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Federal Court Denies DOJ's Request to File Statement of Interest in Pending McDonald's No-Poach Class Action

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The Biden administration's Department of Justice, Antitrust Division (DOJ) continues a practice largely begun under the Trump administration of intervening in private litigation and requesting permission to file statements of interest. Courts have typically granted the requests, perceiving the DOJ's viewpoint to be helpful to the resolution of the pending matter before the court. Recently, a DOJ request garnered significant attention for what it portends about the Biden administration's changing views of traditional antitrust principles and because the court denied the request.

Deslandes v. McDonalds

The DOJ's efforts to express its views were thwarted in a franchise no-poach antitrust class action in federal court in Chicago. In *Deslandes v. McDonald's USA LLC, et al*., McDonald's moved for judgment on the pleadings and/or for summary judgment on the plaintiffs' Sherman Act Section 1 claims. In its motion, McDonald's argued it was entitled to judgment on the pleadings because the plaintiffs had not pled a rule of reason claim, and in denying class certification, the court had previously held that it would not use the less rigorous, quick-look standard. McDonald's argued the plaintiffs could not establish that its employee no-poach agreements with its franchisees constituted a horizontal conspiracy subject to *per se* liability because the vertical agreements between a hub and its spokes "has no rim."[1]

DOJ's Prior Position

In its motion for summary judgment, McDonald's cited the DOJ's March 2019 Statement of Interest in *Stigar v. Dough Dough Inc*, No. 18 C 00244 (E.D. Wash. Mar. 7, 2019), another franchise no-poach antitrust class action, for the proposition that parallel signing of franchise agreements even with "'knowledge of others' agreement does not establish a hub and spoke conspiracy."[2]

In *Stigar*, the plaintiffs — former employees of franchisees of Auntie Anne's, Arby's, and Carl's Jr. — alleged that the no-poach provisions contained within the franchise agreements for all three of the franchises violated Section 1 of the Sherman Act by depressing employee wages and restricting competition within the labor market. The plaintiffs alleged that hub-and-spoke horizontal conspiracies existed among the franchisees and franchisors, and therefore, the *per se* rule applied.[3] In its *Stigar* Statement of Interest, the DOJ's position substantially aligned with the franchisors' argument that the plaintiffs had not alleged sufficient facts to plead a *per se* illegal hub-and-spoke conspiracy because there were no horizontal agreements among the franchisees. The DOJ argued that the

rule of reason governed most franchise agreement provisions because they are vertical agreements.[4] Further, the DOJ rejected the plaintiffs' suggestion that the less rigorous quick-look analysis is applicable because, in its view, the court should weigh the procompetitive benefits of the no-poach restraint against its anticompetitive effects. The DOJ also stated "allegations of parallel conduct alone do not suffice to satisfy the requirements" of a hub-and-spoke conspiracy and that "the mere fact that one franchisee may enforce no-hire provisions of a vertical franchise agreement against another franchisee does not create an actual agreement among competing franchisees" for purposes of Section 1 liability.[5] The parties in *Stigar* ultimately settled their dispute before the court ruled on the motion to dismiss.

Court Denies DOJ's Request

On February 17, after the briefing closed on McDonald's motion, the DOJ sought permission to file its Statement of Interest to set forth the government's position on "the implications of the Supreme Court's decision in *NCAA v. Alston*, 141 U.S. 2141 (2021)." The DOJ also contended that its Statement of Interest in *Stigar* "… does not fully and accurately reflect the United States' current views." McDonald's opposed the DOJ's request, mostly to avoid further delay in the case.

On March 3, the court denied the DOJ's request based on separation of powers concerns and to avoid further delay. The court's denial prevented the DOJ from publicly expressing its "current" views on the standards that should be applied to a franchisor's no-poach agreements and leaves the new position of the DOJ subject to much speculation.

DOJ's Possible New Position

Given the court's refusal of the DOJ's request, it is impossible to know exactly what the "United States' current views" on Section 1 conspiracies in franchising are. But it is not difficult to predict that the DOJ intends to advocate a broader view of antitrust liability on the buy-side markets consistent with the Biden administration policy priority of protecting employee wages.[6] As such, the DOJ could try to push the bounds of traditional antitrust principles by arguing that even vertical arrangements like franchise relationships qualify as horizontal conspiracies worthy of *per se* scrutiny subject to an ancillary restraint defense. This is a sea change from the views expressed in *Stigar*, but it is consistent with what the DOJ argued in a statement of interest filed in Nevada state court on February 25. In that statement, the DOJ contended that the state court could treat non-competes found in separate agreements between employees and an employer, traditionally viewed as vertical arrangements, as horizontal and subject to *per se* illegality.

In *Beck v. Pickert Group*, the DOJ argued that the two-year, post-employment agreement non-competes at issue could be considered to be horizontal territorial allocations because the employer and employees were competitors when they signed their respective employment agreements. If the restraint was a horizontal territorial allocation, the burden would shift to the employer to assert the ancillary restraint defense by showing the restraint is "(1) 'subordinate and collateral to a separate, legitimate transaction,' and (2) 'reasonably necessary' to achieving that transactions' pro-competitive purpose." In *Beck* the DOJ also seems to suggest that courts should consider using the quick look, or truncated rule-of-reason analysis more broadly.

Analogizing the non-competes to franchise no-poach agreements, could the DOJ have suggested in its statement

of interest that separate agreements between the franchisor and franchisees not to poach each other's employees are horizontal territorial allocations subject to the *per se* rule if, at the time they signed the agreements, the franchisor and franchisee competed with each other for employees? Even if it was to articulate such a position, significant factual distinctions exist between the employee anesthesiologists in *Beck* and the franchisees in *Deslandes.* For one, the employee anesthesiologists were a significant number of competitors in the relevant interbrand geographic market. That stands in contrast to the McDonald's franchisees in *Deslandes* that may compete with the franchisor, if at all, only on the buy-side labor market or the intrabrand sell-side market.

Conclusion

Because the court did not allow the DOJ's statement of interest to be filed, it is impossible to know what would have been in the filing. However, it is clear the DOJ wanted to deviate from its expressed position in *Stigar*. Based on the Biden administration's priorities, we can surmise the new statement may have taken a harder line on no-poach agreements in traditionally vertical arrangements like franchise systems. Businesses should continue to stay up to date on these issues as no-poach provisions continue to be a hot button topic in 2022. Members of the Troutman Pepper team are available to advise further on these issues as they develop.

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[1] *Deslandes v. McDonald's USA LLC*, No. 17 C 4857, 2021 WL 6552122, at 6 (N.D. Ill. Oct. 26, 2021).

[2] *Id.* at 9.

[3] *Joseph Stigar, et al. v. Dough Dough, Inc., et al.*, No. 18 C 00244 (E.D. Wash. Aug. 3, 2018).

[4] *Joseph Stigar, et al. v. Dough Dough, Inc., et al.,* No. 18 C 00244, at 11 (E.D. Wash. Mar. 7, 2019).

[5] *Id.* at 14.

[6] *See*, *e.g.,* Executive Order on Promoting Competition in the American Economy, July 9, 2021.

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