Confidential Witnesses & AI, Oh My!

When private suits alleging collusion hit, I search the complaint for "confidential witness."

It used to be that private suits followed criminal resolutions. Today, however, the opposite seems true: public allegations in civil complaints or news reports can prompt criminal investigations.

The Antitrust Division's Manual (now inaccessible while it undergoes revision) underlines factors that favor criminal investigation, including:

- "Whether the allegations or suspicions of a criminal violation are sufficiently credible or plausible to call for a criminal investigation" and

- "Whether the matter is significant," based on the "nature" and impact of the conduct.

Sufficiently credible. Confidential witnesses can (though, of course, don't always) provide an insider account of wrongdoing. Detailed, first-hand information can support a prosecutor's view that particular allegations are "sufficiently credible" to warrant investigation. The existence of confidential witnesses also provides a tempting first step in an investigation: see who they are and what they know. A few witness interviews can break open a case, or let prosecutors go on their way without significant time, effort, or expense.
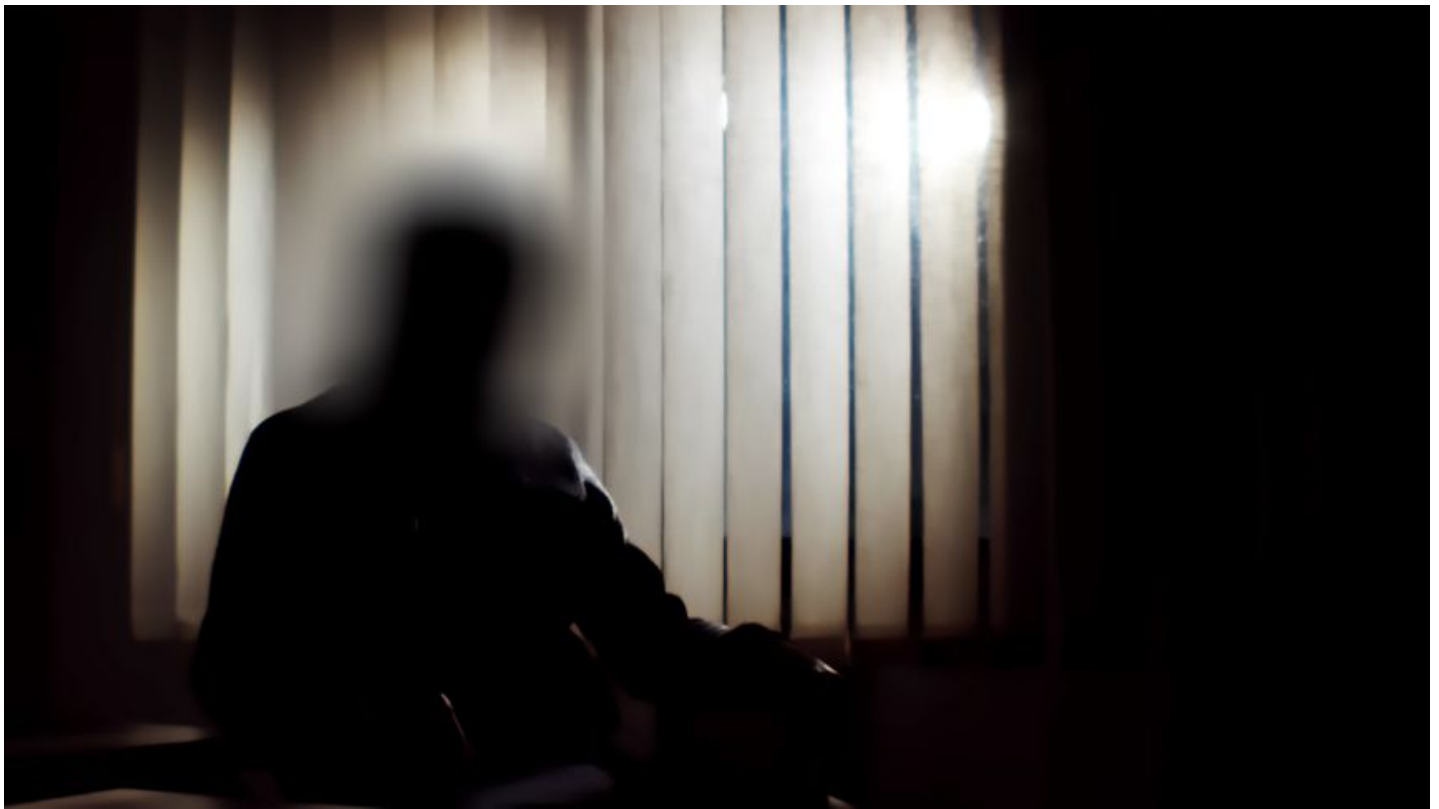
Significant. Department and Division officials have repeatedly outlined their view that collusion by algorithm is an enforcement priority. Last week, for example, Deputy Attorney General Lisa Monaco stated that "[p]rice fixing using AI is still price fixing" and directed prosecutors to "seek stiffer sentences for offenses made significantly more dangerous by misuse of AI."

Antitrust Division officials have echoed her sentiments. For example, Washington Criminal I Chief Ryan Tansey recently explained that "we're now having to investigate markets criminally that we'd never investigated before due to these algorithms and the advent of [these] data aggregation technologies." He added, "any time antitrust enforcers hear that competitors are exchanging competitively sensitive information, particularly through third-party algorithms, it's going to make us perk up."

Why it matters. With a record-high 150 pending grand jury investigations, the Antitrust Division is regularly deeming allegations sufficiently credible and significant to investigate criminally. The Division also has a new league of in-house investigators at its disposal to test the breadth and depth of allegations without drawing upon the resources of its traditional law enforcement partners.
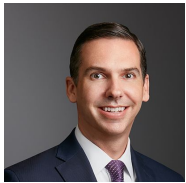
The result is that those facing complaints of collusion-by-algorithm or that contain information from confidential witnesses should assume DOJ is reading the allegations, too. Those facing private suits or other public allegations with hallmarks DOJ may find credible and significant should prepare not just for the civil suits of today but the potential enforcer interest to come.

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