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Executive Pleads Guilty in First Criminal Prosecution for Attempted Monopolization in Five Decades

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On October 31, the U.S. Department of Justice announced the first federal criminal prosecution in five decades for attempted monopolization in violation of Section 2 of the Sherman Act. The action underscores the DOJ's determination to enforce the antitrust laws vigorously, even if the case has little practical consequence given that DOJ has previously prosecuted such conduct criminally as wire fraud, just not as violation of the Sherman Act.

The DOJ charged Nathan Zito, the president of a paving and asphalt contractor, in the United States District Court for the District of Montana for attempting to monopolize the highway crack-sealing services markets in Wyoming and Montana. Zito had attempted to reach a market allocation agreement with a competitor to divide up regional markets between them. The case represents the DOJ's first effort to implement a new policy, announced earlier this year, of charging certain unilateral conduct criminally under Section 2 of the Sherman Act. Section 2 prohibits a conspiracy to create or maintain monopoly power or single firm conduct that creates a dangerous probability of creating monopoly power.

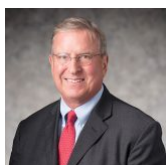
While the case is not significant in terms of its size – Zito agreed to a fine of only \$27,000 and is unlikely to receive jail time when he is sentenced in February – it provides a modern precedent for criminal prosecution of attempted monopolization and potentially other unilateral conduct that violates Section 2. Until now, DOJ typically challenged an unsuccessful attempt to enter into an agreement that might create monopoly power under Section 2 as civil violation. Moreover, if DOJ did proceed criminally, it would typically charge a wire fraud violation rather than a violation of either section 1 or section 2 of the Sherman Act.

DOJ typically charges market allocation agreements and other "hardcore" anticompetitive conduct such as price fixing and bid rigging agreements as criminal violations of Section 1 of the Sherman Act. But that approach was unavailable to prosecutors in this case because Zito's competitor rebuffed his efforts to reach such an agreement.

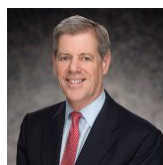
Instead, the competitor reported Zito's solicitation to federal authorities and appears to have cooperated with them to record incriminating phone conversations with Zito.

The DOJ first signaled its intended policy shift in March 2022. Richard Powers, then-Deputy Assistant Attorney General of the Antitrust Division, stated that DOJ was prepared to bring criminal charges for violations of Section 2 of the Sherman Act, including in monopolization cases. The last criminal indictment brought solely pursuant to Section 2 was in *United States v. Empire Gas Co.*, Crim. No. 23917-1 (W.D. Mo. 1972), a case involving destruction of a competitor's physical assets. The government alleged that the conduct constituted attempted monopolization of retail petroleum markets in parts of Missouri. Empire was acquitted and was later found not liable for monopolization in a subsequent effort to prosecute the case civilly.

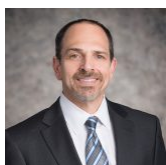
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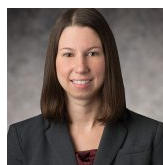
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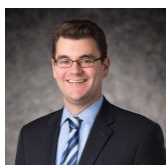
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