

## Surgical Care Affiliates Moves to Dismiss DOJ's First-Ever Indictment for No-Poach Agreements

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On January 7, 2021, a federal grand jury returned an indictment charging Surgical Care Affiliates LLC ("SCA") (a subsidiary of UnitedHealth Group that owns and operates outpatient surgery centers) with antitrust violations of Section 1 of the Sherman Act by entering into so-called no-poach agreements. It was the first-ever indictment of this kind.

According to the indictment, SCA entered into agreements with two other companies not to solicit each other's senior-level employees. In addition, the indictment alleges that SCA monitored compliance with the agreements and took steps to remedy breaches.

The government labels these types of agreements as "naked no-poach agreements" (agreements with no connection to a legitimate collaboration) and deems them per se unlawful restraint of trade. Here, the per se characterization is critical because it is the government's policy to criminally prosecute only per se violations of the Sherman Act.

In a non-binding guidance document issued in October 2016, the Department of Justice ("DOJ") had warned that it intended "to proceed criminally against naked [] no-poaching agreements," but the SCA indictment marked the very first time that the U.S. government followed through on that threat.

On March 26, 2021, SCA moved to dismiss the indictment, arguing, inter alia, that the indictment fails to state a per se offense, and that the novelty of the government's theory proves that SCA was not on fair notice that its conduct was criminal, violating foundational rules of due process.

SCA's motion emphasizes that the government will have a hard time finding any precedent supporting its novel application of the antitrust laws, and suggests that that government is overreaching and pushing the boundaries of vague and broad statutory language in the Sherman Act.

SCA points to the conspicuous absence of certain allegations that one might have expected to appear in such an indictment. For example, the indictment fails to allege (i) that anyone tried to conceal the no-poach agreements; (ii) that anyone believed the agreements were unlawful; (iii) that the companies possessed market power; or (iv) that the agreements resulted in the suppression of anyone's wages. The motion to dismiss also questions how a national company like SCA, which competes to hire management employees from hundreds of companies across the country, could have run afoul of the antitrust laws by entering no-poach agreements with just two other companies.

The government's response is due on April 30, 2021, and, as of the date of this client alert, the case is set for trial on Tuesday, November 2, 2021 before Judge Sam A. Lindsay in the U.S. District Court for the Northern District of Texas.

### Takeaways

With this indictment, we have confirmation that DOJ was not bluffing when it threatened back in October 2016 to prosecute naked no-poaching agreements as per se violations of the Sherman Act. The Antitrust

Division is clearly serious about prosecuting this type of conduct, and this seems to be the case regardless of whether the president is a Republican or Democrat.

But SCA's motion to dismiss the indictment serves as a reminder that the question of whether such no-poach agreements violate the Sherman Act is far from settled. There is still a waiting game to be played as the courts determine whether naked non-solicitation agreements are subject to the per se rule.

At this stage, any company that chooses to enter into naked no-poaching agreements is rolling the dice and risking criminal penalties of up to \$100 million. And individuals face up to \$1 million in fines and 10 years in prison.

The SCA case should be monitored closely, for, if the government's case against SCA sees any success (e.g., if the government manages to defeat SCA's motion to dismiss), it will surely embolden the government to bring more criminal cases involving no-poaching agreements similar to the ones alleged in the indictment.

#### **Sources**

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Motion to Dismiss, *United States v. Surgical Care Affiliates LLC*, No. 3:2021-cr-00011 (N.D. Tex. Mar. 26, 2021), ECF No. 38.

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