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# Recent No-Poach Developments: Hold the Pickle, Hold the Dismissal — Eleventh Circuit Overturns Burger King's District Court Judgment

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In early September, the Eleventh Circuit reversed the district court's judgment for defendants Burger King Corporation, Burger King Worldwide, Inc., and their ultimate parent Restaurant Brands International, Inc. (collectively Burger King), sending the class-action, no-poach litigation back to the district court for further proceedings. The class-action plaintiffs, with assistance from the Department of Justice's (DOJ) Antitrust Division, convinced the appellate court that the plaintiffs had adequately pled that Burger King and its independently operated franchisees had undertaken "concerted action" for purposes of Section 1 of the Sherman Act. The reversal affirmed the applicability of the Supreme Court's holding in *American Needle*[1] to franchise agreements containing no-poach or no-hire restraints, and it allowed the class-action litigation to proceed for now.

***Arrington, et al., v. Burger King Worldwide, Inc., et al.***

On October 5, 2018, plaintiff Jarvis Arrington, a Burger King employee, filed a class-action complaint against Burger King Worldwide in Florida federal court, alleging that the company violated Section 1 of the Sherman Act by including a no-hire provision in its franchise agreements.[2] In a subsequently filed amended consolidated complaint, the plaintiffs alleged that the no-poach or no-hire restraints were *per se* illegal, or alternatively, should be found to be illegal under quick-look analysis.[3]

Until 2018, Burger King's franchise agreements contained no-hire clauses, which prohibited franchisees from employing or seeking to employ individuals who worked for other Burger King restaurants or the very small number of restaurants owned and operated by Burger King itself in Miami. The plaintiff alleged that the restrictions limited the employment opportunities available to Burger King employees, which resulted in suppressed wages.

On March 24, 2020, the Florida district court granted Burger King's motion to dismiss.[4] The district court ruled that the plaintiffs failed to adequately plead a concerted action between franchisor Burger King and its franchisees that restrained trade.[5] The district court examined the relationship between Burger King and the franchised restaurants, as well as the Supreme Court's holdings in *American Needle* and *U.S. v. Citizens & Southern Nat. Bank*, and ruled that "Burger King's relationship with its franchisees more closely resembles a corporation organized into divisions, or *de facto* branches, or that of a parent-subsidiary, then the relationship between similarly situated NFL teams."[6] The plaintiffs appealed the dismissal to the Eleventh Circuit Court of Appeals.

**DOJ Weighs In on Appeal**

As it has previously done, especially in labor antitrust cases, the DOJ's Antitrust Division expressed its dissatisfaction with the district court's opinion as a friend of the court. On December 7, 2021, the DOJ's Antitrust Division filed an amicus brief, urging for the reversal of the district court's decision and arguing that the district court's ruling that a franchisor and franchisee are legally incapable of engaging in concerted action under Section 1 contrasted with the Supreme Court's holdings in *American Needle* and *Copperweld*.[7] The proper analysis required by those precedents, argued the DOJ, was to "evaluate[] how the franchise system allegedly operates in practice, and determine[] whether the complaint plausibly plead[s] that the franchisor and franchisees had disparate economic interests concerning employee hiring."[8] Applying this analysis, the DOJ concluded that the plaintiffs had adequately pled a concerted action that restrains trade.[9]

**Eleventh Circuit Reverses**

On September 1, 2022, the Eleventh Circuit reversed the district court's judgment and revived the litigation.[10] Citing extensively to *American Needle*, the court held that the plaintiffs adequately pled that the inclusion of the no-poach provisions in the franchise agreements amounted to concerted action under Section 1.[11]

The Eleventh Circuit began its analysis by citing to *American Needle* for the premise that "substance, not form" governs whether an arrangement rises to the level of a concerted action and that the "key" factor is whether the arrangement "joins together separate decisions makers."[12] After noting those guiding principles, the court held that *American Needle* required it to examine the specific decision at issue when evaluating whether the entities engaged in concerted action.[13] As such, the court stated that it was to "train [its] attention on whether Burger King and its independently owned and operated franchisee restaurants under[took] concerted activity through the No-Hire agreement."[14]

Next, the court turned to the "key" question of whether the no-hire agreements "join[ed] together independent centers of decision makers."[15] Analogizing to *American Needle*, the court held that "Burger King and its franchisees, though they certainly have some economic interests in common, each separately pursued their own economic interests when hiring employees."[16] To support this conclusion, the court cited to the franchise agreements' language, which emphasized the independent nature of the franchisees, the franchise agreements' express language giving the franchisees complete independence on hiring decisions, and each of the plaintiffs' allegations as to their different hiring experiences.[17] Therefore, the court concluded: "[I]n absence of the No-Hire Agreement, each independent Burger King restaurant would pursue its own economic interests … [and therefore] the No-Hire Agreement deprives the marketplace of independent centers of decisionmaking about hiring and therefore of actual or potential competition."[18]

The court concluded its opinion by denying Burger King's invitation to determine the appropriate level of scrutiny that should be applied to the restraints, and instead held that the question was best left to the district court.[19]

**Conclusion**

While the Eleventh Circuit's holding in *Burger King* is an unwelcome result for Burger King, it may have a silver lining for franchisors generally. The decision reaffirmed traditional notions that franchisors and franchisees are independent decision-makers, especially when it comes to labor and employment decisions, which should bode well for franchisors when others (state and federal labor departments, labor unions, employees, etc.) try to hold

them accountable for their franchisees' alleged unfair labor and employment practices. And, despite the court's holding in favor of the employees, it did so by relying on traditional antitrust principles and the well-established Supreme Court precedents *American Needle* and *Copperweld*. Lastly, the holding was quite limited, only addressing the requirements to plead a concerted action under Section 1 and not addressing the thornier issues of the proper level of scrutiny to be applied.

Similarly, while the employees won this appeal, it is far from clear that they will ultimately succeed in the litigation. In its granting of the motion to dismiss, the Florida district court noted that the plaintiffs, like the plaintiffs in *McDonald's*, only alleged that the no-poach restraints are *per se* illegal or alternatively, illegal under quick-look analysis. The decision not to plead that the no-poach restraints were unlawful under rule of reason analysis proved fatal to the *McDonald's* plaintiffs' motion for class certification. Whether the plaintiffs' similar decision will prove equally fatal is yet to be seen.

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[1] *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010)*.

[2] *Arrington, et al. v. Burger King Worldwide Inc., et al.*, 1:18-cv-24128 (S.D. Fla. Oct. 5, 2018).

[3] *Id.* at ¶ 149-160; *Arrington, et al. v. Burger King Worldwide Inc., et al.*, 448 F. Supp. 3d 1322, 1327 (S.D. Fla. 2020).

[4] *Arrington, et al. v. Burger King Worldwide Inc., et al.*, 448 F. Supp. 3d 1322 (S.D. Fla. 2020).

[5] *Id.* at 1329-23.

[6] *Id.*

[7] *Arrington, et al. v. Burger King Worldwide Inc., et al.,* No. 20-13561 (11th Cir. Dec. 7, 2020) at 12-14.

[8] *Id.* at 22.

[9] *Id.* Along with filing an amicus brief, the DOJ also partook in the oral argument.

[10] *Arrington, et al. v. Burger King Worldwide Inc., et al.*, No. 20-13561, 2022 U.S. App. LEXIS 24628 (11th Cir. Aug. 31, 2022).

[11] *Id.* at *5. Notably, the court's holding aligned with the DOJ's interpretation of the case.

[12] *Id.* at *15-*16.

[13] *Id*. at *17.

[14] *Id.*

[15] *Id.*

[16] *Id.* at *19.

[17] *Id.* at *19-*20.

[18] *Id.* at *21-*22 (citations and brackets omitted).

[19] *Id.* at *22.

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