aggressive (and thus far unsuccessful) pursuit of these labor cases may have made prosecuting even some more run of the mill Section 1 cases more difficult. In many respects, *Patel* built on pre-trial decisions from *U.S. v. DaVita* – the government's first criminal no-poach trial, which ended in a jury acquitting both defendants. The Antitrust Division's loss in *Patel* marks its fourth straight loss in criminal labor market trials, with its only Section 1 convictions coming from a pair of guilty pleas in one case that resulted in a minimal fine. Although the government has publicly stated that it is pursuing novel cases to develop favorable law for itself, the body of case law built up in the pursuit of criminal labor market prosecutions has tended to be more favorable for the defense. That may well have implications for the Antitrust Division's ability to secure convictions under Section 1 more broadly if extended to future cases.

[23] *Id.* at 17 (quoting *Bogan*, 166 F.3d at 515).

[24] *Id.* at 18-19 (quoting *DaVita*, 2022 WL 1288585, at *3).

The law in this area is rapidly developing. It is particularly important in the current enforcement environment that companies work with experienced antitrust counsel to evaluate the treatment of hiring restrictions in their contracts and compliance programs.

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