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DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial

By **Cara Salvatore**

Law360 (April 15, 2022, 6:24 PM EDT) -- A Colorado federal jury on Friday acquitted DaVita Inc. and its former chief executive on all counts of conspiring with three other companies to suppress competition in the market for employees, handing the U.S. Department of Justice a second consecutive high-profile loss in its crackdown on employment-related antitrust crimes.

The verdict came just a day after a federal jury in Texas rejected most charges against the former owner and former clinical director of a physical therapist staffing company in the DOJ's first-ever criminal wage-fixing case.

In the DaVita case, the jury found that the kidney dialysis company and its former CEO Kent Thiry — who turned the once financially distressed company into an outpatient-care powerhouse over the course of decades — did not coerce three companies run by DaVita alumni — Surgical Care Affiliates, Radiology Partners and Hazel Health — to stay away from his workforce.

Over a week and a half, the jury heard from insiders at SCA and Radiology Partners. Many witnesses testified under immunity or leniency agreements.

The case was an early test of the DOJ's theory that striking such deals can be a "per se" violation of the Sherman Act regardless of their effects.

U.S. District Judge R. Brooke Jackson had denied the defendants' earlier motion to dismiss on the grounds that the alleged scheme constituted a horizontal market allocation and could conceivably be found to be a per se antitrust violation.

During trial, he stuck with that finding and denied the defendants' motions for judgment of acquittal, citing a Sixth Circuit decision.

The jury heard from prosecutors in closing arguments Wednesday that the agreements were understood to be real by all, and that it didn't matter whether they worked perfectly in practice.

In contrast, the defense said the three companies' executives wanted to "mollify" Thiry and keep his friendship. They argued Thiry's intent in his dealings with the others was never malevolent, but that he wanted to know about possible departures so that he could, in fact, compete for those workers.

A DOJ representative said by email Friday, "While we are disappointed in the outcome, we respect the jury's decision and remain committed to enforcing the antitrust laws in the labor markets."

The jury deliberated for two days. Thursday afternoon, they sent a question asking about one of the central points they had to decide: whether the defendants ended "meaningful competition" in the relevant markets.

"Can we have a definition of 'meaningful competition'?" the jury asked.

After much deliberation by the judge and parties, the jury was sent an answer that included synonyms for "meaningful" and quoted a portion of one key jury instruction.

"'Meaningful competition' essentially is another way of saying 'significant competition' or 'competition of consequence,'" the response said.

A spokeswoman for DaVita said by email Friday, "We appreciate the jury's decision and are grateful to put this matter behind us. We remain committed to operating with integrity and upholding the highest standards of law."

The outcome is a further disappointment for the DOJ in its recent antitrust enforcement efforts.

On Thursday, a Texas federal jury handed a **near-complete loss** to the Justice Department in its first-ever criminal wage-fixing case.

The jury found the former owner and the former clinical director of a physical therapist staffing company not guilty of orchestrating a wage-fixing scheme, but convicted the former owner of obstructing the government's investigation into the claims.

The outcomes so far in the government's aggressive antitrust enforcement push have left some experts questioning whether it's **overstretched**.

Thiry's counsel reflected that view in reactions to the verdict Friday evening. Tom Melsheimer of Winston & Strawn LLP said the DOJ's new strategy "needs to be reconsidered."

"It is always a challenge to defend against the full force and weight of the Department of Justice, especially in a case where it conducted over 100 interviews with witnesses all over the country," he said. He called Thiry "a transformative leader" and said it was a "high honor" to represent him.

"You can't expect to convict an honorable man in a case where, to do so, you have to hand out immunity like candy to every witness who testified against him," Melsheimer said.

The government is represented by Megan Lewis, Sara Clingan, William Vigen and Anthony Mariano of the DOJ's Antitrust Division.

DaVita is represented by John Walsh III of WilmerHale, and John Dodds of Morgan Lewis & Bockius LLP.

Thiry is represented by Juanita Brooks of Fish & Richardson PC, and Thomas Melsheimer of Winston & Strawn LLP.

The case is U.S. v. DaVita Inc. et al., case number 1:21-cr-00229, in the U.S. District Court for the District of Colorado.

--Additional reporting by Matthew Perlman, Craig Clough and Bryan Koenig. Editing by Adam LoBelia.

Update: This article has been updated with further details about the jury's deliberations and comments from the parties' counsel.