‘Titans’ of Antitrust Policy Clash Over No-Poach Agreements

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Legal battles over the antitrust treatment of no-poach agreements continue to escalate with new district court decisions and new pronouncements from two “titans” of antitrust policy, the Department of Justice (DOJ) and the American Antitrust Institute (AAI).

Earlier this spring, DOJ filed statements of interest in three related fast-food franchise “no-poach” cases in the U.S. District Court for the Eastern District of Washington — *Stigar v. Dough Dough*, *Richmond v. Bergey Pullman* and *Harris v. CJ Star* — in order to clarify how DOJ believes franchise no-poach agreements should be evaluated under federal antitrust laws. DOJ’s statements followed a wave of class action lawsuits against major fast food franchising companies around the country concerning provisions in franchise agreements whereby franchisors and/or franchisees agree not to hire each other’s employees. In its statements, DOJ made three principle arguments: (1) in general, a no-poach agreement between a franchisor and franchisee is a vertical restraint that should be evaluated under the rule of reason; (2) no-poach agreements entered into by the franchisor and multiple franchisees should not be viewed as a hub-and-spoke conspiracy unless there is evidence that individual franchisees agreed with each other to enforce the agreement; and (3) franchise no-poach agreements should not be evaluated under “quick-look” analysis, but instead under the full rule of reason, because they likely are ancillary to the franchise joint venture and potentially provide procompetitive benefits.

Prior to the statements, DOJ’s most recent advocacy regarding the antitrust treatment of no-poach agreements was set forth in DOJ and the Federal Trade Commission’s October 2016 issuance of the “Antitrust Guidance for Human Resource Professionals,” in which the agencies argued that naked no-poach agreements were *per se* illegal, but that no-poach agreements that were ancillary or reasonably related to otherwise procompetitive agreements would be analyzed under a more permissive mode of analysis (*i.e.*, rule of reason or quick-look analysis).

Because the Washington cases settled before the judge issued a ruling on the defendants’ motion to dismiss, the impact on the court of DOJ’s statements is unknown. But decisions in two other cases from outside of Washington that were issued after DOJ filed its statements — on which the franchise defendants in the two cases heavily relied in support of their own motions to dismiss — suggest that courts may not be influenced by DOJ’s position.

Most recently, on May 24, Judge Victoria Roberts of the U.S. District Court for the Eastern District of Michigan denied defendants Domino’s Pizza and its affiliated entities’ motion to dismiss in *Blanton v. Domino’s*, concluding that the plaintiff, a former Domino’s employee, plausibly alleged a horizontal restraint of trade between Domino’s Pizza franchisees not to hire each other’s employees in violation of Section 1 of the Sherman Act.[1] Judge Roberts explicitly declined to announce what mode of analysis would ultimately apply, explaining that “more factual development is necessary,” but she nevertheless concluded that the plaintiff plausibly alleged that the no-poach provision in Domino’s franchise agreements was unreasonable under both the per se rule and quick-look analysis. Neither DOJ’s guidance nor its statements of interest were cited in the decision, but Judge Roberts’ holding rejected DOJ’s position that “quick-look” analysis should not apply to franchise restraints, and franchise no-poach restraints are likely ancillary to the franchise joint venture and should thus be evaluated under the full rule of reason.

[1] *Blanton v. Domino’s*, No. 18-13207 (E.D. Mich. May 24, 2019).

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A more explicit discussion of DOJ's statements came in a May 21, 2019, decision involving Jimmy John's. Although defendant Jimmy John's motion to dismiss was denied in part in July 2018 in *Butler v. Jimmy John's* (Southern District of Illinois), the case recently underwent another round of motion to dismiss briefing after the original judge retired, a new judge took over and a new named plaintiff filed an amended complaint (*Conrad v. Jimmy John's*). On May 21, Chief Judge Nancy Rosenstengel of the U.S. District Court for the Southern District of Illinois again denied Jimmy John's motion to dismiss, predominantly based on the "law of the case" doctrine, which dictates that a court should not revisit issues decided at earlier stages in the litigation unless the prior decision is "clearly erroneous."[2] Jimmy John's argued that the original decision denying its motion to dismiss was wrong in light of DOJ's position that franchise no-poach provisions are likely ancillary to legitimate franchise agreements. Judge Rosenstengel rejected this argument because the original order denying the motion to dismiss did not address whether the no-poach provision might be ancillary to the franchise agreement, and "if the facts of this case show that the no-poach agreements are not ancillary restraints, then the DOJ's theory may not apply." In addition, while Judge Rosenstengel acknowledged that DOJ's Antitrust Division is "certainly a titan in this arena," it is not the "ultimate authority on the subject," and the fact that "another titan in the antitrust arena" — AAI — recently wrote a letter criticizing DOJ's arguments was sufficient to show that the proper mode of analysis for franchise no-poach restraints remains unsettled. Thus, the court concluded that the prior motion to dismiss decision was not clearly erroneous and remained the law of the case.

In her decision, Judge Rosenstengel referred to a 13-page letter that AAI sent to DOJ on May 2, strongly criticizing the positions DOJ took in its statements of interest.[3] First, AAI argued that vertical restraints, such as franchise no-poach agreements, can produce horizontal anticompetitive effects sufficient to invoke either the per se rule or quick-look analysis. Second, AAI argued that the mere potential for a restraint to be ancillary to a broader legitimate agreement does not require a court to analyze the restraint under the full rule of reason; instead, according to AAI, the burden is on the defendant to "identify a plausible basis to believe that a franchise no-poach agreement holds the promise of procompetitive benefits." Without establishing such a basis, "a facially anticompetitive restraint that lacks such a plausible connection [to the venture] should be condemned ... under either the per se rule or a quick look, without further inquiry." As to the effects of the no-poach provisions at issue in many of the fast food cases, AAI argued that the purported efficiencies "make no economic sense." AAI concluded that courts should not apply the full rule of reason to such restraints, and if the *per se* rule does not apply, then a quick-look analysis "seems entirely appropriate" or, at a minimum, a "quicker look is warranted with regard to effects analysis."

DOJ's statements have also provoked concerns from Congress. On May 22, Congressman David Cicilline (D-R.I.), chairman of the House Judiciary Committee's antitrust subcommittee, wrote a letter criticizing DOJ's recent advocacy efforts, singling out the fast food franchise statements.[4] In Chairman Cicilline's view, DOJ's "decision to interfere [in the franchise cases] in order to win greater protection for corporate franchisors that restrict labor market competition ... reflects grossly misshapen priorities." Chairman Cicilline warned that continuing the use of resources on the amicus program may cause Congress to review the Antitrust Division's budget.

But unless Congress acts, the antitrust treatment of no-poach agreements will continue to evolve in the courts. In the words of Judge Rosenstengel,"This dichotomy [between DOJ and AAI] shows that the legal questions here are in their infancy, and this battle looks like one that will make its way through the courts for years to come."

[2] *Conrad v. Jimmy John's*, No. 3:18-cv-00133-NJR-RJD (S.D. Ill. May 21, 2019).

[3] https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf.

[4] https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/DOJ_05222019.pdf.