



Moore & Van Allen

Antitrust Update Summer 2021

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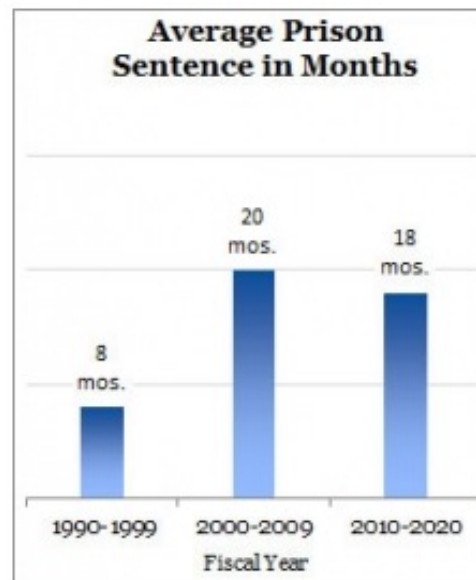
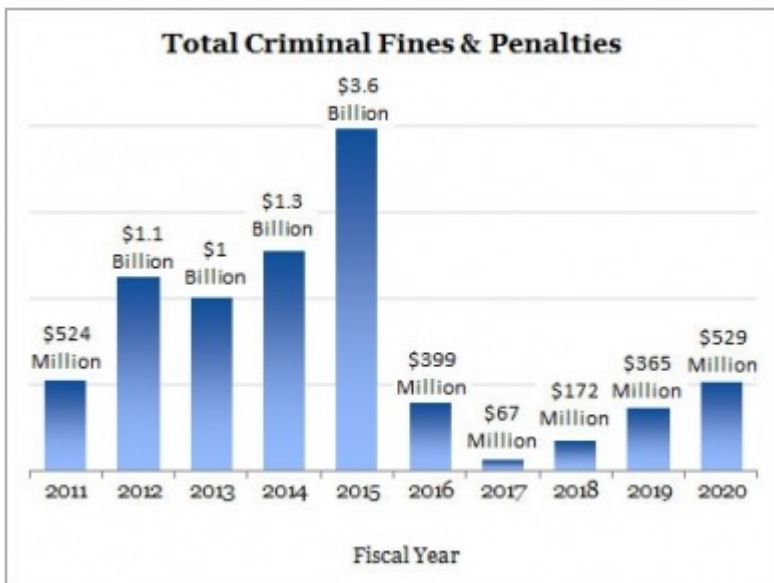
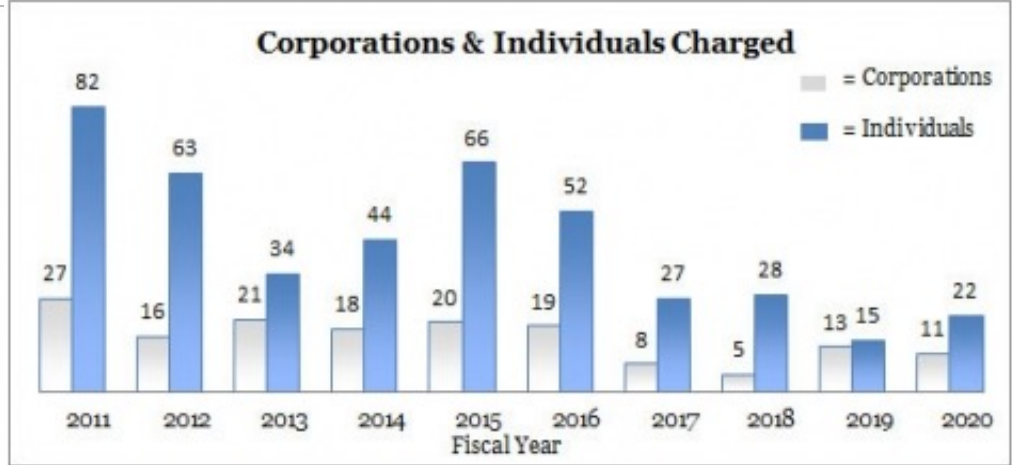
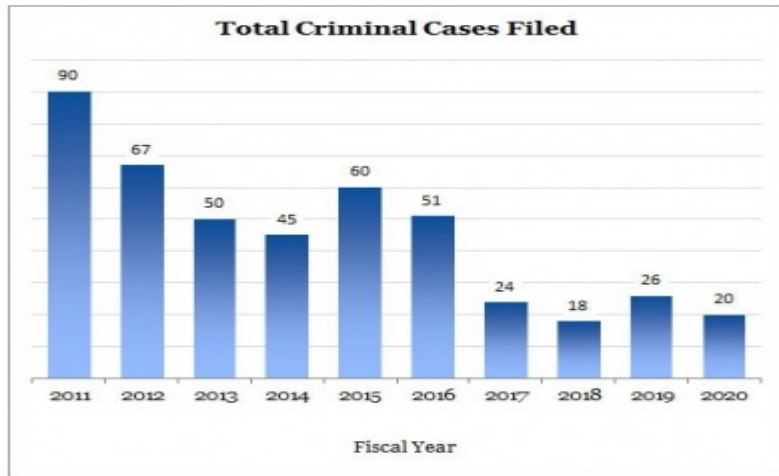
Antitrust Enforcement and Private Suits Will Increase

- ✓ FTC will be more forceful—new chair Rebecca K. Slaughter –has been vocal in seeking faster, more aggressive enforcement and more structural remedies.
- ✓ DOJ has significantly increased activity on several fronts
 - Cross-border cooperation:
 - Signed the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) with Canada, the U.K., Australia and New Zealand
 - Signed MOU with South Korea, which has revamped its cartel enforcement
- ✓ DOJ has been doing “market sweeps” and litigating more aggressively
 - Challenging privilege claimed by Bain in the Visa-Plaid deal investigation
- ✓ Private litigants are more sophisticated—surfing DOJ’s wave and using statistical analysis to prove liability, not just damages.
- ✓ Cases are attractive to litigation funders because the payoff is treble damages plus fees—making financing metrics more attractive.

What is Criminal versus Civil Antitrust Behavior?

- ✓ **A conspiracy or agreement to fix prices, wages, or business terms; rig bids; allocate customers or market share; or to restrain supply.**
 - **“Per se”** restraints on trade are criminal: No legitimate justification, lacking any redeeming competitive purpose, have the effect of raising prices to consumers, and require no analysis of reasonableness or economic justification.
 - To fall under the per se rule, the agreement must be so plainly anticompetitive that no inquiry is needed to establish illegality.
 - No need to define the relevant market.
 - No acts are required. The agreement itself violates the Sherman Act.
 - The defendant must act knowingly.
 - Only need to show that the defendant acted voluntarily and intentionally, rather than due to a mistake or accident or some other innocent reason.
- ✓ Civil violations require the court to determine whether the practice is likely to have a significant anticompetitive effect in the relevant market and whether there are any procompetitive justifications relating to the restraint.
 - Anticompetitive harm can be outweighed by procompetitive effects.

Recent Criminal Antitrust Trends



Criminal Antitrust Whistleblower/Leniency Provisions

Criminal Antitrust Anti-Retaliation Act of 2019

- Prohibits an employer from retaliating against a covered individual (an employee, contractor, subcontractor, or agent of an employer) who provides information regarding misconduct that violates antitrust laws.
- Passed in late 2020, the act provides the Criminal Antitrust Division with a whistleblower protection provision.
 - Too soon to tell, but similar whistleblower offices with the CFTC and SEC saw record setting numbers of tips in 2020 – 30% increases since 2018.

Antitrust Division's Leniency Program

- This policy grants the first company or individual to self-report criminal antitrust violations immunity from criminal prosecution.
- International Competition Network's Guidance on Enhancing Cross-Border Leniency Cooperation
 - Released in June 2020
 - Assists competition agencies in dealing with leniency applicants and cooperating companies in cross-border investigations.

Recent Criminal Antitrust Enforcement Efforts

Meat Supply Chain

- Tuna Industry
 - Fixing prices of canned tuna.
- Broiler Chicken Industry
 - Fixing prices and rigging bids in the sale of broiler chicken products.

Healthcare

- Pharmaceuticals
 - Fixing prices, rigging bids, and allocating customers for generic drugs.
- Florida Cancer Specialists & Research Institute
 - Suppressing competition.

Labor Market

- Neeraj Jindal
 - Wage fixing conspiracy.
- Surgical Care Affiliates
 - Agreement not to solicit other senior-level employees.

/ Where does the Division go from here?

- Increased enforcement
- Wage-fixing
- “No-Poach” agreements

Antitrust Considerations in Employment Context

／ Potentially Anti-Competitive Conduct

- No-Poach Agreements
- Wage-fixing or Benefit-fixing Agreements
- Salary and Benefit Surveys

／ DOJ Antitrust Division and FTC issue Antitrust Guidance for Human Resources Professionals (October 2016) (<https://www.justice.gov/atr/file/903511/download>)

- “Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.”
- Antitrust Red Flags for Employment Practices

／ Civil and Criminal Enforcement & Private Litigation

DOJ Antitrust Guidance for Employers

/ Non-Compete Agreements violating Antitrust Laws

- FTC 2020 Workshop on Non-Compete Commission Rule

/ Whistleblower Protection

- Criminal Antitrust Anti-Retaliation Act (CAARA), Dec. 2020
- Remedies: “all relief necessary to make the covered individual whole”:
 - Reinstatement with the same seniority status
 - Back pay, with interest
 - Compensation for any special damages, including litigation costs, expert witness fees, and reasonable attorney's fees.

DOJ Antitrust Guidance for Employers

Joint Antitrust Statement Regarding Covid-19 and Competition in Labor Markets (April 2020)

“COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”

“The Agencies are on alert for employers, staffing companies (including medical travel and locum agencies), and recruiters, among others, who engage in collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked.”

Source: Joint Antitrust Statement Regarding Covid-19 and Competition in Labor Markets, April 2020 (<https://www.justice.gov/opa/press-release/file/1268506/download>)

Civil Antitrust Litigation Trends

Technology

- Epic Games Inc. v. Google LLC et al.
- In re: Google Play Consumer Antitrust Litigation
- In re: Google Play Developer Antitrust Litigation
- In re: Apple iPhone Antitrust Litigation

Generic Drug Price-Fixing

- In re: Teva Securities Litigation

Supply Chain Price- Fixing

- In re: Broiler Chicken Antitrust Litigation
- In Re: Packaged Seafood Products Antitrust Litigation

Epic Games v. Apple

- ✓ Biggest antitrust trial in Silicon Valley history concluded last month
- ✓ CEOs of both companies attended and on May 24, Tim Cook took the stand for the first time as Apple's CEO
- ✓ Judge Gonzalez Rogers hopes to issue a verdict by mid-August, but appeals and a stay are likely
- ✓ Apple faces two other federal lawsuits over its app fees — one from consumers and one from developers — which are both seeking class-action status before Judge Gonzalez Rogers
- ✓ Epic Games sued Google as well—Google has less control over Android apps. May give more guidance on market and market power definitions.

Steves & Sons, Inc. v. JELD-WEN, Inc.*

Steve & Sons—Consumer of Jeld-Wen doorskins alleges

- After acquiring one of two competitors Jeld-Wen lowered quality and raised prices in violation of their supply contract.
- Jury found for Steve & Sons on contract and antitrust claims.
- Circuit affirmed order to Jeld-Wen to divest itself of the competitor's plant as an equitable remedy—balancing test—needed to protect a family business and Jeld-Wen as a big diversified producer could easily survive loss of plant.
- Circuit affirmed past damages of \$36.5MM but not future damages ruling divestiture was a complete remedy

Jeld-Wen argued but the Court Rejected Arguments:

- DOJ did not object to the merger despite two reviews
- Lesser relief would protect Steve & Sons
- Steve & Sons waited too long—four years—to sue

* 988 F. 3d 690 (4th Cir. 2021)