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BLOG

Class Action Claims Rejected for Plaintiffs in Two Franchise No-Poach Cases

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In the fast-developing area of no-poach antitrust law, two courts have recently denied class certification bids for former Jimmy John's and McDonald's employees in their respective no-poach suits alleging that the chains' franchise locations were prohibited from recruiting one another's workers. Plaintiffs in both actions were seeking to certify a nationwide class of former employees, but the judges found that no single nationwide market existed for such fast-food labor, and individual class-member differences were fatal to the class claims.

Background on No-Poach and Franchise Claims

No-poach and wage-fixing agreements have become an increasing focus of both government enforcement and private litigation in the United States. In 2016, the U.S. Department of Justice (DOJ) and Federal Trade Commission jointly issued the Antitrust Guidance for Human Resource Professionals (Guidance), which alerted employers to the antitrust risks associated with wage-fixing and no-poach agreements. The Guidance specifically warned competing employers against entering into anticompetitive agreements that would limit or fix individual-firm decision-making with regard to wages, salaries, or benefits, as well as terms of employment or job opportunities. Recently, the DOJ moved beyond civil litigation in this area and secured its first criminal indictments for wage-fixing and non-solicitation agreements. (See here for our prior blog post on the DOJ's first criminal wage-fixing indictment and here for our blog post on the challenges facing the constitutionality of such indictments). President Biden's July 2021 Executive Order on competition reinforced that labor market antitrust issues will remain a high priority for the foreseeable future. (See our prior blog post and podcast on these issues).

The franchise subset of no-poach cases further developed over 2017 and 2018, as a coalition of state attorneys general investigated and began to challenge no-poach provisions in franchise agreements between owners of franchises and corporate headquarters. Such agreements typically prevented employees from moving among stores in the same corporate chain. Private plaintiffs similarly filed dozens of class actions across the fast-food industry, often as a follow-on to enforcer investigations. In response to the increasing scrutiny, many of the national franchise chains announced they would no longer enforce their no-poach agreements and entered into settlements to avoid enforcement actions. Despite the high volume of cases, disagreements continue to exist regarding the correct legal standard of review that should apply to such franchise cases. Some state attorneys general, such as in Washington, argue that franchisees and franchisors are horizontal competitors and the agreements are per se illegal. Under the

Trump administration, the DOJ had instead taken the position that the rule-of-reason balancing test should apply, arguing that it is a vertical relationship and no-poach agreements can offer procompetitive benefits. It is unclear whether the Biden administration will take a consistent position or back a different standard of review. (See here for our prior blog post on the legal standards applied in the franchise no-poach context).

Recent Jimmy John's and McDonald's Decisions

On July 23, 2021, in a now-unsealed decision, the Southern District of Illinois denied class certification in the action brought against Jimmy John's. *Conrad v. Jimmy John's Franchise, LLC*, No. 18-CV-00133, Dkt. No. 240 (S.D. Ill. July 23, 2021). According to the allegations, the Jimmy John's franchise agreement contained a no-poach provision that, in effect, prohibited employees from switching between rival locations. Such provisions allegedly stifled competition for labor in violation of Section 1 of the Sherman Act, effectively suppressing wages and limiting worker mobility, leading to class-wide injury and damages. The former Jimmy John's employee who brought the case, Donald Conrad, was denied his request to represent an estimated 615,000 current and former employees who worked at either Jimmy John's franchises or corporate stores during a four-year period. The class that Conrad sought to certify included all employees at Jimmy John's-branded restaurants, including managers who were in charge of enforcing the no-poach provisions and nonsupervisory employees, such as in-shoppers and drivers.

A few days later, on July 28, 2021, in a decision that aligns with that of the *Jimmy John's* court, the Northern District of Illinois denied class certification in litigation against McDonald's. *Deslandes v. McDonald's USA, LLC*, No. 17-CV-4857, Dkt. No. 372 (N.D. Ill. July 28, 2021). Plaintiffs alleged that the franchise agreement, from at least 1973 to 2017, had contained a no-poach provision that violated the Sherman Act and suppressed their wages. Former workers Leinani Deslandes and Stephanie Turner sought to represent a nationwide class of former McDonald's employees during a five-year period. In March 2017—just months before the private *Deslandes* class action was filed—McDonald's announced it would discontinue enforcing the same no-poach provision at issue and, in July 2018, entered an agreement with the Washington State Attorney General that the provision would no longer be included in future agreements or enforced in existing agreements.

Notably, in denying class certification, both courts concluded that a rule-of-reason balancing test should apply to the cases, relying upon the June 2021 Supreme Court decision in *NCAA v. Alston* (in which Winston successfully represented the college athletes). The correct standard of review to apply in no-poach cases, and within the franchise context in particular, is a still-debated topic, and indeed the plaintiffs here took varying positions. The plaintiff in *Jimmy John's* had alleged that the no-poach provisions were "naked restraints" on competition, or a per se violation. In *McDonald's*, plaintiffs relied on earlier language from the court to argue that a "quick look" analysis, which is a short form of the rule-of-reason analysis, should apply. However, in both cases, the courts rejected the plaintiffs' proposed standards and held that the Supreme Court's reasoning in *Alston* meant that the rule of reason would be the appropriate standard given defendants' evidence of procompetitive benefits. *Jimmy John's* at 26; *McDonald's* at 11. Of the three potential legal standards at issue, the rule of reason requires the most extensive factual inquiry, including the need for the ultimate finder of fact to balance the anticompetitive effects of the conduct (*e.g.*, decreased intra-franchise labor competition) with the procompetitive benefits of that conduct (*e.g.*, increased incentive to invest in training and inter-franchise competition) with a relevant antitrust market. Thus, at the class certification stage, applying the rule of reason raises the bar for plaintiffs because it increases the number of factual issues that plaintiffs need to show are capable of resolution on a class-wide basis. Without reaching the merits, the courts in *Jimmy John's* and *McDonald's* both considered evidence of procompetitive justifications and the relevant markets.

Both district courts ultimately found that plaintiffs failed to meet the predominance requirement of Fed. R. Civ. P. 23(b)(3) and that common issues could not be determined on a class-wide basis. Due to their failure to adequately plead predominance, the plaintiffs were denied their requests to represent nationwide classes. In *McDonald's*, the court extensively discussed the relevant market, noting that by virtue of their labor, the "relevant market for each plaintiff's labor is a small, geographic area" and that "there are likely hundreds or thousands of relevant markets among the class members." *McDonalds*, at 21-23. Thus, those localized issues predominate and do not allow for determination of the claims on a nationwide basis, as the plaintiffs sought to do.

In *Jimmy John's*, the court instead focused its predominance analysis on differences in the alleged no-poach agreements and how they were applied by different franchisees, as well as conflicting roles of employees in the putative class, noting that managers were often responsible for making hiring decisions of franchisee workers. *Jimmy John's*, at 22-24. Further, both courts agreed the defendants had offered persuasive evidence that the no-poach agreements had procompetitive justifications in the franchise context, namely that they encouraged the chains to invest in training their employees and promoted cooperation between franchisees. *Jimmy John's*, at 27-28; *McDonald's*, at 12-16.

Separately, the individual named plaintiff in the Jimmy John's case, Conrad, presented unique issues that contributed to the court's denial of class certification. *Jimmy John's*, at 13-14. The plaintiff failed to establish that he had been denied the opportunity to change employment locations because of any no-poach agreement, and actually conceded that such provisions were "irrelevant" to him. As such, Conrad's claims were atypical of those of the putative class members, and simply being a former employee of Jimmy John's was insufficient.

Conclusion

The denial of class certification significantly decreases the potential exposure for both Jimmy John's and McDonald's and poses serious questions for whether other no-poach class actions (even outside of the franchise context) will be allowed to proceed under a theory that a nationwide class is appropriate for such claims. It remains to be seen whether these plaintiffs will seek to appeal (both cases would go to the Seventh Circuit) or refile new motions for class certification attempting to narrow their classes and/or correct deficiencies identified by the courts. As it stands, these decisions significantly raise the bar on attempts to bring nationwide class claims for alleged labor market antitrust violations, particularly in the many sectors where workers are drawn primarily from local or regional labor pools.

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