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McDonald's and Medicine: Developments in the Law of No-Poaching and Wage-Fixing Agreements

BY MICHAEL A. LINDSAY

WHAT DO A MEDICAL SCHOOL professor in North Carolina and a minimum-wage McDonald's worker in Chicago have in common? In recent years, both have been the subjects of litigation over what are commonly called "no-poaching" agreements. Like other employers, the medical school and the McDonald's franchise hunted for talent. After acquiring the talent, they wanted to keep it—and not lose the employees to a competing bidder for their services. Employers hunting for the same kind of talent, however, cannot make naked agreements to treat each other's workforce as private preserves. Employees are entitled to competitive bids for their services (more precisely, to be free from naked agreements against competitive bidding), just as consumers are entitled to competitive offers for their purchases. Enforcement, litigation, guidance, and advocacy have all reinforced this point over the last decade.

The last two years, however, have seen several developments. The DOJ and FTC have continued enforcement efforts against no-poaching agreements and other restraints in employment markets. They continue to condemn naked restraints in employment markets as per se illegal, and although the DOJ has not yet filed any criminal cases, it is still signaling its intention of doing so. Meanwhile, the Washington State Attorney General has launched a campaign against no-poaching provisions in franchise agreements—restraints that limit the ability of franchisees to hire each other's employees. Private class-action plaintiffs have challenged both naked no-poaching agreements between horizontal competitors and similar provisions that are ancillary to franchise agreements. Somewhat surprisingly, defendants in clearly horizontal cases have argued for application of the rule of reason, and plaintiffs in seemingly vertical cases have argued for application of the per se or quick look rule. The DOJ has filed statements of interest in some of these cases arguing—consistent with previous case law—for per se illegality of naked no-poaching agreements and for rule of reason treatment for ancillary restraints in franchise agreements.

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DOJ/FTC Enforcement of Naked Horizontal Agreements as Per Se Violations

In October 2016, the DOJ and FTC issued their Antitrust Guidance for Human Resource Professionals.[1] The Guidance stated plainly that it is illegal for employers competing in the employment marketplace to make express or implied agreements not to compete with each other, whether on wages, benefits, or other terms of employment—or on offering job opportunities. Although the substance of this guidance did not come as a surprise to antitrust professionals (particularly those who had been following the *High Tech Employee Antitrust Litigation*),[2] it was certainly a wake-up call for HR professionals—and for some in-house counsel and private practitioners as well. Moreover, one part of the Guidance may have surprised even the practicing bar: the explicit statement that the DOJ intended to use *criminal* prosecutions against both companies and individuals participating in naked no-poaching agreements.[3]

Antitrust enforcers have continued to pursue no-poaching and wage-fixing violations when uncovered. The two principal cases are the FTC's *Therapy Source*[4] and DOJ's *Knorr-Bremse*.[5] Both cases involved naked agreements between companies that were horizontal competitors in both the upstream market (for hiring and retaining employees) and in the downstream market (for selling products or services based on the work of those employees).

***FTC's* Therapy Source.** In July 2018, the FTC announced that it had filed a complaint against two competing therapist staffing agencies in Texas that had made a wage-fixing agreement. These agencies hired therapists (physical, occupational, and speech) as employees or contractors and then provided the therapists' services to home health agencies to treat

patients in their homes. The home health agency paid the "bill rate" to the therapy agency, and the therapy agency paid the therapist a "pay rate." A home health agency notified one of the therapy companies (Integrity) that the home health agency was going to lower the bill rate. This was obviously a problem, because therapists were presumably the major cost input, so reducing the spread between the bill rate and the pay rate would shrink Integrity's profits.

The allegations read like the fact-pattern in a 21st century law school exam, but without the ambiguity.[6] The conspiratorial communications took place through text messages. Integrity's owner contacted rival Your Therapy, asked whether it was considering a pay-rate reduction for physical therapist assistants, and disclosed the lower pay rates that Integrity planned. Your Therapy responded "Yes I agree. I'll do it with u."[7] Your Therapy proposed expanding the pay-rate reduction agreement to include physical therapists as well as their assistants. Integrity (apparently recognizing that a conspiracy cannot succeed unless the conspirators have a very high combined market share) replied that they needed all therapy staffing companies "on the same page,"[8] so that there would not be "a bunch of flip-flopping"[9] of therapists moving from one agency to another agency (that is, to a non-conspiring agency that was offering a higher pay rate). Other text messages between the first two conspirators included further conspiratorial expressions ("I agree,"[10] "I can join—where did you go,"[11] "Ok we are going to lower [our rates] to your numbers,"[12] and "We have to drop rates everywhere"[13]). Integrity later invited other therapy companies to get "on board" with "collectively" reducing pay rates "together."[14]

The FTC challenged the actions as an unreasonable restraint of trade in violation of Section 5 of the FTC Act and noted that the conduct was not "reasonably related to any efficiency-enhancing justification."[15] In its press release describing the case, the FTC expressly likened the wage-fixing agreement to a seller-side price-fixing conspiracy.[16]

The only real controversy about the case was the adequacy of its remedies. In the FTC's press release announcing the complaint and settlement, Bureau of Competition Director Bruce Hoffman explained that the FTC (in cooperation with the Texas Attorney General) had been "successful in stopping this conduct quickly" (implying that the conduct had inflicted relatively little damage). He added that the FTC would "seek relief commensurate with the conduct, the harm to workers, and—where appropriate—any ill-gotten benefits received by the firms engaged in the illegal activities." This implied that the *Therapy Source* case was not an "appropriate case" for seeking relief for workers, presumably because the conspiracy's short duration meant there had been little time for it to inflict actual harm on workers.[17] Commissioner Rohit Chopra, however, was not satisfied with the absence of notice to (or restitution for) the conspiracy's victims, and he invited public comments.[18]

The FTC received 101 comments (including one from Rep. David Cicilline, then ranking member and now chair of the House Judiciary Committee's antitrust subcommittee). None disagreed with the premise that wage-fixing agreements are and should be illegal. Most of the comments expressed concern about either or both of two issues: the failure to obtain any kind of restitution for injured workers, and the failure to prosecute the matter criminally. As of March 15, 2019, the FTC had not granted final approval of the proposed consent order.

***DOJ's* Knorr-Bremse.** In April 2018, the DOJ filed a complaint alleging that two companies—Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (Wabtec)—had entered into no-poaching agreements in 2009. Two years later, Knorr and Wabtec made similar agreements with a third company (Faiveley, which Wabtec later acquired). All three companies were competitors in the rail equipment manufacturing and services business; in fact, they were the top three firms in the industry. The complaint alleged that the defendants were competitors both in the market for development, manufacture, and sale of rail equipment, but also for attracting, hiring, and retaining talent from the "limited supply of skilled employees who have rail industry experience."[19]

The complaint alleged that senior executives of the relevant subsidiaries made, monitored, and enforced agreements not to solicit or hire each other's employees. Internal documents and communications between the conspirators provided ample evidence of an agreement. For example, one Knorr communication to Wabtec stated, "[Y]ou and I both agreed that our practice of not targeting each other's personnel is a prudent cause for both companies. As you so accurately put it, 'we compete in the market.'"[20] An internal Knorr document stated that a conversation with a Faiveley representative "resulted in an agreement between us that we do not poach each other's employees. We agreed to talk if there was one trying to get a job."[21] In an internal email, a Wabtec executive stated his resistance to hiring a Faiveley employee because "I don't want to violate my own agreement" with Faiveley.[22]

Consistent with the Guidance, the DOJ challenged the no-poaching agreement as a per se violation of Section 1. The agreements were "facially anticompetitive because they eliminated a significant form of competition to attract skilled labor in the U.S. rail industry" and "denied employees access to better job opportunities, restricted their mobility, and deprived them of competitively significant information that they could have used to negotiate for better terms of employment."[23]

In contrast to the 101 comments that the FTC would later receive in *Your Therapy*, the DOJ received no comments on the proposed remedy.[24] Final judgment was entered on July 11, 2018.[25]

But Why No Criminal Prosecutions? The Guidance expressly announced that "[g]oing forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[26] Individual DOJ officials repeated this intention in later speeches,[27] but the DOJ did not prosecute

Knorr and Wabtec criminally. The Competitive Impact Statement acknowledged these prior statements of the DOJ's intention "to bring criminal, felony charges against culpable companies and individuals who enter into naked No-Poaching Agreements."[28] The DOJ explained, however, that those intentions were prospective. Although nothing prevented the DOJ from moving criminally against Knorr and Wabtec (or others), the DOJ stated that as "a matter of prosecutorial discretion," it would proceed civilly against parties whose no-poaching agreements were entered into and terminated before October 2016, but it "may proceed criminally where the underlying No-Poach Agreements began or continued after October 2016."[29] The DOJ explained that it elected civil enforcement against Knorr/Wabtec because their conspiracy ended before the announcement of potential criminal enforcement.

The general principle does not explain the absence of criminal prosecution in *Your Therapy*. The complaint does not reveal the end-date of the agreement, but it did not begin until March 2017—more than four months after the Guidance was issued. There may be other reasons not to proceed criminally (for example, relative brevity of the conspiracy, relatively small impact, lack of sophistication of the parties, presence of powerful buyers exerting downward pressure on conspirators). Indeed, with the proposed consent order still awaiting final approval, it is not even certain that the *Your Therapy* parties have avoided criminal prosecution. In any event, even after the *Knorr-Wabtec* filings, DOJ officials have continued to promise future criminal enforcement against participants in no-poaching agreements.[30]

And What About Joint Ventures? Neither of these enforcement actions involved joint ventures—both were naked agreements between competitors in labor markets (as well as competitors in downstream markets). In both cases, the enforcers made clear that there were no efficiency-enhancing justifications. In *Your Therapy*, the FTC alleged that the challenged conduct was not "reasonably related to any efficiency-enhancing justification," and in *Knorr-Wabtec*, the DOJ alleged that the no-poaching agreements "were not reasonably necessary to any separate, legitimate business transaction or collaboration between the companies."[31]

Antitrust enforcers have been quite clear that a no-poaching agreement that is ancillary to a legitimate joint venture will be analyzed under the rule of reason. Deputy Principal AAG Andrew Finch explained that "agreements between competitors that are ancillary to joint ventures or other legitimate collaborations . . . have been, and will continue to be, analyzed under the rule of reason, consistent with the civil doctrine of ancillary restraints."[32] He added that this is also true for traditional noncompete agreements with employees that seek to "protect the employer's trade secrets by prohibiting the employee from taking a job with a competitor."[33] (More recently, the DOJ stated plainly and concisely that "no-poach agreements among competing employers are per se unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration among the employers, in which case the rule of reason applies."[34]) In his speech, Finch had added that "none of that should be new or surprising to antitrust lawyers familiar with U.S. antitrust law."[35] Recent DOJ statements of interest filed in private litigation have helped emphasize the difference between a naked no-poaching agreement (subject to the per se rule) and an ancillary provision to a joint venture or other procompetitive business structure (subject to the rule of reason).

Private Litigation Challenges to No-Poaching Agreements

Private litigants have joined in challenging no-poaching agreements under the antitrust laws—and seeking treble damages. This development is not new, because private class actions followed the DOJ's enforcement against no-poaching agreements ten years ago. Even though the DOJ is looking at potential criminal prosecutions of naked no-poaching agreements as hard-core violations, defendants are arguing that courts should not use the per se rule at all and should instead judge no-poaching agreements under the rule of reason.

Seaman v. Duke/UNC. North Carolina's Research Triangle is home to three major research universities. A medical faculty member (Danielle Seaman) at Duke University's medical school sought a position at the University of North Carolina's medical school. Some preliminary meetings went well, and although no position was open at the time, the department head stated that Seaman "would fit in very nicely."[36] Two years later, a position opened up, and Seaman applied. The same department head repeated that Seaman "would be a great fit"—except for a no-poaching agreement between Duke and UNC medical schools: "I just received confirmation today from the Dean's office that lateral moves of faculty between Duke and UNC are not permitted. There is reasoning for this 'guideline' which was agreed upon between the deans of UNC and Duke a few years back."[37] The department head even explained the origins and terms of the agreement. The agreement arose because of Duke's attempt to recruit "the entire UNC bone marrow transplant team," which forced UNC "to generate a large retention package to keep the team intact."[38] As a result, the UNC and Duke medical deans agreed that they "would not hire each other's faculty in a lateral move—only way they can hire each other's faculty is if there is an upward move, ie a promotion."[39]

Seaman filed a class action alleging that Duke had made a per se illegal agreement in restraint of trade. The first challenge with the case, however, was finding the second party to the agreement. Seaman initially named "DOES 1-20," whom she generically identified as "corporate officers, members of the boards of directors and boards of trustees, deans, or senior administrators of Duke University and Duke University Health System."[40] This presented a pleading problem, to the extent that (a) the university and the health system can be considered a single "person" under *Copperweld*, and (b) the

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individual Doe defendants could be considered as acting for the university's interests (and not for their own separate private interests).[41] In amended complaints, she named as additional defendants UNC and its health system and the UNC medical school dean in his official capacity as dean (as well as in his capacity as CEO of UNC's health system).[42] Defendants sought dismissal based on the state action doctrine, asserting that UNC was a state actor (and therefore not subject to the Sherman Act) and that its immunity also extended to private-actor Duke. The district court denied the Rule 12 motion, deciding to defer the issue until a factual record could be developed through discovery. The UNC defendants then settled, and the court approved the settlement (which did not include any damage award to class members) and certified a settlement class.[43] The court later certified a class for the claims against Duke, which was narrower than what Seaman sought and what the court had approved for the UNC settlement class.[44]

Duke made no serious effort to seek dismissal of the complaint based on *Twombly*[45] or on merits grounds other than state action,[46] but on summary judgment, Duke maintains that the court should apply the rule of reason, not per se analysis. Duke reasons that no court has ever applied the per se rule to what Duke calls "employee mobility" restraints, that the per se rule should be reserved for cases with which courts have extensive experience, that the agreement is between a state actor and a private nonprofit, and that the agreement has no obvious anticompetitive effects and might have procompetitive effects. Duke has not argued (at least insofar as the public record discloses) that the restraint is ancillary to any specific agreement.

The DOJ filed a statement of interest that responded to Duke's argument.[47] The DOJ reiterated its position that naked no-poaching agreements are per se illegal and noted that if no court had held a no-poaching agreement per se illegal at the completion of a case, that was because defendants settled after courts had denied motions to dismiss claims of per se illegality.[48] A no-poaching provision that is reasonably necessary to a separate, legitimate business transaction or collaboration among employers, however, is judged under the rule of reason. The DOJ observed that Duke had not identified *any* specific collaboration with UNC, much less one to which the no-poaching agreement was actually and reasonably ancillary—generalized claims of collaboration would not suffice.[49] Finally, the DOJ refuted Duke's claim that employee mobility restraints would be a new per se category. A no-poaching agreement is a form of market allocation—which is not novel. The DOJ could also have added that the buyer-side aspect (that is, employers as buyers of services) is not novel either—the Supreme Court condemned buyer cartels as long ago as the first Truman administration.[50]

The court heard argument on the motions on March 12, 2019, but had not yet issued any rulings as of April 8, 2019. The case was set for trial on July 31, 2019, but the parties informed the court of a settlement on April 8, 2019.

Private Knorr-Wabtec Litigation. The DOJ's complaint and settlement spawned the filing of some 26 private actions against Knorr and Wabtec, which have been consolidated in the Western District of Pennsylvania as the *Railway Industry Employee No Poach Antitrust Litigation*.[51] The consolidated complaint alleges that the defendants' no-poaching agreement is a per se violation of Section 1.[52] Knorr and Wabtec have sought dismissal on multiple grounds,[53] including the claim that no-poaching agreements should be evaluated under the rule of reason. Like Duke, Knorr-Wabtec have argued that the per se category should be reserved for agreements with which courts have considerable experience and that, under Third Circuit law, no-poaching agreements should be evaluated under the rule of reason—and that the complaint should be dismissed because plaintiffs have not alleged a relevant market. The plaintiffs have responded that no-poaching agreements are not novel and that numerous courts have held them illegal per se.[54]

The court seemed to indicate at oral argument that the plaintiffs have the better of this argument.[55] The Third Circuit rule is more nuanced than Knorr-Wabtec have suggested, and plaintiffs are correct that no-poaching agreements are no longer novel (even if labeled as "employee mobility restraints"). The defendants have relied on *Eichorn* for the proposition that no-poaching agreements should be judged under the rule of reason. At least two of the three inter-related agreements at issue in *Eichorn*, however, were plainly related to divestiture efforts, and the third arguably so.[56] *Eichorn*'s real teaching is "no-hire agreements entered upon the legitimate sale of a business to a third party" should be judged under the rule of reason—which ought to be noncontroversial.[57]

In cases involving truly naked no-poaching agreements, courts have applied the per se rule. For example, in *United States v. eBay*, the court determined on a Rule 12 motion that the United States had adequately alleged that an "agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement."[58] The issue was whether the United States could *prove* that the agreement between eBay

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and Intuit was indeed a naked restraint—as opposed to a restraint that was "ancillary to a legitimate procompetitive business purpose: [the Intuit chairman's] service on eBay's board."[59] Similarly, in denying a Rule 12 motion the *Animation Workers* court held that the plaintiff had "alleged sufficient facts to support a plausible per se claim that Defendants allegedly conspired to suppress the compensation of the putative class."[60]

The DOJ filed a statement of interest in the private Knorr-Wabtec litigation, reaffirming the basic mode of antitrust analysis. The agreement at issue in this litigation is alleged to have "serve[d] no purpose except for stifling competition," and such naked "no-poach agreements among competitors in labor markets are *per se* unlawful in the same way that customer- and market-allocation agreements in product markets are per se unlawful."[61] For specific precedent regarding no-poaching agreements, DOJ pointed to the *eBay* and *High-Tech Employee* cases, as well as to the Guidance.[62]

Samsung-LG Litigation. Regardless of the merits standard that applies to no-poaching agreements, a plaintiff's complaint must still allege sufficient facts to meet the *Twombly* standard. In *Frost v. LG Electronics*, the plaintiff alleged a conspiracy between the Korean parents of the Samsung and LG Electronics U.S. subsidiaries. The complaint pleaded that an employee of LG's India subsidiary had been publicly quoted as stating that LG and Samsung "have an 'understanding' not to hire from each other . . . without a gap of a year."[63] The district court held, however, the complaint did not include sufficient allegations of "who, did what, to whom (or with whom), where, and when?" and or of "the quality and quantity of facts found adequate in other no poach suits."[64]

Franchise Agreements and No-Poaching Clauses

No-poaching litigation has now expanded to vertical (or at least partially vertical) agreements—specifically, in a series of challenges against the use of no-poaching clauses in franchise agreements. Franchisors unquestionably have a vertical relationship with their franchisees, and the clauses are interwoven with other provisions setting the terms of a broader relationship than the restraint itself. These provisions, however, are now the subject of enforcement by both state attorneys general and by private plaintiffs.

Franchise No-Poaching Clauses. The core concept in a franchise no-poaching provision is a limitation on each franchisee's ability to solicit or hire employees of another franchisee or corporate store operating under the same banner. In other words, the provision would limit a KFC franchisee's ability to hire employees of another KFC location but not its ability to hire a Pizza Hut employee. For example, the McDonald's clause stated:

> *Interference with Employment Relations of Others.* During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.[65]

Franchise no-poaching provisions can vary from each other in a number of ways. The McDonald's provision above applies equally to all franchisee employees, regardless of position or skill level. In contrast, the Carl's Jr. provision applied only to "managerial-level employees."[66] The Auntie Anne's provision was a no-solicitation clause in some years, and a no-hire clause in others.[67] The Anytime Fitness provision had a geographic limitation (limited to employees of other Anytime Fitness centers located within 10 miles) and a shorter duration (90 days instead of six months).[68]

There certainly are procompetitive arguments for no-poaching provisions in franchise agreements. The franchisor wants to create and foster a strong brand, and franchisees share that interest. The brand can be strengthened through having employees well-trained in the particular franchise's business model. Consequently, a franchisor wants to preserve its franchisees' interest in investing in the training of employees in franchise-specific skills. Indeed, 25 years ago, the Ninth Circuit treated a no-poaching provision in a franchise agreement as protected under the *Copperweld* doctrine because (at least on the facts of that case) a franchisor and franchisee were incapable of conspiring.[69] In short, there is an articulable procompetitive rationale for no-poaching clauses in franchise agreements. Nevertheless, franchise no-poaching clauses have been under severe challenge for the last few years.[70]

Washington State Attorney General. In 2018, the Washington AG launched an investigation into the use of no-hire and no-solicitation provisions in franchise agreements. The investigation was inspired by a 2017 *New York Times* report of a study by two Princeton professors.[71] As reported in *The New York Times*,[72] Professors Alan Krueger and Orley Ashenfelter found that 58 percent of the franchise agreements in their study included some form of no-poaching provision, and they speculated that these provisions (to the extent that they have grown and are effective) "might help explain a recent puzzle in the U.S. job market: unemployment has reached a 16-year low and job openings are at an all-time high, yet wage growth has remained surprisingly sluggish."[73]

The Washington AG's investigation began with issuance of civil investigative demands, seeking information on whether a targeted franchisor had included no-poaching provisions in its franchise agreements, its reasons for including them, and

(if applicable), its reasons for rescinding them. In some cases, the AG then sought "Assurances of Discontinuance" under a state statute permitting the AG to obtain commitments to discontinue a business practice that might violate the state antitrust statute.[74] The assurances are not identical, but the franchisor typically commits to refrain from enforcing existing no-poaching provisions anywhere in the United States, to inform the AG if a franchisee attempts to enforce such provisions, to amend their agreements to delete the provisions, and to inform the AG of any franchisees that do not consent to the amendment. Interestingly, at least one franchisor submitted an assurance even though it had no locations in Washington State.[75]

As of February 15, 2019, the Washington AG had secured assurances from 57 franchisors who agreed to abandon no-poaching provisions in their franchise agreements.[76] Although the vast majority of the assurances have come from quick-serve restaurant franchisors, the AG has also obtained assurances from franchisors in the fitness center, executive search, quick lube, temp employee, and convenience store industries.[77]

Thus far, the Washington AG has filed only one lawsuit against a franchisor who did not submit an assurance: Jersey Mike's. The complaint names not only the franchisor but also 18 franchisees operating Jersey Mike franchise locations in Washington State.[78] The complaint alleges that that the no-poaching provisions in the franchise agreements constitute both a per se violation of the state antitrust statute and, in the alternative, a "quick look" violation.[79] The complaint alleges both a "hub and spoke" conspiracy among the franchisees (orchestrated by the franchisor) and a horizontal agreement between the franchisees and the franchisor (which operates company-owned stores in Washington State and is therefore a competitor in the same labor market).[80] The defendants filed a motion to dismiss the complaint. The district court denied the motion on the basis that dismissal was appropriate only if it "appears beyond doubt that the plaintiff can prove no facts, consistent with the complaint, which would entitle the plaintiff to relief."[81]

Multistate AG Group. In July 2018, a coalition of attorneys general from 11 other states began an effort similar to that of the Washington AG.[82] These state AGs sent a letter to eight national fast food franchisors requesting information and copies of documents related to "no-poach" clauses in their franchise agreements. Their inquiry was more specific than the Washington AG's information request, including questions on the categories of employees covered, the duration of the no-poach period, and the disclosure of provisions to employees.[83]

On March 12, 2019, the California Attorney General announced the multistate AG group's first set of consent agreements with four franchisors.[84] At least three of the four settling franchisors—all in the quick-service restaurant business—had previously provided assurances of discontinuance to the Washington AG. Like the Washington AG settlements, the multistate settlements include a nationwide prohibition on enforcing no-poaching provisions in existing franchise agreements or including them in new agreements.

The multistate agreements differ from the Washington AG in several respects. For example, in addition to asking franchisees to amend their agreements to eliminate no-poaching provisions, the multistate agreements include a requirement that franchisors ask franchisees to agree to post a bilingual notice informing employees that they are allowed to be recruited and hired by other franchisees (e.g., one Arby's can hire another Arby's employee).[85] The agreements also specify dollar penalties for material breaches (up to $100,000 if the breach results in a refusal to hire, or $10,000 if it does not), with the amount to be determined by the settling state AGs.[86]

Two weeks after announcing the settlements, the California AG's antitrust chief Kathleen Foote publicly stated that no-poaching provisions in franchise agreements are probably per se violations of California's state antitrust law. She said that it is "extremely unlikely that a state court would find no-poach agreements in the vertical context should be treated any differently than the ones in the horizontal context," and she predicted that "state law is going to be important as this whole thing plays out."[87]

Private Class Action Litigation. Private litigants' challenges to no-poaching provisions in franchise agreements pre-date the Washington AG's investigation. For example, private class actions were filed against Carl's Jr. (February 2017), McDonald's (June 2017), Pizza Hut (November 2017), and Jimmy John's (January 2018).[88]

Courts have taken somewhat differing views as to how to analyze no-poaching provisions in franchise agreements and whether the per se rule applies. For example, in deciding a Rule 12 motion in *Deslandes v. McDonald's USA, LLC*,[89] the district court agreed that a franchise agreement has vertical elements but found that it also has horizontal elements because it restrains competition between franchisees and corporate-operated stores. The court also had "no trouble concluding that a naked horizontal no-hire agreement would be a per se violation of the antitrust laws."[90] The court refused to apply the per se rule, however, because the horizontal restraint at issue was "ancillary to franchise agreements," and the franchise agreement (though not necessarily the no-poaching provision) was "output enhancing" because it "increased output of burgers and fries."[91] The court permitted the complaint to go forward, however, on a "quick look" basis because "a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate."[92] The court noted that the restraint was not limited to the employees with the most expensive training and was not limited to a reasonable time after receiving the training.[93] Nevertheless, the court also noted that the evidence ultimately might not support the claim.

In *Butler v. Jimmy John's Franchise, LLC*,[94] the district court also recognized the vertical elements of the no-poaching provision but concluded that the plaintiff had alleged

enough of a horizontal character to survive Rule 12. The court determined, however, that it was too early to decide whether to apply the per se rule or the "quick look" rule—or even the rule of reason (which the court acknowledged would "burn this case to the ground").[95] The single-most compelling fact was that the agreement gave each franchisee "a contractual right to enforce the no-hire agreements directly against each other through the third-party beneficiary provision."[96] In addition, the court cited other provisions (some of which may have been boilerplate, but they were still persuasive at the pleading stage) that franchisees "may be subject to competition from other franchisees" and that franchisees are not "agents" or "partners" of Jimmy John's.[97]

DOJ Statement of Interest. The DOJ filed a statement of interest in one of the pending franchise cases, *Richmond v. Bergey Pullman Inc.* (which involves the Arby's franchise system) and its two companion cases, *Stigar* and *Harris*.[98] The DOJ first explained its view on the role of *Copperweld* and *American Needle* in the franchise relationship—in other words, the foundational question of whether a franchisor and its franchisees are legally capable of "conspiring." Under *American Needle,* that depends on whether, on the specific facts of the case, the franchisor and franchisee have a unity of economic interests. In *Richmond*, the plaintiffs alleged that each franchisee had responsibility for day-to-day operations, including employment decisions. These allegations suggested that any given franchisee's hiring interests "may not be perfectly aligned with those of the franchisors or other franchisees," which in turn "tend[s] to show that a franchisor and its franchisees are legally capable of concerted action."[99]

Next, the DOJ reiterated and expanded its views on appropriate analysis of no-poaching agreements. Naked no-poaching agreements, of course, are per se illegal, and a naked no-poaching agreement among franchisees (whether in a single franchise system or in different systems) would fall into this category. In contrast, a no-poaching provision in an agreement between a franchisor and a franchisee should be judged under the rule of reason. If the franchisor does not operate any corporate stores, then the agreement is purely vertical and, like other vertical agreements, should be judged under the rule of reason. If the franchisor does operate corporate locations—and thus is competing with its franchisee for employee services—then the agreement is horizontal, but the no-poaching provision would not be per se illegal unless it was "not ancillary to any legitimate and procompetitive joint venture."[100]

The DOJ then discussed the concept of a hub-and-spoke conspiracy. For the no-poaching provision to be per se illegal, the plaintiff would have to show an actual agreement among the franchisees—not simply parallel conduct. If the plaintiff cannot show a "rim" to the hub and spoke, then the no-poaching agreements are simply a set of parallel vertical agreements, which are subject to the rule of reason. Even if the plaintiff had pleaded a horizontal agreement, however, the agreement would still be distinguishable from the usual hub-and-spoke agreement: "The typical franchise relationship itself is a legitimate business collaboration in which the franchisees operate under the same brand. No-poach agreements would thus qualify as ancillary restraints if they are reasonably necessary to the legitimate franchise collaboration and not overbroad."[101] This point is particularly important in any employment market in which the franchisor operates corporate stores—and therefore, in the DOJ's view, might be competing with franchisees for employees.

Finally, the DOJ stated that the "quick look" doctrine should not apply under any circumstances. If a plaintiff shows a naked no-poaching agreement among the franchisees, then the per se rule applies. If the plaintiff does not show an agreement among the franchisees, then the no-poaching provision is an ancillary restraint. The quick look doctrine applies "only in rare cases";[102] no-poaching provisions in franchise agreements are not one of those rare cases because they "may indeed provide procompetitive benefits and promote interbrand competition."[103] The DOJ expressly urged the court to reject the contrary rulings of *Deslandes* and *Butler*.

Washington State AG Amicus. On March 12, 2019, the Washington AG filed an amicus brief in Richmond and its two companion cases.[104] In its motion seeking leave to file the amicus brief, the AG had explained that it wanted to provide the court with more information on the purpose, function, and interpretation of the relevant antitrust provisions of Washington's Consumer Protection Act and specifically its relationship to federal law, along with the AG's "unique perspective" from "having investigated over 100 franchisors."[105]

In its amicus brief, the Washington AG acknowledged that Washington state law provides that courts interpreting the state antitrust statue "be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters."[106] The AG argued that state antitrust laws "are not beholden to their federal counterparts" and that Washington courts "have departed from federal law for reasons rooted in the state's own statutes or case law."[107] The only specific authority that the AG offered to demonstrate that Washington state law might treat a no-poaching provision in a vertical agreement as per se illegal was the state district court's decision in *Jersey Mike's* that denied a motion to dismiss the AG's complaint, thus "preserving in full both the State's per se and quick look claims" under state law.[108]

The AG also argued that franchise agreements are not "vertical in all instances" because franchisors operate corporate-owned locations, and that where the franchise agreement restricts competition between a franchisee and a corporate location, "the agreement must properly be analyzed as a *per se* restraint."[109] Finally, the AG argued that no-poaching provisions should not be considered reasonably necessary to a separate and legitimate business transaction because no-poaching agreements are not even close to being uniformly used by franchisors—the AG represented that almost one-

third of the franchisors that it investigated "did not include and have never included any form of a no-poach provision in their franchise agreements," that there was a "paucity of evidence on the extent to which franchisors have enforced no-poach provisions," and that many franchisors voluntarily removed no-poaching provisions or stopped enforcing them as a result of the Washington AG's investigation.[110]

Shortly after the DOJ and Washington AG filed their respective statements in *Richmond*, the parties informed the court that they had settled the case (although terms were not disclosed).[111]

Conclusion

The DOJ and the FTC have condemned horizontal no-poaching agreements as per se violations that are worthy of criminal prosecution, while defendants have claimed that the same agreements should be judged under the rule of reason. Although vertical restraints (even in dual distribution) and ancillary restraints have long been judged under the rule of reason, class plaintiffs and the Washington State AG are now challenging no-poaching provisions in franchise agreements as per se or quick-look violations.

As a practical matter, what this means is that proponents of any kind of no-poaching agreement will have a much tougher time defending their agreement. Defendants with a naked and inarguably horizontal agreement may whittle away at the claims, contesting the breadth and duration of an agreement, and challenging the scope and certifiability of a class. On the other hand, defendants of a vertical agreement with horizontal characteristics will need to identify a basis on which to argue that the justification for a restraint outweighs any potential wage-depressing effects.

The times also demand continued—and more extensive—counseling of clients on the issues that no-poaching and wage-fixing agreements present. Here are some suggestions:

(1) *Get to know the HR department.* The relationship between the HR department and the legal department can vary from company to company. Even two years after the release of the Guidance, however, some HR departments might not fully appreciate the enterprise-level risk that naked no-poaching agreements pose. Company counsel should conduct in-house trainings for HR personnel.

(2) *Identify the hiring decision-makers.* Hiring decisions—and decisions to refrain from competing for employees—can happen outside the HR department. Make sure that you understand the company's hiring process and that you have not overlooked a risk area.

(3) *Remind or educate the decision-makers about the basics.* The DOJ's recent enforcement actions and statements of interest have made clear its position that no-poaching and wage-fixing agreements are plainly illegal per se. Some clients may need to be informed or reminded that the antitrust laws protect competition in employment markets.

(4) *Think leniency.* DOJ has not—as of this writing—prosecuted any naked no-poaching agreements criminally, but that day is coming. If you discover that your client is a party to such an agreement, consider an application under the DOJ's leniency policy (particularly if the agreement was not terminated before the Guidance's publication).

(5) *Review carefully any no-poaching provisions in joint venture agreements.* Collaborating with another company can certainly be both valuable and pro-competitive, but at the same time, it can enable the other company to come to know some of your company's valuable employees. A narrowly drawn no-poaching provision that applies only to employees directly involved in the collaborative activity may well be justified, but it warrants careful consideration of both the scope and the justification. If you conclude that the provision is appropriately tailored and can be justified, then consider advising the business personnel to document their justification in contemporaneous business records that are not privileged.

(6) *Think twice about no-poaching provisions in franchise agreements.* The Washington AG and the multistate AG group continue to challenge no-poaching provisions in franchise agreements. The recent DOJ statement of interest urges rule of reason treatment, but that does not mean that all courts will agree or that, even under the rule of reason, all franchise-related no-poaching provisions will be found reasonable. Nor does it mean that the Washington AG or the multistate AG group will back down. Consequently, consider carefully whether the value of a no-poaching provision exceeds the costs and risks of litigation.

(7) *Improve the reasonableness of no-poaching provisions in franchise agreements.* There are good economic reasons for no-poaching provisions in franchise agreements. The people who are burdened by these provisions, however, tend to be at the low end of the wage scale, and their inability to benefit from opportunities at other franchise locations without their current employer's consent is going to present a challenge for defending a no-poaching provision. If your client nevertheless thinks there is value in at least some form of a no-poaching provision, then consider ways of limiting the provision to be more reasonable. For example, limit the clause to a relatively short period (say, six months) from the date of hire, last promotion, or last training; remove any ban on moving from a part-time position at one franchisee to a full-time position at another (or moving from a line position at one franchisee to a managerial position at another); and perhaps even restrict the clause to more senior employees with a higher level of franchise-specific training. ■

[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (2016) [hereinafter Guidance], www.justice.gov/atr/file/903511/download. For discussion of this guidance, see Michael Lindsay, Jaime Stilson & Rebecca Bernhard, *Employers Beware: The DOJ and FTC Confirm that Naked Wage-Fixing and "No-Poaching" Agreements Are Per Se Antitrust Violations*, Antitrust Source (Dec. 2016), www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec16_lindsay_12_12f.authcheckdam.pdf [hereinafter Lindsay et al., *Employers Beware*].

[2] Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues*

in Labor Markets, ANTITRUST, Summer 2012, at 74–75; Lindsay et al., *Employers Beware*, *supra* note 1, at 6–8.

[3] Guidance, *supra* note 1, at 2, 4.

[4] Decision and Order, Your Therapy Source, LLC, FTC File No. 1710134 (Jul. 31, 2018), www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_agreement_7-31-18.pdf.

[5] United States v. Knorr-Bremse AG, No. 1:18-cv-00747-CKK, 2018 U.S. Dist. LEXIS 142125 (D.D.C. July 11, 2018). *See also* Press Release, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[6] Complaint, Your Therapy Source, LLC, FTC File No. 1710134 (July 31, 2018) [hereinafter *Your Therapy* Complaint], www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

[7] *Id.* ¶ 16.

[8] *Id.* ¶ 17.

[9] *Id.*

[10] *Id.*

[11] *Id.* ¶ 20.

[12] *Id.*

[13] *Id.* ¶ 22.

[14] *Id.* ¶¶ 24, 25.

[15] *Id.* ¶¶ 28, 29.

[16] Press Release, Fed. Trade Comm'n, Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area (July 31, 2018), www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they.

[17] *Id.*

[18] Statement of Comm'r Rohit Chopra, Fed. Trade Comm'n, In the Matter of Your Therapy Source, LLC, FTC File No. 1710134 (July 31, 2018).

[19] Complaint ¶¶ 14–15, Knorr-Bremse AG, 2018 U.S. Dist. LEXIS 142125 (Apr. 3, 2018) (No. 1) [hereinafter *Knorr Bremse* Complaint]. *See also id.* ¶ 30 (alleging that defendants are "direct competitors in certain labor markets for skilled rail industry employees, including project managers, engineers, sales executives, and corporate officers").

[20] *Id.* ¶ 20.

[21] *Id.* ¶ 24.

[22] *Id.* ¶ 28.

[23] *Id.* ¶ 31; *see also id.* ¶¶ 31, 32 (alleging anticompetitive effects in labor market and per se violation).

[24] Motion & Memorandum of the United States in Support of Entry of Final Judgment at 4–5, *Knorr-Bremse* (July 2, 2018) (No. 18).

[25] Final Judgment, *Knorr-Bremse* (July 11, 2018).

[26] Guidance, *supra* note 1, at 2, 4.

[27] Competitive Impact Statement at 11 nn.7–8 (citing speeches), *Knorr-Bremse*, 2018 U.S. Dist. LEXIS 142125 (Apr. 3, 2018) (No. 3).

[28] *Id.* at 10–11.

[29] *Id.* at 11.

[30] Barry Nigro, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Keynote Remarks at the ABA's Antitrust in Healthcare Conference: A Prescription for Competition (May 17, 2018) ("We are investigating other potential criminal antitrust violations in this industry, including market allocation agreements among healthcare providers and no-poach agreements restricting competition for employees. We believe it is important that we use our criminal enforcement authority to police these markets."), www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar; Deputy Assistant Attorney General Michael Murray Delivers Remarks at the Santa Clara University School of Law (Mar. 1, 2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-santa-clara-university. For an earlier speech, see Andrew C. Finch, Principal Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Trump Antitrust Policy After One Year (Jan. 23, 2018) ("For agreements that began after the date of that announcement, or that began before but continued after that announcement, the Division expects to pursue criminal charges. As our Assistant Attorney General explained last week, the Division expects to initiate multiple no-poach enforcement actions in the coming months."), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage.

[31] *Your Therapy* Complaint, *supra* note 6, ¶ 28; *Knorr-Bremse* Complaint, *supra* note 19, ¶ 3.

[32] Andrew Finch, Principal Deputy Assistant Att'y Gen., Remarks at the ABA Antitrust in Asia Conference (May 31, 2018), www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-remarks-aba-antitrust.

[33] *Id.*; *see also* Pallavi Guniganti, *No-Poach Provisions Justified in Joint Ventures, Lawyer Says*, GLOBAL COMPETITION REV. (May 29, 2018) (citing William Rinner, counsel to Antitrust Division chief Makan Delrahim, who contrasted "a 'naked' no-poach agreement in which companies agree not to hire each other's workers and do so covertly without informing the employees" with "a 'vertical no-poach' in which the employer agrees to a non-compete in exchange for the employer investing more in the employee's human capital").

[34] Statement of Interest of the United States at 4, *In re* Railway Industry Employees No-Poach Antitrust Litig., Civil No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019) (No. 158) [hereinafter DOJ *Railway* Statement of Interest].

[35] Finch, *supra* note 32.

[36] Second Amended Complaint ¶ 55, Seaman v. Duke Univ., No. 1:15-cv-00462-CCE-JLW (M.D.N.C. Oct. 4, 2017) (No. 109). The case was filed in June 2015, so the agreement began (and, one would hope, ended) before the DOJ's October 2016 announcement of potential criminal prosecutions.

[37] *Id.* ¶ 57.

[38] *Id.* ¶ 59.

[39] *Id.*

[40] Complaint at ¶ 14, *Seaman*, No. 1:15-cv-462 (M.D.N.C. June 9, 2015).

[41] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) ("[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy."); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 37–39 (8th ed. 2017) (discussing "independent personal stake" exception). As for the university and the health system, Duke appears to have gone in the opposite direction, arguing that the health system was a separate person, but not a party to any alleged conspiracy. Duke University & Duke University Health System, Inc.'s Omnibus Motion for Summary Judgment & Application of the Rule of Reason at 2–3, *Seaman*, No. 1:15-cv-00462-CCE-JLW (M.D.N.C. Dec. 21, 2018) (No. 285) (footnote omitted) ("DUHS is separate from the School of Medicine, and compensation of Duke medical faculty is determined by the relevant department at the School of Medicine with respect to academic services. DUHS also does not set or approve compensation paid by the Private Diagnostic Clinic to any physicians for clinical services. DUHS also does not make decisions regarding the recruitment of physicians as members of the faculty of the School of Medicine. Plaintiff has not offered any evidence that supports her claim that DUHS entered into a conspiracy that caused her or the class injury.").

[42] First Amended Complaint, *Seaman*, No. 1:15-cv-00462-CCE-JLW (M.D.N.C. Aug. 12, 2015) (No. 15); Second Amended Complaint, *supra* note 36 (naming UNC and UNC Health System as defendants). The original complaint identified UNC and its health system as unnamed co-conspirators.

[43] Order at 2, *Seaman* (M.D.N.C. Sep. 29, 2017) (No. 108) (approving settlement class consisting of all natural persons employed at Duke University, DUHS, UNC at Chapel Hill, and UNC Health Care System); Order Granting Final Approval of Class Action Settlement, *Seaman* (M.D.N.C. Jan. 4, 2018) (No. 185) (final approval of UNC class settlement).

[44] Memorandum Opinion & Order, *Seaman*, No. 1:15-CV-462, 2018 U.S. Dist. LEXIS 16136, at *30–31 (Feb. 1, 2018) (limiting class to natural persons employed "as a faculty member with an academic appointment at the Duke or UNC Schools of Medicine").

[45] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (requiring antitrust complaint to include "allegations plausibly suggesting (not merely consistent with) agreement").

[46] Duke's Rule 12 brief devoted approximately three pages to the issue, but not to argue that *no* conspiracy could plausibly be alleged, only that the conspiracy actually alleged was broader than the factual allegations supported. The court denied the motion. Order, *Seaman*, No. 1:15-CV-462 (M.D.N.C. Feb. 12, 2016) (No. 39).

[47] Statement of Interest of the United States of America, *Seaman*, No. 1:15-CV-462 (M.D.N.C. Mar. 7, 2019) (No. 325). The Statement of Interest also discussed the "state action" issues raised by co-conspirator's UNC's state actor status.

[48] *Id.* at 25.

[49] *Id.* at 28–29. The DOJ also noted that Duke's nonprofit status was no defense and that not every agreement between universities was judged under the rule of reason. *Id.* at 27–28.

[50] Mandeville Island Farms v. Am. Crystal Sugar, 334 U.S. 219, 235 (1948) ("It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers." (footnotes omitted)).

[51] Transfer Order, *In re Railway Industry Employees No-Poach Antitrust Litig.*, No. 2:18-mc-00798 (W.D. Pa. Aug. 13, 2018) (No.1).

[52] Consolidated Class Action Complaint ¶ 79, *Railway Employees No-Poach Antitrust Litig.* (W.D. Pa. Oct. 12, 2018) (No. 88).

[53] The defendants have also argued that the complaint should be dismissed insofar as it alleges a single overarching conspiracy (as opposed to separate bilateral conspiracies) and that the class allegations should be stricken as facially inadequate (because the complaint alleges an overly broad class that includes persons who could not possibly have been injured by the alleged wrongdoing). Defendants' Joint Motion to Dismiss the Consolidated Class Action Complaint, or, in the Alternative, to Strike the Class Allegations, *Railway Employees No-Poach Antitrust Litig.* (W.D. Pa. Nov. 27, 2018) (No. 124).

[54] Plaintiffs' Response to Defendants' Joint Motion to Dismiss the Consolidated Class Action Complaint, or, in the Alternative, to Strike the Class Allegations, *Railway Employees No-Poach Antitrust Litig.* (W.D. Pa. Jan. 11, 2019) (No. 152).

[55] Leah Nylen, *Knorr*, *Wabtec No-Poach Class Action Likely to Move Forward as Per Se, Judge Says*, MLex (Feb. 25, 2019) (quoting Judge Conti at beginning of oral argument) ("At this stage of this proceeding, which is just at the motion to dismiss, my initial sense would be that [the complaint] would be sufficient to pass muster as far as per se analysis.").

[56] Eichorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001).

[57] *Id.* at 144. Before closing on its sale of Paradyne to Texas Pacific, Lucent agreed that it "would not hire, rehire, retain, or solicit the services of any Paradyne employee or consultant whose annual income exceeded $50,000." *After* the closing—"[o]nce the deal was closed"—Lucent and Texas Pacific Group entered a post-closing agreement in which Lucent agreed that it "would not seek to hire, solicit or rehire any Paradyne employee or consultant whose compensation exceeded $50,000." *Id.* at 137. The duration of this agreement was "245 days (8 months) following the sale and the expiration" of the previous agreement. *Id.*

[58] 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (quoting 12 Phillip E. Areeda et al., Antitrust Law ¶ 2013b, at 143 (3d ed. 2007)).

[59] *Id.*

[60] *In re* Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175 (N.D. Cal. 2015). Defendants had not contested the per se rule's application to a "no solicitation" agreement. *Id.* at 1211.

[61] DOJ *Railway* Statement of Interest, *supra* note 34, at 4, 8.

[62] *Id.* at 8–10 (citing *eBay*, 968 F. Supp. 2d 1030; *In re* High-Tech Employees Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012)).

[63] Order Granting Motions to Dismiss Second Amended Consolidated Class Action Complaint Without Leave to Amend; & Dismissing Action at 6, Frost v. LG Elecs. Inc., No. 16-cv-05206 (N.D. Cal. July 9, 2018) (No. 206) (quoting Second Amended Complaint ¶¶ 98–99, Frost v. LG Elecs. (N.D. Cal. Dec. 12, 2017) (No. 161).

[64] *Id.* at 7, 9.

[65] Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 U.S. Dist. LEXIS 105260, at *5 (N.D. Ill. June 25, 2018) (alteration in original).

[66] *See* Carl's Jr. Restaurants LLC Assurance of Discontinuance ¶ 2.2, *In re:* Franchise No Poaching Provisions (King Cty. Super. Ct.) (citing different provisions), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Carls%20Jr%20FINAL%20AOD.PDF.

[67] Auntie Anne's Franchisor SPV Assurance of Discontinuance ¶ 2.2, *In re:* Franchise No Poaching Provisions (King Cty. Super. Ct. July 12, 2018) (citing different provisions), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/20180712_AuntieAnnes_SignedFiled_AOD.pdf.

[68] Anytime Fitness LLC Assurance of Discontinuance ¶ 2.2, *In re:* Franchise No Poaching Provisions (King Cty. Super. Ct.) (citing different provisions), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/20181003_AnytimeFitness_AOD_Signed.pdf.

[69] Williams v. I.B. Fischer Nevada, 999 F.2d 445, 447–48 (9th Cir. 1993), *aff'g* 794 F. Supp. 1026 (D. Nev. 1992). For further discussion, see Lindsay et al., *Employers Beware*, *supra* note 1, at 10–11. At least one district court in the Ninth Circuit has rejected a *Copperweld* defense of franchisors against no-poaching antitrust claims on the basis of *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010). *See* Order Denying Defendants' Motion to Dismiss at 6, Yi v. SK Bakeries, LLC, No. 18-cv-05627-RJB (W.D. Wash. Nov. 13, 2018) (No. 33) ("Even if Cinnabon and all its franchisees could be considered a single firm . . . '[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself'—here competing for labor with Cinnabon and the other franchisees.") (alteration in original) (quoting *American Needle*, 560 U.S. at 200).

[70] For a more detailed discussion, see Josh M. Piper & Erik Ruda, *Employee "No-Poaching" Clauses in Franchise Agreements: An Assessment in Light of Recent Developments*, 38 Franchise L.J. 185 (2018).

[71] *See* Press Release, Wash. State, Office of the Attorney Gen., AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018); Press Release, Wash. State, Office of the Attorney Gen., AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at 50 Corporate Chains (Jan. 14, 2019) [hereinafter Washington AG, 50 Corporate Chains].

[72] Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. Times, Sept. 27, 2017.

[73] Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 21 (IZA Inst. of Labor Econ., Discussion Paper No. 11672, 2018), ftp.iza.org/dp11672.pdf.

[74] Wash. Rev. Code § 19.86.100 (2018). The statute does not require filing of an action other than the assurance of discontinuance itself. The assurance is not an injunction, but "proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of this chapter." *Id.* Other states have similar provisions. *See, e.g.*, Minn. Stat. § 8.31 subd. 2(b) (2018).

[75] *See* Washington AG, 50 Corporate Chains, *supra* note 71 (noting that Carraba's Italian Grill had no Washington franchisees).

[76] Press Release, Wash. State, Office of the Att'y Gen., AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at Seven More Corporate Chains (Feb. 15, 2019).

[77] *See* Press Release, Wash. State, Office of the Att'y Gen., AG Ferguson Announces Major Milestones in Initiative to Eliminate No-Poach Clauses Nationwide, Files Lawsuit Against Jersey Mike's (Oct. 15, 2018).

[78] Complaint for Civil Penalties, Injunction, & Other Relief Under the Washington State Consumer Protection Act, RCW 19.86, State v. Jersey Mike's Franchise Sys., Inc., No. 18-2-25822-7-SEA (King Cty. Super. Ct. Oct. 18, 2018) https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/20181015_Complaint_Filed_Conformed.pdf.

[79] *Id.* ¶¶ 65–66.

[80] *Id.* ¶¶ 63–64.

[81] Order Denying Defendant Jersey Mike's Franchise Systems, Inc.'s Motion to Dismiss, State v. Jersey Mike's Franchise Sys. (King Cty. Super. Ct. Jan. 25, 2019).

[82] Zack Huffman, *AGs Take Aim at No-Poach Rules in Fast Food*, Courthouse News, July 11, 2018. The states are California, District of Columbia, Illinois,

Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, and Rhode Island.

[83] The redacted letter is available at www.courthousenews.com/wp-content/uploads/2018/07/NoPoach.pdf.

[84] Press Release, Calif. Dep't of Justice, Attorney General Becerra Announces Multistate Settlements Targeting "No-Poach" Policies that Harm Workers (Mar. 12, 2019).

[85] *See, e.g.*, Settlement Agreement Between the States of Massachusetts, California, Illinois, Iowa, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, and Pennsylvania and Arby's Restaurant Group, Inc. ¶ 15.

[86] *See, e.g.*, *id.* ¶¶ 25(a), 25(b).

[87] Max Fillion & Joshua Sisco, Franchise No-Poach Agreements Likely per se Antitrust Violations in California, State Official Says, MLEX (Mar. 28, 2019).

[88] Bautista v. Carl Karcher Enters. LLC, No. BC649777 (Super. Ct. L.A. 2017); *Deslandes*, No. 17 CV4857 (N.D. Ill. 2017); Ion v. Pizza Hut, LLC, 17-CV-00788-ALM-KPJ (E.D. Tex. 2017); Butler v. Jimmy John's Franchise, LLC, No. 18-cv-00133-MJR-RJD (S.D. Ill. 2018).

[89] 2018 U.S. Dist. LEXIS 105260.

[90] *Id.* at *18. The *Knorr-Wabtec* plaintiffs cited *Deslandes* for this proposition.

[91] *Id.* at *19, 20.

[92] *Id.* at *20.

[93] *Id.* at *22–23.

[94] 331 F. Supp. 3d. 786 (S.D. Ill. 2018).

[95] *Id.* at 797.

[96] *Id.* at 796.

[97] *Id.* at 796–97. On March 14, 2019, Jimmy John's filed a motion to dismiss plaintiff's first amended complaint. Conrad v. Jimmy John's Franchise LLC, No. 3:18-cv-00133 (S. D. Ill. Mar. 14, 2019) (No. 82). The motion is based in part on the Statement of Interest that the DOJ filed in another franchise case. This Statement of Interest is discussed in the next section of this article.

[98] Statement of Interest of the United States of America, Richmond v. Bergey Pullman Inc., No. 2:18-cv-00246 (E.D. Wash. Mar. 7, 2019) (No. 39) [hereinafter DOJ Franchise Statement]. The statement was simultaneously filed in two other actions: Stigar v. Dough Dough Inc., No. 2:18-cv-00244 (E.D. Wash. Mar. 7, 2019) (involving the Auntie Anne's franchise system) and Harris v. CJ Star, LLC, No. 2:18-cv-00247 (E.D. Wash. Mar. 7, 2019) (involving the Carl's Jr. franchise system).

[99] DOJ Franchise Statement, *supra* note 98, at 8.

[100] *Id.* at 13.

[101] *Id.* at 16.

[102] *Id.* at 17.

[103] *Id.*

[104] Amicus Curiae Brief by the Attorney General of Washington, Richmond v. Bergey Pullman Inc., No. 2:18-cv-00246 (E.D. Wash. Mar. 12, 2019) (No. 47) [hereinafter Washington AG *Richmond* Amicus].

[105] Motion for Expedited Leave to File Amicus Curiae Brief by the Attorney General of Washington at 2–3, Richmond v. Bergey Pullman Inc., No. 2:18-cv-00246 (E.D. Wash. Mar. 1, 2019) (No. 38) [hereinafter Washington AG Bergey Motion].

[106] Washington AG *Richmond* Amicus, *supra* note 104, at 4 (quoting WASH. REV. CODE § 19.86.920 (2018)).

[107] *Id.* at 4 (citing Blewett v. Abbott Labs, 86 Wash. App. 782, 787, 938 P.2d 842 (1997); internal brackets, quotation marks, and ellipses removed).

[108] *Id.* at 5. The AG also identified another difference between federal and Washington state law: the AG's ability under state law to bring *parens patriae* actions for indirect purchasers without being subject to a statute of limitations. *Id.* at 4–5.

[109] *Id.* at 6–7.

[110] *Id.* at 7–8.

[111] Order Closing File, Richmond v. Bergey Pullman Inc., No. 2:18-cv-00246 (E.D. Wash. Mar. 18, 2019) (No. 49). Similar orders were entered in Stigar and Harris.