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DOJ Antitrust Head: No 'Chickenshit Club' Despite Losses

By Jack Queen

Law360 (April 21, 2022, 7:03 PM EDT) -- The U.S. Department of Justice Antitrust Division will not relent on its criminal enforcement push despite recent setbacks, Assistant Attorney General Jonathan Kanter said Thursday, casting cases that ended with acquittals as important precedent-setters.

Federal prosecutors suffered a pair of acquittals last week in wage-fixing and no-poach cases that advanced antitrust law into untrod realms of the labor market. The department was also dealt its **second consecutive mistrial** earlier this month in a marquee price-fixing case against poultry executives.

"I'm here to declare that we're not part of the chickenshit club," Kanter said when asked about the losses during an antitrust and competition conference hosted by the University of Chicago. The term is a reference to a 2018 book by Jesse Eisinger critical of the DOJ's approach to white-collar crime.

In one of the recent losses, jurors **acquitted** two operators of a physical therapy staffing company on antitrust charges alleging they colluded with competitors to keep compensation rates down — although one defendant was convicted of obstructing a federal investigation. Kanter said he nonetheless counted this as a win because a pretrial ruling held for the first time that the definition of price-fixing can extend to wage-fixing.

A Colorado jury **acquitted** dialysis giant DaVita and its former CEO last week on charges that they sought illicit nonsolicitation deals with competitors to prevent their employees from getting poached. That case was also the first of its kind and survived a motion to dismiss.

"Both of those cases — which were extremely important cases establishing that harm to workers is an antitrust harm — survived motions to dismiss," Kanter noted. "The courts said, 'These are legally sound cases.' We want those decisions."

The DOJ's stance has merit, experts say, as the rulings open the door for additional prosecutions and will give the government a boost in pending cases. Some observers nonetheless see the mounting setbacks an indication that the Antitrust Division **may have overstretched** on the criminal side.

Asked Thursday if the jury verdicts indicated a disconnect between the public and the department on the importance of antitrust issues, Kanter cautioned against reading too much into the outcomes of individual cases.

"Just because a jury or two decided not to convict on a specific case doesn't mean the public isn't demanding more," Kanter said. "We're hearing from the public on a regular basis, and they want more enforcement."

The department is tripling down in the poultry price-fixing case, **seemingly undeterred** by a judge's skepticism and the quality of evidence twice rejected by juries. In a highly unusual move last week, U.S. District Judge Philip A. Brimmer summoned Kanter to Colorado to explain why a third trial would be worthwhile.

Kanter said he believes the government can improve its odds by adding new attorneys, streamlining the case and dropping five of the 10 original defendants, which it did after the mistrial.

At Thursday's conference, Kanter reaffirmed his belief that the case is worth fighting for.

"We have to strengthen our resolve and bring cases that are righteous," he said. "They're hard. But if it's worthwhile, sometimes it's difficult. And we're going to stick with it."

--Editing by JoVona Taylor.

Correction: An earlier version of this article misspelled the first name of Jesse Eisinger. The error has been corrected.

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