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# DOJ Antitrust Division Makes Filings in Civil Cases to Influence Development of Antitrust "No Poach" Law

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In October 2016, the Antitrust Division of the Department of Justice (the "DOJ" or "Antitrust Division") and the Federal Trade Commission published their *Antitrust Guidance for Human Resource Professionals*,[1] focusing in significant part on so-called "no poach" agreements between employers. The Antitrust Division has repeatedly enforced the antitrust laws against no poach agreements between competitors.[2]

As expected, this government enforcement policy and activity have spawned a series of private damage actions focusing upon alleged no poach agreements. Such litigation has included follow-on cases to the government enforcement actions, while others have not involved federal enforcement.

The Antitrust Division has sought to influence the development of the law in this area by filing Statements of Interest in private litigation. This Alert highlights two filings the DOJ made last week in cases pending in federal district courts in North Carolina and Washington.


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## Franchise No Poach Activity

The recent DOJ enforcement and private litigation activity regarding no poach agreements has drawn attention to a common feature of many franchise agreements in which franchisees agree not to hire employees from other franchisees. The Antitrust Division has not brought cases against this type of agreement to date, but private actions and cases brought by State Attorney Generals have been filed. Last week, the Antitrust Division filed a Statement of Interest in one set of pending class actions.[3]

In its statement, the Antitrust Division drew a sharp distinction between "no poach" agreements directly between competing employers and those embedded in franchise agreements. With respect to horizontal agreements between competing employers, the DOJ maintained that *per se* illegal treatment is appropriate.

In contrast, in commercial franchise relationships, the government urged the courts to recognize that this is a vertical restraint. As such, like all vertical restraints under current law, the no poach restraint should be analyzed under the rule of reason. Even if the agreements arose in an alleged "hub-and-spoke" conspiracy, where the no poach provision arose because of the franchisees' desire, the Antitrust Division asserted that they should still be subject to the ancillary-restraints doctrine; the government reasoned that the typical franchise relationship itself is a legitimate business collaboration in which the franchisees operate under the same brand. No poach agreements would qualify as ancillary restraints if they are reasonably necessary to the legitimate franchise collaboration and not overbroad. Finally, the Antitrust Division urged that the issue warrants a full rule of reason analysis, not just a so-called "quick look."

Interestingly, the State of Washington, which has been active in this area, has articulated the position that the franchise no poach agreements should be considered *per se* illegal under the state's antitrust law.

The Antitrust Division's position is consistent with the general state of the law on vertical restraints; it may also explain why the DOJ has stayed out of challenging no poach agreements in the franchise context. The rule of reason does not mean, however, that the provision will be upheld in all contexts. No court has yet ruled on the rationale for the franchise restriction —usually articulated as avoiding bidding wars within the franchise family. Franchisors will have to defend against allegations that the restriction is overbroad. The restriction usually prohibits the hiring of any employees, and the rationale may fray when it reaches beyond executives and managers to cooks and dishwashers.

## Duke / UNC No Poach Class Action

The second Antitrust Division filing last week was in the class action damage action challenging an alleged no poach agreement between the Duke University and the University of North Carolina Schools of Medicine.[4] The gravamen of the case is that Duke and UNC Medical Schools had agreed that lateral moves of faculty between Duke and UNC are not permitted because of a "guideline" agreed to by the deans of the schools. UNC settled, but the case is proceeding against Duke.

In the pleading that provoked the Antitrust Division to make its filing, Duke had argued that the UNC School of Medicine was exempt from the antitrust laws under either the *Parker* or *Midcal* doctrines. If so, Duke cannot be held liable either. In the alternative, Duke argues that the matter requires a full rule of reason treatment.

In its filing, the Antitrust Division disagreed. Calling the *Parker* state action defense limited, the government claimed that it applies only "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" State agencies are not *ipso facto* exempt under *Parker;* the UNC Medical School does not have sovereign powers for purposes of *Parker.* The Antitrust Division also claimed that the Medical School acted purely as a labor market participant, not a regulator. As a consequence, UNC cannot meet the test in *Midcal* to obtain an exemption. North Carolina has not clearly articulated a policy to displace competition in medical faculty hiring; moreover, active supervision by the state is required by the doctrine, but is absent here.

So, according to the Antitrust Division, *per se* condemnation would be appropriate ***unless*** Duke and UNC could establish the agreement is ancillary to a separate, legitimate venture between the competitors. The Antitrust Division does point out that, to date, "Duke has not identified any specific collaboration between it and UNCSM to which the no-poach agreement would have been ancillary."

This remains an important space to watch. The Antitrust Division's view, although influential, is not binding on the court. One district court last year did hold that the *per se* rule was inapplicable to the no poach clause in McDonald's franchise agreements because the hiring restriction was an ancillary provision in the franchise agreement.[5]

**Endnotes**

1 U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016),https://www.justice.gov/atr/file/903511/download; Bruce D. Sokler, *FTC and DOJ Issue Antitrust Guidance for Human Resource Professionals*, Oct. 27, 2016, available here.

2 *United States v. Knorr-Bremse AG,* No. 18-cv-747, Final Judgment, Doc. 19 (D.D.C. July 11, 2018); *United States v. eBay, Inc.* No. 12-cv-5869, Final Judgement, Doc. 66 (N.D. Cal. Sept 2, 2014); *United States v. Adobe Sys., Inc.* No. 1:10-cv-1629, Final Judgment, Doc. 17 (D.D.C. Mar. 18, 2011); *United States v. Lucasfilm Ltd.*, No. 1:10-cv-2220, Doc. 6-1 (D.D.C. May 9, 2011).

3 *Stigar v. Dough Dough, Inc. et al*, No. 2:18-cv-00244-SAB (E.D. Wa.).

4 *Seaman v. Duke University*, Civil No. 1:15-cv-462, (M.D. N.C); Bruce D. Sokler, *Antitrust Attacks on "No-Poach" Agreements Between Employers Accelerating*, Feb. 12, 2018, available here.

5 *Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955 (N.D. Ill. June 25, 2018).