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Newsletter

Major Victory for Policyholders in Utah Supreme Court's UMIA v. Saltz

By Michael Harmond

On June 9, 2022, the Utah Supreme Court issued one of the most significant decisions in recent memory concerning liability insurers' duties to policyholders, *UMIA Insurance, Inc. v. Saltz*, 2022 UT 21. In a victory for policyholders, the high court clarified that liability insurers have a duty to policyholders to "accept a settlement offer at or below limits if there is a substantial likelihood of an excess verdict." *Id*. at ¶ 47. Applying this holding, the Court ruled that Utah Medical Insurance Association ("UMIA") breached its duty of good faith by failing to settle a lawsuit brought against the policyholder and plastic surgeon Renato Saltz, M.D., in the face of a potential excess verdict. *Id*. at ¶¶ 48-49. One of Saltz's former patients brought suit over Saltz's alleged unauthorized release of nude "before and after" photos of her plastic surgery procedure to a local news outlet. UMIA breached its duty to settle this suit in the face of multiple in-limits offers from the former patient, despite defense counsel warning UMIA of the potential for a verdict in excess of Saltz's policy limits.

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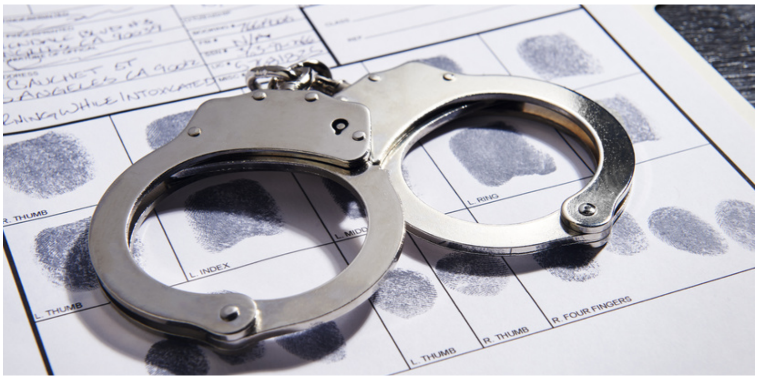
The Court made several additional rulings to the benefit of policyholders, including roundly rejecting UMIA's attempt to dispute coverage for Saltz's lawsuit eight years into the litigation. The trial evidence, the Court ruled, showed this late-coming coverage dispute prejudiced Saltz by depriving him of settlement opportunities, including those that may have arisen earlier in the litigation had coverage been addressed at the outset. *Id*. at ¶ 34. The court further held that a reasonable jury could find Saltz entitled to punitive damages based on UMIA's claim-handling behavior, including its decision to dramatically decrease settlement authority after Saltz asked UMIA to settle within limits. *Id*. at ¶ 67. The case was ultimately remanded to allow Saltz to pursue his claim for punitive damages. Going forward, *Saltz* should provide greater protection for policyholders, and direct liability insurers away from certain aggressive claims-handling practices that do not emphasize policyholders' best interests.

Wage-Fixing and No-Poach Agreements: Employers Need to Know that the Biden Administration is Criminally Prosecuting Violations of Antitrust Law to Protect Workers

By Nicolas Wilde



On July 9, 2021, President Biden issued an Executive Order encouraging the Attorney General "to enforce the antitrust laws fairly and vigorously." Of primary concern to the Biden Administration are "the harmful effects of" monopsony "in labor markets"—the ability of employers to pay a lower wage than would prevail in a purely competitive market.

A few months later, on October 1, 2021, Acting Assistant Attorney General Richard A. Powers of the Department of Justice's ("DOJ") Antitrust Division delivered remarks indicating that the DOJ would prioritize the President's concerns. Powers stated that the Antitrust Division "is committed to prosecuting naked conspiracies in labor markets because they rob workers of competitive wages, benefits, and other terms of employment." He also made clear that the Antitrust Division would vigorously enforce antitrust laws through both "civil and criminal enforcement efforts."

To avoid both civil and criminal liability, employers should review the DOJ and the Federal Trade Commission's October 2016 "Antitrust Guidance for Human Resource Professionals." ("Guidance")[1] That guidance demonstrates that the DOJ considers two types of agreements to be per se illegal under the antitrust laws: naked wage-fixing agreements and no-poaching agreements.

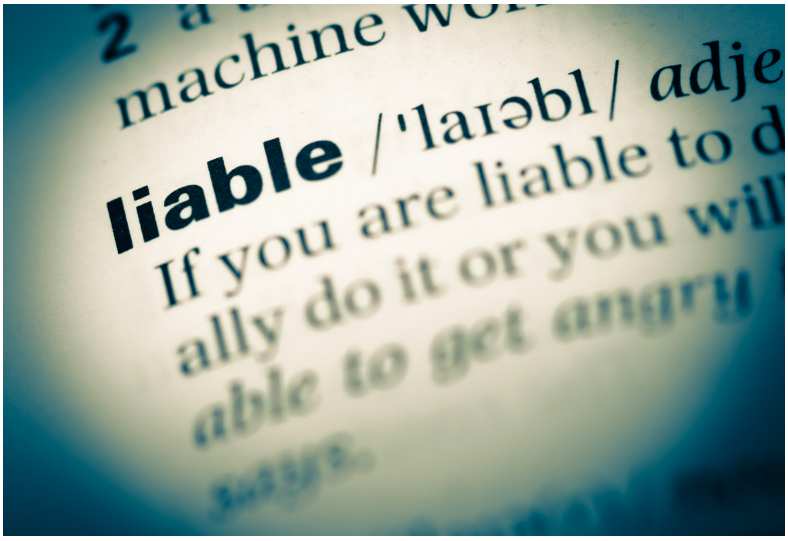
A wage-fixing agreement is an agreement—between competing employers—about employee salary or other terms of compensation, either at a specific level or within a range. A no-poach agreement is an agreement to refuse to solicit or hire another company's employees.

Employers should familiarize themselves with no-poach agreements and wage-fixing agreements because these agreements expose collaborators to not only civil enforcement actions and private causes of action—but also criminal prosecution.

Section 1 of the Sherman Act outlaws "[e]very contract, combination, or conspiracy in **restraint** of trade or commerce . . . ." 15 U.S.C. § 1 (bold added). The Supreme Court has clarified time and again that § 1 outlaws only unreasonable restraints. The DOJ considers no-poaching and wage-fixing agreements that are "naked"—agreements separate from and not reasonably necessary to a larger legitimate collaboration—to be per se unreasonable. The DOJ noted in its 2016 Guidance that it "intends to proceed criminally against naked wage-fixing and no-poaching agreements." **Continued on next page.**

Indeed, although most enforcement actions under the Sherman Act are civil, the Sherman Act is also a criminal law. The maximum penalty for an individual under the Act is imprisonment not exceeding 10 years, and a fine of $1,000,000. The maximum penalty for a corporation is $100,000,000.

In its "Antitrust Primer for Federal Law Enforcement Personnel," last updated April of 2022, the Antitrust Division indicated that it "undertakes proactive efforts to undercover" antitrust violations—including the use of "covert methods." The Antitrust Division "and its law enforcement agencies . . . vigorously investigate antitrust conspiracies using all available tools including informants, wiretaps, undercover agents, consensual monitoring, cooperators, search warrants, and foreign assistance requests."



Since December of 2020, the DOJ has obtained grand jury indictments against individuals and companies in at least six different cases involving no-poach agreements or wage-fixing agreements.[2] In two of these six cases, the defendants were acquitted of the antitrust charges. Despite these losses at trial, the Antitrust Division appears committed to aggressively prosecuting conspiracies in labor markets. For example, on June 3, 2022, Deputy Assistant Attorney General Powers delivered prepared remarks reaffirming the Division's commitment "to protect workers from employer cartels" and stating that he expects "to continue to see high levels of litigation going forward" from antitrust prosecutors.[3] Considering the severe penalties for violations of the Sherman Act, and the DOJ's continued commitment to enforce the Act via criminal prosecution, employers must avoid engaging in naked no-poach and wage-fixing agreements.

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[1] It should be noted that in his July 9, 2021 Executive Order, President Biden encouraged the Attorney General and the Chair of the FTC "to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016." Employers should be aware that updated guidance on this topic may be forthcoming.

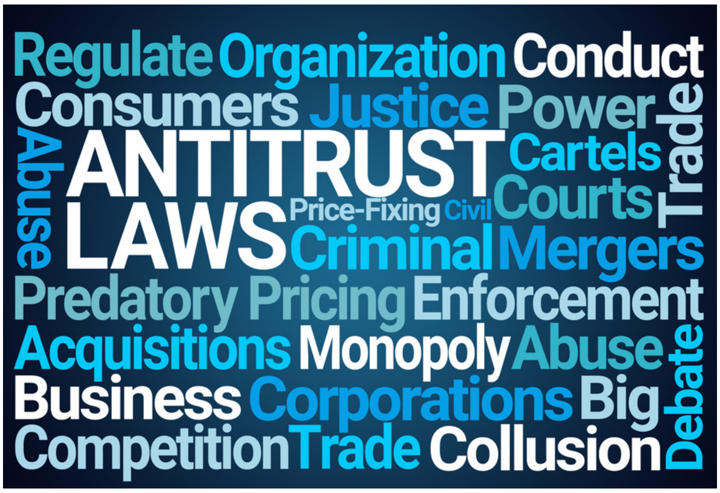
[2] {1} *United States v. Jindal, et al.*, 4:20-CR-00358, 2021 WL 5578687, (E.D. Tex.) (it should be noted that the defendants in this case were ultimately acquitted of the wage-fixing charges); {2} *United States v. Surgical Care Affiliates, et al.* 3:21-cr-00011 (N.D. Tex.); {3} *United States v. Hee, et al.* 2:21-cr-00098 (D. Nev.); {4} *United States v. Davita, Inc., et al.*, 1:21-cr-229 (D. Colo.) (it should be noted that the defendants were found not guilty as to all counts); {5} *United States v. Patel, et al.*, 3:21-cr-00220 (D. Conn.); {6} United States v. Manahe, et al., 2:22-cr-00013 (D. Maine).

[3] "To understand what aggressive antitrust enforcement will look like in the future, the best place to start is to look at what the criminal program has done recently. I won't go through the statistic today, but Antitrust Division prosecutors are bringing more cases to trial now than any time in the recent past and continue to have a record number of open investigations. Of course, not all of these investigations will result in prosecutions, but I expect to continue to see high levels of litigation going forward. . . . We are prosecuting wage-fixing and employee allocation conspiracies to protect workers from employer cartels. Our labor market cases provide an important example for what thoughtful, aggressive antitrust enforcement looks like. . . . Labor competition enforcement goes straight to the heart of the Antitrust Division's economic justice mission. So protecting workers is—and will remain—a priority for the division."

The DOJ Signals that Its Aggressive Antitrust Enforcement May Even Extend to Some Employer-Employee Non-Compete Agreements

By Nicolas Wilde

As discussed above, it is well-established that the DOJ considers naked no-poach and wage-fixing agreements between employers to be per se illegal under Section I of the Sherman Act. But recently, the DOJ's Antitrust Division submitted a Statement of Interest suggesting that some non-compete agreements between employers and employees "may [also] be unlawful under" the Sherman Act. To understand the Antitrust Division's position, it is helpful to first have some familiarity with certain economic principles relevant to the Sherman Act.



As noted above, the Supreme Court of the United States has, time and again, interpreted Section 1 of the Sherman Act to outlaw only unreasonable restraints on trade or commerce. Restraints are generally categorized as horizontal or vertical. A horizontal restraint is an agreement among competitors—at the same level of production, distribution, or supply—on the way in which they will compete with one another. *Id.* Vertical restraints are restraints imposed by agreement between firms at different levels of distribution, production, or supply. Courts employ two different standards to determine whether a particular restraint is unreasonable.

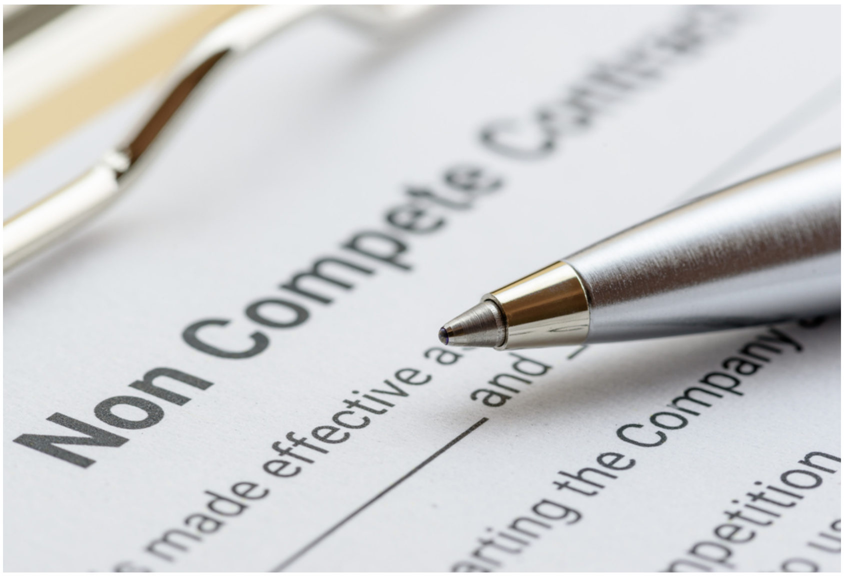
The first standard involves a factual inquiry commonly known as the rule of reason. The rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects. Nearly every vertical restraint is assessed under the rule of reason. Courts conduct a fact-specific assessment to distinguish between: (1) restraints with anticompetitive effect that are harmful to the consumer; and (2) restraints stimulating competition that are in the consumer's best interest.

The second standard is the per se standard, which recognizes that a small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Such agreements or practices are conclusively presumed to be unreasonable because of their pernicious effect on competition and lack of any redeeming virtue.

But not all horizontal restraints are analyzed pursuant to the per se standard. Under the "ancillary restraints" doctrine, a horizontal agreement is exempt from the per se rule, and analyzed under the rule of reason, if it meets two requirements. These requirements are that the restraint must be: (1) subordinate and collateral to a separate, legitimate transaction; and (2) reasonably necessary to achieving that transaction's pro-competitive purpose. Naked restraints are categorically not ancillary restraints. Thus, naked horizontal restraints are always analyzed under the per se standard. A restraint is naked if it has no purpose other than stifling competition. **Continued on next page.**

The DOJ Likely Considers Non-Compete Agreements Containing Post-Employment Geographic Restrictions to Be Per Se Unreasonable if the Employee is a Potential Competitor of the Employer

On February 25, 2022, the DOJ filed a "Statement of Interest" in *Beck v. Pickert Medical Group*, Case No. CV21-02092, Washoe County District Court, State of Nevada. In *Beck*, a group of anesthesiologists—and employees of the defendant, Pickert Medical Group (Pickert)—challenged, under Nevada state law, the enforceability of post-employment non-compete provisions in their contracts. Under the agreements, the plaintiffs are subject to a two-year, post-employment non-compete that prohibits them from providing anesthesiology services within 25 miles of a medical center that exclusively receives its anesthesiology services from Pickert.



Non-compete agreements have traditionally been considered to constitute vertical restraints on commerce. This is because employers and employees normally enter an agreement at different market levels of production, distribution, or supply. The employee normally "sells" his or her services in the labor input market and the employer sells a product or service in an output market distinct from the labor market.

But in *Beck*, the DOJ expressed its view that the non-compete agreements at issue in that case "appear to qualify as 'horizontal restraints." This is because, in the DOJ's opinion, the "individual plaintiffs were board-certified and licensed anesthesiologists at the time they signed their agreements with defendants," and were thus "actual or potential competitors of Pickert" in the market for "anesthesiology services" "when they agreed to the non-competes." In support of its position that the non-compete agreements constituted horizontal restraints between competitors, the DOJ pointed to the non-compete agreements themselves, which "explicitly provide that 'Employer [Pickert] has a legitimate interest in protection from competition by Employee . . . .'" Because the non-compete agreements could be characterized as agreements among actual competitors, the DOJ concluded that the agreements' post-employment 25-mile prohibition "would constitute horizontal agreements to allocate territories subject to the per se rule unless the ancillary-restraints defense applies." **Continued on next page.**

Employers Should Consider Reviewing Their Non-Compete Agreements in Light of the DOJ's Position in Beck

The DOJ's Statement of Interest in Beck should raise concerns for employers that have non-compete agreements with employees who may be characterized as direct competitors. Employers should review their non-compete agreements to determine whether the agreements contain language characterizing their employees as competitors. If employers' non-compete agreements do contain such language, this could likely be used as evidence that the agreements are horizontal restraints.

If employers have entered into non-compete agreements that could be characterized as horizontal restraints, they should consider whether they would be able to argue that the restraints are reasonably necessary to a legitimate, pro-competitive purpose. If the restraints are not necessary for a pro-competitive purpose, employers should consider the possibility that they may face exposure under the antitrust laws.

PRACTICE AREA HIGHLIGHT

Our business litigation team has extensive experience drafting, negotiating, and litigating restrictive covenants, including non-compete, non-solicitation, confidentiality, and non-disclosure agreements. We have successfully represented companies seeking to prosecute such claims against former employees, as well as companies seeking to defend against such claims when they hire a new key employee. Our experience in this area includes prosecuting and defending claims seeking temporary restraining orders and preliminary injunctions. We also draft employment agreements, and provide advice and consultation on how to strengthen and interpret existing employment agreements and restrictive covenants.