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Ninth Circuit Upholds Unlimited Nonsolicitation Provision

WRITTEN BY

A. Christopher Young | Jan P. Levine | Robyn R. English-Mezzino

Over the past five years, the Department of Justice (DOJ) and civil litigants have rigorously challenged the lawfulness of buy-side restraints of trade, including noncompetes, no-poach, and nonsolicitation agreements, under antitrust laws. Uncertainty, however, still remains as to how the courts should scrutinize the alleged restraints, especially after the DOJ and Federal Trade Commission (FTC) issued guidance in 2016 about *per se* treatment applying to naked restraints like wage fixing and no-poach agreements. This uncertainty is only growing now that the Biden administration plans to reconsider many of the policy underpinnings of current antitrust law. But in a step toward clarity, the Ninth Circuit, relying on traditional antitrust principles — the rule of reason and the ancillary restraints rule — recently found an unlimited nonsolicitation agreement between horizontal competitors to be both ancillary to a procompetitive agreement and lawful under the rule of reason.

Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., decided on August 19, involved health care staffing agencies AMN Health, Inc. (AMN) and Aya Healthcare Services, Inc. (Aya) that place travel nurses at different temporary assignments.[1] AMN and Aya entered into a contract in 2010 to provide travel nursing services to hospitals and other health care facilities, containing a nonsolicitation provision that precluded Aya from soliciting AMN's employees. AMN and Aya competed with each other to "place the travel nurses on temporary assignments."[2][3] When Aya started soliciting AMN's travel nurses,[4] AMN temporarily terminated Aya's access to its platform, and the parties relationship eventually ended. Aya then filed suit.

Aya alleged claims under Section 1 and 2 of the Sherman Act and California state laws. After amending its complaint in response to rulings by the district court three times, the case proceeded to discovery and to summary judgment. The district court eventually granted all of AMN's motions for summary judgment on claims premised on the Sherman Act and declined to exercise supplemental jurisdiction on state law claims. Regarding Sherman Act claims, the district court rejected Aya's argument that the *per se* rule against naked no-poaching restraints made the nonsolicitation clause illegal under Section 1 of the Sherman Act. Instead, strictly applying the rule of reason, the district court found that the restraint was ancillary to an agreement with a procompetitive purpose, and therefore, it did not constitute an unreasonable restraint of trade. Aya appealed.

Section 1 of the Sherman Act precludes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States," 15 U.S.C. § 1. However, the Sherman Act only "outlaw[s] unreasonable restraints."[5] Two different standards primarily exist for determining whether a restraint of trade is unreasonable: the rule of reason, where the court must weigh procompetitive justifications for the restraint against the restraint's anticompetitive effects; and the *per se* illegal standard, which deems certain

restraints illegal because they tend to always harm competition. Vertical restraints are typically evaluated under the rule of reason, and restraints between competitors (*i.e.,* horizontal) tend to be illegal *per se*. But not all horizontal restraints are *per se* illegal. Under the ancillary restraints doctrine, a horizontal agreement can be "exempt from the *per se* rule, and analyzed under the rule of reason, if it meets two requirements."[6] To be ancillary, the restraint must be "subordinate and collateral to a separate legitimate transaction" and "reasonably necessary to achieving that transaction's procompetitive purpose."[7] A naked horizontal restraint, such as a price-fixing agreement, cannot be an ancillary restraint and is subject to the *per se* standard because it is automatically deemed anticompetitive and a violation of antitrust laws.

The threshold issue on appeal was whether or not the nonsolicitation provision was a naked or ancillary restraint because that answer would decide which standard — *per se* or rule of reason — applies to determine whether the alleged restraint is unreasonable. Aya asked the Ninth Circuit to recognize a *per se* rule against naked no-poaching agreements and that it had raised a triable dispute as to whether AMN's nonsolicitation provision is a naked no-poaching restraint.

As an initial matter, the Ninth Circuit found the nonsolicitation agreement was ancillary to a collaborative agreement between the competitors, and the subject restraint was necessary to advance the collaborative goal. It ensured that AMN would not lose its personnel while collaborating with Aya.

Nevertheless, Aya argued that the provision was an impermissible naked restraint on trade because it was of unlimited duration. The nonsolicitation agreement was permanent, meaning it outlived the parties' collaboration. Aya relied upon a Seventh Circuit decision, *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), which found an indefinite agreement between competitors not to advertise in each other's territories was *per se* unlawful. But the Ninth Circuit distinguished *Blackburn* because what made that restraint *per se* unlawful was not its unlimited duration, but it not being ancillary to a collaborative undertaking. Notably, the restraint there was made after the parties' joint venture had concluded — it was contained in a dissolution of partnership agreement — and it therefore had no procompetitive effects.

Because the challenged restraint was ancillary to a broader agreement, the rule of reason standard applied. Under the rule of reason, courts apply the following three-part test from *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018):

First, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

The district court concluded that Aya failed to show that triable facts existed with respect to harm to competition. The Ninth Circuit agreed. The Ninth Circuit explained that there are two ways to make this showing: (1) direct evidence of anticompetitive effects and (2) indirect evidence that proves there is market power plus some evidence that the restraint harms competition.[8] The district court found that Aya had not presented sufficient direct evidence of supracompetitive pricing. Further, the district court rejected Aya's proffer of indirect evidence of AMN's market power (Aya claimed, among other things, that AMN had market power in certain markets because

it “wields extraordinary control over the available workflow and plum assignments”[9]), finding it was not evidence of consumer preference, supracompetitive prices, or lower quality service. Aya also failed to show that AMN could actually execute a predatory scheme. On appeal, Aya did not challenge these findings, but it argued the district court conflated Section 1 and Section 2 standards, while also requiring Aya to show that AMN held a monopoly position. The Ninth Circuit disagreed, finding that the district court had properly followed the rule of reason standard set forth in *American Express*.

Takeaways

The Ninth Circuit’s decision did not directly answer the question of whether a permanent restraint that the parties intend to have in effect long after their collaboration ends should be analyzed under the rule of reason as per the ancillary restraints doctrine. The appeals court may have thought it unnecessary to create an exception to the ancillary restraints doctrine because ultimately, the rule of reason requires the parties to show evidence of an ancillary restraint’s anticompetitive effects and procompetitive rationale. If a restraint outlives the collaboration and no longer serves a procompetitive rationale, it should not be considered reasonable under the rule of reason.

In the day and age where buy-side restraints like no-poach, nonsolicitation, and noncompete agreements are being heavily scrutinized as possible *per se* unlawful restraints, the Ninth Circuit has turned to traditional antitrust principles to find that the rule of reason still applies to ancillary agreements even of unlimited duration. This case may serve as notable assurance to businesses entering into joint ventures or other similar collaborative arrangements with competitors that the ancillary restraints doctrine is alive and well. However, judicial scrutiny of these restraints remains ripe with uncertainly as the Supreme Court has not weighed in, and many lower courts are struggling with which standards to apply.

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[1] “Travel nurses are nurses and nurse technicians who perform temporary, medium-term assignments in understaffed hospitals and other healthcare facilities [ ] that cannot have the assignments performed by their own nurses.” “[A]gencies place the travel nurses at hospitals several ways: by directly placing the travel nurses at the agencies’ hospital accounts and by indirectly placing the travel nurses at hospitals through either an agency that manages the hospitals’ travel nurse needs (managed service provider or MSP) or electronic platforms that facilitate the placements.”

[2] *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679, 2021 WL 3671384 (9th Cir. Aug. 19, 2021) (citing *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, —— F. Supp. 3d ——, ——, 2020 WL 2553181, at *1 (S.D. Cal. May 20, 2020)).

[3] *Id.*

[4] *Id.* at *2.

[5] *Id.* at *3 (quoting *State Oil v. Khan*, 522 U.S. 3, 10 (1997)).

[6] *Id.* at *4 (citation and quotations omitted).

[7] *Id.* (citations and quotations omitted).

[8] *Id.* at *6.

[9] *Id*. at *7.

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