The Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association

Chair’s Column

Jill M. Manning

Editor’s Column

Anna Fabish
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Articles</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANTITRUST IS ALREADY EQUIPPED TO HANDLE “BIG DATA” ISSUES</td>
<td>1</td>
</tr>
<tr>
<td>Abiel Garcia</td>
<td></td>
</tr>
<tr>
<td>D-LINK SYSTEMS: POSSIBLE SIGNS FOR THE FUTURE OF FTC DATA SECURITY ENFORCEMENT</td>
<td>13</td>
</tr>
<tr>
<td>Ronald Cheng and Mallory Jensen</td>
<td></td>
</tr>
<tr>
<td>ANTITRUST, PRIVACY, AND DIGITAL PLATFORMS’ USE OF BIG DATA: A BRIEF OVERVIEW</td>
<td>22</td>
</tr>
<tr>
<td>Eliana Garcés and Daniel Fanaras</td>
<td></td>
</tr>
<tr>
<td>THE HOLD-UP TUG-OF-WAR: PARADIGM SHIFTS IN THE APPLICATION OF ANTITRUST TO INDUSTRY STANDARDS</td>
<td>34</td>
</tr>
<tr>
<td>Ben Hendricks and Brian Quinn</td>
<td></td>
</tr>
<tr>
<td>ABOVE FRAND LICENSING OFFERS DO NOT SUPPORT A CALIFORNIA UCL ACTION IN TCL V. ERICSSON</td>
<td>47</td>
</tr>
<tr>
<td>Robert B. McNary</td>
<td></td>
</tr>
<tr>
<td>THE DIFFICULTIES OF SHOWING PASS THROUGH IN INDIRECT PURCHASER COMPONENT CASES</td>
<td>54</td>
</tr>
<tr>
<td>James Bo Pearl and Allison Smith</td>
<td></td>
</tr>
<tr>
<td>SUPREME COURT TO CONSIDER THE FUTURE OF HANOVER SHOE, ILLINOIS BRICK, AND THE STRUCTURE OF PRIVATE ANTITRUST ENFORCEMENT</td>
<td>62</td>
</tr>
<tr>
<td>Ryan M. Sandrock</td>
<td></td>
</tr>
<tr>
<td>ANTITRUST TREATMENT OF THE INTRODUCTION OF NEW DRUG PRODUCTS: THE TENSION BETWEEN HATCH-WAXMAN’S DUAL GOALS OF CHEAPER DRUGS AND BETTER DRUGS</td>
<td>69</td>
</tr>
<tr>
<td>Rosanna K. McCallips</td>
<td></td>
</tr>
<tr>
<td>“NO-POACH” AGREEMENTS AS SHERMAN ACT § 1 VIOLATIONS: HOW WE GOT HERE AND WHERE WE’RE GOING</td>
<td>81</td>
</tr>
<tr>
<td>Jiamie Chen</td>
<td></td>
</tr>
<tr>
<td>SMART CONTRACTS AND BLOCKCHAINS: STEROID FOR COLLUSION?</td>
<td>100</td>
</tr>
<tr>
<td>Ai Deng</td>
<td></td>
</tr>
</tbody>
</table>
I. INTRODUCTION

These days you can't talk to an antitrust lawyer for three sentences without hearing about no-poach. But it certainly wasn’t always like that. The early cases challenging no-poach agreements as antitrust violations fought for each step into the courthouse, including to establish that horizontal agreements not to hire could in fact harm competition. Federal courts turned a corner in recognizing that the proper competitive harm analysis in no-poach cases should be aimed at competition in the labor market for the employees' services rather than competition among companies in the industry. The punctuated equilibrium of evolving antitrust law entered the current phase of rapid development in the 2000s, when the first no-poach antitrust class actions came before federal appeals courts, and the Department of Justice Antitrust Division (“DOJ”) at the same time took a sudden and keen enforcement interest in no-poach agreements. This pace has only accelerated in the intervening years and placed no-poach at the forefront of developing antitrust jurisprudence. But to best understand where this is all going, we need to take a look back, at where we started and how we got here.

II. HOW DID WE GET HERE? THE EARLY CASES

The earliest federal antitrust cases involving no-poach agreements were brought by individual plaintiffs who were personally denied employment or terminated on the basis of the agreements. Because no authority had yet recognized no-poach agreements as unlawful, and the courts themselves expressed doubt as to the viability of an antitrust claim based on no-poach agreements, none of the defendants in these cases contested the existence of the agreements as alleged. Rather, the defendants challenged as a matter of law whether the no-poach agreements as alleged could even amount to an antitrust claim. Meanwhile, the courts, in analyzing competitive harm resulting from the agreements, focused on harm to the industry or to companies participating in the industry rather than to the employees subject to the agreements. Nonetheless, the early era of no-poach antitrust cases was buttoned in the beginning and at the end with two strong cases that each set the stage for the next phase of development in no-poach antitrust jurisprudence.

In perhaps its first encounter with a Sherman Act § 1 claim based on agreements directed at hiring practices, the Supreme Court in Anderson v. Shipowners’ Association of the Pacific Coast paved the way for the line of antitrust litigation discussed herein. The plaintiff, a seaman, alleged that the owners of substantially all registered merchant vessels on the Pacific Coast agreed not to employ any seamen unless certain conditions were met. The plaintiff further

1 Jiamie Chen is a senior associate at the Joseph Saveri Law firm and specializes in antitrust private enforcement and complex litigation. The author gratefully acknowledges the guidance and support of Joseph R. Saveri and Steven N. Williams in preparing this article.
2 272 U.S. 359 (1926).
3 Id. at 361–62.
claimed that seamen who did not meet those conditions were excluded from employment as a result of the agreement, and he was in fact denied employment for that reason.\textsuperscript{4} In a surprisingly strong ruling on first impression, the Court held that prohibitions against unreasonable restraint of trade apply no less to individuals—particularly, to employees—than to products, as they are both instrumentalities of commerce.\textsuperscript{5}

If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper, and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce, and within the commerce clause, no less than cargoes.

Reversing the lower court’s dismissal of the complaint, the Court further held, with practically no explanation, that the “effect” of the of alleged agreement is “precisely” what is “condemn[ed]” by the Sherman Act’s prohibition against “‘undu[e] interfere[nce]’” with “‘the right of freedom of trade.’”\textsuperscript{6} As discussed further below, this ruling arguably went further than any other Supreme Court or federal court of appeals opinion for the next 40 years.

The Second Circuit in \textit{Union Circulation Company v. Federal Trade Commission} seemed to take a step back from the Supreme Court’s ruling in \textit{Anderson}.\textsuperscript{7} Here, the petitioners, agencies that sell magazine and periodical subscriptions via door-to-door solicitation, allegedly agreed with each other not to hire any salesman who had been employed by another agency within the preceding year.\textsuperscript{8} The Second Circuit had no trouble holding that such “no switching agreements” as alleged categorically do not constitute per se antitrust violations.\textsuperscript{9} The court found that, unlike per se violations, “no-switching” agreements are not inherently anticompetitive because they are “directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices.”\textsuperscript{10} Along this line of reasoning, the court further stated as follows:

These agreements are not designed to coerce retailers, or other independent members of an industry, into abandoning competitive practices of which the concerted parties do not approve. Rather, they are ostensibly directed at ‘housecleaning’ within the ranks of the signatory organizations themselves. Because a harmful effect upon competition is not clearly apparent from the terms of these agreements, we believe

\begin{itemize}
\item \textsuperscript{4} \textit{Id}.
\item \textsuperscript{5} \textit{Id.} at 362–63 (citing \textit{Second Employers’ Liability Cases}, 223 U. S. 1, 47, 49 (1912)).
\item \textsuperscript{6} \textit{Id.} at 363 (quoting \textit{United States v. Colgate & Co.}, 250 U.S. 300, 307 (1919)).
\item \textsuperscript{7} 241 F.2d 652 (2nd Cir. 1957).
\item \textsuperscript{8} \textit{Id.} at 655.
\item \textsuperscript{9} \textit{Id.} at 656–57.
\item \textsuperscript{10} \textit{Id}.
\end{itemize}
them to be distinguishable from those boycotts that have been held illegal per se.\textsuperscript{11}

Nevertheless, the Second Circuit found that the agreement at issue unreasonably restrained trade. The court recognized that “no-switching agreements could ‘‘freeze’ the labor supply’ and ‘‘discourage labor mobility.’”\textsuperscript{12} However, the actual competitive harm the court considered was that such agreements would foreseeably “impair or diminish competition between existing subscription agencies” and “prevent would-be competitors from engaging in similar activity,” and that “the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well-established signatory agencies and to the disadvantage of infant organizations.”\textsuperscript{13}

Thus, the court threw the cloak of antitrust protection over existing and potential magazine agencies rather than over the door-to-door salesmen in their employment opportunities and mobility, relegating them to “housecleaning” issues relevant to antitrust only to the extent they affect an agency’s competitiveness in the industry.\textsuperscript{14}

In \textit{Nichols v. Spencer},\textsuperscript{15} decided 10 years after \textit{Union Circulation Company}, the Seventh Circuit seems to return to the fold of \textit{Anderson} but ultimately maintains the focus of antitrust protection on the industry rather than on the employees. In \textit{Nichols}, the defendants, two companies that sell encyclopedias and reference books, entered into a “no-switching” agreement where each company would not hire any employee of the other company for six months after termination of that employment.\textsuperscript{16} Again, defendants here did not dispute the existence of the agreement as alleged.\textsuperscript{17} Rather, the defendants argued that the “no-switching agreements” do not amount to an antitrust violation and that the plaintiff’s “inability to obtain employment” did not constitute an injury to “in his business or property,” as required for recovery under antitrust law.\textsuperscript{18} Addressing the second argument first, the Seventh Circuit took a clear stance: “[W]e readily conclude that one who has been damaged by loss of employment as a result of a violation of antitrust laws is ‘injured in his business or property’ and thus entitled to recovery under 15 U.S.C.A.

\begin{itemize}
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id. at 658.}
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} \textit{Id. at 657-58.}
\item \textsuperscript{15} 371 F.2d 332 (7th Cir. 1967).
\item \textsuperscript{16} \textit{Id. at 333–34.}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id. at 334.}
\end{itemize}
§ 15.” However, court found determining the requisite violation of antitrust laws based on the admitted “no-switching” agreement to be “more difficult.” Specifically, the court distinguished Radovich and other cases where “there were, or were assumed to be, a monopoly of an agreement in restraint of trade in the service or commodity supplied by the particular enterprises.” Here, by contrast, “the only allegedly unlawful agreement among defendants is the so-called ‘no-switching’ agreement[].” But the defendants overreached by arguing that such agreements as a matter of law cannot amount to antitrust violations and prompted the court to issue this key holding:

Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other’s employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.

Nevertheless, in reversing the trial court’s grant of summary judgment, Seventh Circuit, like the Second Circuit in Union Circulation Company, returned the focus of antitrust protection to the industry rather than the employees: “We cannot say, as a matter of law, that the effect of the ‘no-switching’ agreement, challenged in this case, upon the business of supplying encyclopedias and reference books is so negligible that the agreement is not a restraint of trade in such products.”

Nine years after Nichols, the Fifth Circuit took up the issue in Quinonez v. National Association of Securities Dealers. The Fifth Circuit, in a seemingly conflicted opinion,

---

19 Id. The court relied on the Supreme Court’s opinion in Radovich v. National Football League, 352 U.S. 445 (1957). In Radovich, a football player alleged antitrust violations on the basis that the NFL and its member teams agreed to blacklist, or not hire, any player under contract with a member team who signs a contract with another team without the consent of the team holding his contract. Id. at 448–49. The main issue in Radovich, however, was whether federal antitrust law applies to professional football. The Court answered in the affirmative, finding that the volume of interstate business involved in organized professional football brought it within the scope of the Sherman Act and the Clayton Act. Id. at 452–53. But the Court gave only cursory treatment to evaluating the sufficiency of Radovich’s complaint under antitrust law, such that the Seventh Circuit was left to read between the lines of the opinion. Nichols, 371 F.2d at 334 (“Radovich’s claim did, however, rest upon his loss of opportunity to be employed, and the court and the parties must have assumed that such loss falls within the type of injury for which damages may be recovered under 15 U.S.C.A. § 15.”) (citing Radovich, 352 U.S. at 454 for the statement that federal antitrust laws “protect the victims of the forbidden practices as well as the public.”) (emphasis added).

20 Nichols, 371 F.2d at 335.

21 Id.

22 Id. at 335–36. Both Nichols and the Supreme Court in Radovich, as discussed above, note that federal antitrust laws as applied to the labor market protect both the “victims” or employees as well as the “public,” meaning consumers and customers. Id.; Radovich, 352 U.S. at 454. For an in-depth discussion of interplay between these, which is beyond the scope of this article, see Clayton J. Masterman, The Customer is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law, 69 Van. L. Rev. 1387 (Oct. 2016).

23 Nichols, 371 F.2d at 337 (emphasis added).

24 540 F. 2d 824 (1976).
reached a strong legal holding that solidified *Nichols* while warning that the plaintiff’s victory at this stage may be short-lived and ultimately empty. In *Quinonez*, the defendant securities companies reached a “no-switching” agreement analogous to the blacklisting agreement in *Radovich* and agreed that they would not hire any applicant who had been denied employment or been terminated by any other member company.25 Relying on *Radovich* and *Nichols*, but providing little analysis beyond emphasizing the leniency of the (now outdated) pleading standards, the Fifth Circuit nevertheless unambiguously held that “no-switching agreements, which allegedly impair competition among the defendants and others are sufficient as a matter of law to state a claim under the Sherman Act.”26 But, in a concluding section ominously titled “Not Over Yet But It Soon May Be,” the court closes with the warning that its holding reversing dismissal was all but dictated by the extremely lenient *Conley* pleading standards, and that, once “the Court sees what the real facts are, it may well wash out on summary judgment, or if not then, then later on motion for directed verdict[.][27]

Nearly 20 more years passed before a federal court of appeals again grappled with this issue—but, when it happened, a new paradigm emerged. The Tenth Circuit in *Roman v. Cessna Aircraft Co.* issued the most modern opinion in the early era of no-poach antitrust cases, and set the stage for the current era of antitrust class actions.28 Here, airplane manufacturer defendants Cessna and Boeing agreed not to hire each other’s engineers.29 In an analysis that signaled a paradigm shift, the Tenth Circuit relied on and interpreted *Radovich*, *Quinonez*, and a recent antitrust treatise to place the focus of antitrust protection squarely on the employees in a no-poach case:

```
The relevant cases hold that plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard.

[. . .]```

“Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law’s solicitude and the persons most directly concerned—perhaps the only persons concerned—could not challenge the restraint.”30

25  *Id.* at 827-28.
26  *Id.* at 829 (emphasis added).
27  *Id.* at 830 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
28  55 F.3d 542 (10th Cir. 1995).
29  *Id.* at 542-43.
30  *Id.* at 544 (citing *Radovich*, 352 U.S. 445; *Quinonez*, 540 F. 2d 824) (quoting *Phillip Areeda & Herbert Hovenkamp, Antitrust Law* ¶ 377c (rev. ed. 1995)).
The court, by framing the antitrust harm in a no-poach case as occurring in the subject labor market and borne primarily, if not exclusively, by the group of subject employees, effectively invited such employees to bring antitrust no-poach lawsuits as class actions. And, as discussed below, that is exactly what happened.

III. THE MODERN ERA OF NO-POACH

A. First Attempts at No-Poach Antitrust Class Actions

That only six years passed before a no-poach antitrust class action made its way before a federal court of appeals reflects the paradigm shift touched off by *Cessna Aircraft*. And, while the first two attempted class actions, both before the Third Circuit, failed, their shortcomings were fact-specific and limited to those particular cases. These two decisions indicated that it was only a matter of time before a case with sufficiently different facts wins class certification.

In *Eichorn v. AT&T Corp.*, a series of business acquisitions and reorganizations (indeed, a “trivestiture”) contained no-hire terms applicable to certain employees of the involved companies. Plaintiffs based their antitrust claims on the competitive harm suffered by the subject employees in the labor market resulting from defendants’ no-hire agreements, and the Third Circuit analyzed them accordingly, following the framework established in *Cessna*. However, in assessing the no-hire agreement that survived *Copperweld*, the court sided with the defendants as to both the applicable legal standard and the merits of plaintiffs’ antitrust claims. First, the court held that, based on the clear weight of prior case law and acknowledging “judicial hesitance to extend the per se rule to new categories of antitrust claims,” rule of reason, rather than per se, analysis applied. The court then evaluated the no-hire agreement under rule of reason, and found that the agreement as a covenant not to compete ancillary to the sale of a business, was a lawful rather than unreasonable restraint of trade. The court further found that the eight-month duration of the agreement was reasonable and did not go further than necessary to ensure the successful transition of ownership. Accordingly, based on these case-specific facts, the Third Circuit affirmed the district court’s grant of the defendants’ pre-certification summary judgment motion as to plaintiffs’ antitrust claims.

Progress is made in steps. The next step was made by the plaintiffs in *Weisfeld v. Sun Chemical Corp.*, who reached the class certification stage when they landed before the Third Circuit a scant three years after the court grappled with *Eichorn*. The defendants here controlled a dominant market share in the manufacturing of print inks and allegedly agreed not to hire each other’s employees. The court declined to address whether rule

---

32 *Id.* at 140-142. In fact, the court quoted the same passage from Areeda & Hovenkamp, *Antitrust Law*, to hold that the plaintiffs had antitrust standing, reversing the district court. *Id.*
34 *Eichorn*, 248 F.3d at 143-144.
35 *Id.* at 144-46.
36 *Id.* at 146-47.
of reason or per se analysis applied as it was “irrelevant” to the issue of whether the requirements of Fed. R. Civ. P. 23(b)(3) have been met.38 The plaintiffs lost certification before both the trial court and the Third Circuit because the plaintiffs’ expert, in his three-page declaration in support of class certification, “provide[d] no independent analysis or evidence to support his conclusions of common impact” and offered only “‘naked conclusions’ that common proof would demonstrate injury to class members.”39 However, further setting the stage for successful certification of an antitrust no-poach class, the Third Circuit readily acknowledged that “multiple regression and yardstick analyses have been widely accepted in this Circuit,” presumably to model class-wide damages.40

B. And Then—*In Re High Tech Employee Antitrust Litigation*

On September 24, 2010, DOJ Antitrust Division filed a civil complaint, along with a concurrent proposed final judgment and competitive impact statement, against six Silicon Valley companies.41

On May 23, 2011, a group of plaintiffs filed what would become the first successfully certified no-poach antitrust class action against those same companies.42

And, just like that, the game had changed. There were some differences in the precise conduct at issue in the DOJ case and the class action, but the enforcement target was the same: agreements among the defendant companies to not recruit or compete for each other’s employees that were not ancillary to any procompetitive venture or collaboration—that is, the agreements were “naked” restraints of trade.

With these cases, there can no longer be any doubt that the focus of antitrust protection in no-poach cases is, and should be, the employees subject to the agreement. In particular, the allegations in both the government case and the class action made clear that, where defendant companies compete with each other for employees, such agreements disrupt the normal competitive mechanisms in the labor market and substantially diminish competition for the employees’ services to the detriment of the affected employees.43 Accordingly, both charge such “naked” no-poach agreements as per se violations of the Sherman Act § 1.44

38 Id. at 260.
39 Id. at 260–62.
40 Id.
44 Id.
Moreover, having both the DOJ and a nationwide class action squarely and strongly target no-poach agreements made clear that such agreements are far from triggering only the rare or experimental cases brought by single plaintiffs for individual damages, as in the early era. Rather, as discussed below, no-poach agreements have taken center stage in both federal government and private antitrust enforcement.

1. High Tech Employee Antitrust Class Action

In the High Tech Employees class action, the defendants tellingly did not attempt to argue, as past defendants did, that federal antitrust laws do not apply to no-poach agreements, or that no-poach agreements do not harm competition because they merely seek to regulate defendants’ own hiring practices. Instead, the defendants in seeking dismissal treated the no-poach antitrust claims like allegations in traditional Sherman Act § 1 cartel cases. For example, the defendants argued that the conspiracy allegations lacked specificity, the allegations failed to allege sufficient parallel conduct “plus factors,” and that the plaintiffs’ allegations of a single overarching conspiracy were implausible, each of which was unsuccessful. In addition, old habits die hard, and the defendants took another shot at arguing that the plaintiffs failed to allege antitrust injury. The court noted that, under Ninth Circuit law, “where, as here, an employee is the direct and intended object of an employer’s anticompetitive conduct, that employee has standing to sue for antitrust injury.” The court then disposed of the defendants’ argument in seven sentences of analysis:

Plaintiffs have asserted that their salary and mobility were suppressed by Defendants’ agreements not to cold call, and that the alleged agreements were entered into to suppress competition for skilled labor. Plaintiffs have specifically alleged that they were injured by Defendants’ alleged anticompetitive conduct; have explained the means by which Defendants allegedly caused this injury; and have suggested how this injury should be quantified. In alleging that Defendants conspired to fix salaries at artificially low levels, Plaintiffs have alleged an example of the type of injury the antitrust laws are meant to protect against. Plaintiffs have further alleged that Defendants’ attempts to suppress competition had the intended effect of fixing the compensation of [Plaintiffs] at artificially low levels. Plaintiffs have thus also alleged that their injury is a direct result of Defendants’ conduct.

45 Order Granting in Part and Denying in Part Defendants’ Joint Motion to Dismiss; Denying Lucasfilm Ltd.’s Motion to Dismiss, In re: High-Tech Employee Antitrust Litigation, 5:11-cv-02509 (N.D. Cal. filed May 23, 2011), ECF No. 119.
46 Id. at 11-24.
47 Id.
48 Id. at 23-24.
49 Id., citing Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 742-43 (9th Cir. 1984); Eichorn, 248 F.3d at 140-41, Cessna Aircraft Co., 55 F.3d 542.
Thus, Plaintiffs have adequately pled antitrust injury. Accordingly, Defendants’ motion to dismiss Plaintiffs’ Sherman Act claim and Cartwright Act claim is DENIED.\(^50\)

Moreover, the parties as well as the court agreed that the court need not reach, and the court in fact did not reach, the issue of whether rule or reason or per se analysis applies to the no-poach agreements at issue.\(^51\)

On October 24, 2013, Judge Lucy Koh, in a lengthy and detailed opinion, certified a nationwide class of employees who were subject to the defendants’ no-poach agreements to proceed with their antitrust claims.\(^52\) The court evaluated and held that the purported class met each requirement of Fed. R. Civ. P. 23(a), even though the defendants did not contest this issue.\(^53\) The defendants did, however, hotly contest predominance under Rule 23(b)(3).\(^54\) After noting the lack of clear case law across the Supreme Court and federal courts of appeal on the applicable legal standard for predominance, Judge Koh, relying on the plaintiffs’ extensive evidence obtained from, civil discovery, and, indirectly, from the DOJ investigation, as well as from plaintiffs’ class experts, found that the purported class satisfied predominance as to antitrust violation, antitrust impact, and estimated measure of damages.\(^55\) Notably, the Court rejected the defendants’ argument that individualized inquiries predominate as their compensation practices were highly individualized and varied widely, and the subject employees’ compensation was set by hundreds of different managers with individual discretion to differentiate and reward high achieving employees.\(^56\) Finally, Judge Koh found that the purported class also satisfied superiority under Rule 23(b)(3) and rejected the defendants’ suggestion for “bellwether” trials because the plaintiffs’ case rises and falls with their common evidence.\(^57\) Within one week of certification, three defendant companies had reached tentative settlements with the plaintiff class.\(^58\)

After class certification, a lighter order denying the remaining defendants’ motion for summary judgment followed on March 28, 2014.\(^59\) The court’s analysis relied on much less evidence to reach its conclusion here as the question was neither novel nor close.\(^60\) At this point, the remaining defendants capitulated and reached a tentative settlement

\(^{50}\) Id. at 24 (internal citations, quotations, and footnote omitted).

\(^{51}\) Id. at 22–23.

\(^{52}\) Id., Order Granting Plaintiffs’ Supplemental Motion for Class Certification, ECF No. 531.

\(^{53}\) Id. at 86.

\(^{54}\) Id. at 85–86.

\(^{55}\) Id. at 84–86.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id., Order Granting Plaintiffs’ Motion for Conditional Class Certification and Preliminary Approval of Partial Class Action Settlements With Defendants Intuit, Inc., Lucasfilm, Ltd., and Pixar, ECF No. 540.

\(^{59}\) Id., Order Denying Defendants’ Individual Motions for Summary Judgment, ECF No. 771.

\(^{60}\) Id.
with the plaintiff class.\textsuperscript{61} However, in a final twist, Judge Koh rejected as insufficient the proposed $324.5 million settlement between the class and the four remaining defendants.\textsuperscript{62} In September 2015, Judge Koh gave final approval to a revised settlement between the class and the four remaining defendants for $415 million.\textsuperscript{63}

Six months after the class certification opinion in \textit{High Tech}, and having read the writing on the wall, another group of plaintiffs brought a related no-poach action against California-based animation studios.\textsuperscript{64} Judge Koh again sided with the plaintiffs regarding dismissal,\textsuperscript{65} and, on May 25, 2016, after engaging in similarly detailed analyses, certified a second nationwide no-poach class to proceed with its antitrust claims.\textsuperscript{66} Shortly after class certification, all remaining defendant companies reached tentative settlement with the plaintiff class.\textsuperscript{67} Settlements in \textit{Animators} totaled $169 million for the class.\textsuperscript{68}

\section{2. Governmental Enforcement Against eBay}

While the private enforcement world broke new ground with \textit{High Tech} and \textit{Animators}, government regulators doubled down on no-poach prosecutions against eBay.

Following closely on the heels of its landmark civil prosecution against six Silicon Valley high tech companies, the DOJ filed a similar no-poach complaint against eBay on November 16, 2012.\textsuperscript{69} In a coordinated enforcement action, the state of California on the same day filed a related action against eBay for antitrust violations based on its no-poach agreement with Intuit.\textsuperscript{70} Trying a different tactic, eBay moved for dismissal in the DOJ case on the basis that the Intuit executive involved in the no-poach agreement was an overlapping board member of both companies, and, therefore, incapable as a matter of law of conspiring with eBay under \textit{Copperweld}.\textsuperscript{71} Judge Davila neatly disposed of this argument, finding that the key issue is whether that board member was acting on behalf of eBay or
Intuit in relation to the no-poach agreement, and concluded that the complaint sufficiently alleges an actionable conspiracy between eBay and Intuit.\(^{72}\) eBay further sought dismissal on the basis that the DOJ’s complaint failed to allege an unreasonable restraint of trade because the no-poach agreement should be analyzed under the rule of reason standard, and the complaint fails to include any allegations sufficient to state a rule of reason claim.\(^{73}\) Like Judge Koh in the *High Tech* order on defendants’ motion to dismiss, Judge Davila held that he need not reach, and did not reach, the question of the appropriate standard at the motion to dismiss stage, rejecting eBay’s argument.\(^{74}\) Not long after its motion to dismiss was denied, eBay settled with both the DOJ and the state of California in 2014.\(^{75}\) Notably, eBay’s settlement with California provides for a $3.75 million payout, most of which will go to employees and prospective employees of eBay and Intuit.\(^{76}\)

### C. Current Enforcement Spotlight on No-Poach Agreements

#### 1. 2016 Federal Antitrust Guidance

In October 2016, the DOJ and the FTC jointly issued Antitrust Guidance for Human Resource Professionals.\(^{77}\) While ostensibly targeted at HR professionals, the most significant messages in the Guidance seem geared toward attorneys and employers. First, and perhaps more alarming to some, DOJ Antitrust announced for the first time that it plans to criminally prosecute naked no-poach agreements:

> Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others’ [sic] employees. And if that investigation uncovers a naked wage-fixing or no poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.\(^{78}\)

By equating the nature and seriousness of no-poach agreements’ harm to competition with that of price-fixing and market allocation agreements, the Guidance makes a marked departure from the *Union Circulation* line of cases which viewed hiring practices

---

72 Id. at 5–8.
73 Id. at 9.
74 Id. at 10–13.
76 Id.
78 Id. at 4.
agreements as merely “housecleaning” matters within the member companies and not inherently anticompetitive. 79 In a way, the Guidance brings us full circle back to the path of *Anderson* nearly a century later, by extending the same level of antitrust protection to individuals and employees as to products in interstate commerce. 80 Further, the Guidance seeks to answer the question left open by *Eichorn* and *Weisfeld* and that the courts expressly declined to reach in *High Tech*, *Animators*, and *eBay*—does the limited category of conduct amounting to per se antitrust violations now include naked agreements not to recruit or hire employees? More on this later.

Second, the Guidance re-establishes federal regulators’ enforcement focus on no-poach agreements, including by highlighting the recent actions brought by DOJ Antitrust Division and by the FTC, and reiterating that federal regulators consider naked no-poach agreements to constitute per se antitrust violations. 81 Although perhaps less jarring than the first announcement, this message, which both state and federal antitrust regulators have since reinforced, carries much more widespread impact, as discussed below.

2. Getting the Message Across: No More No-Poach

Since the Guidance, DOJ Antitrust Division has placed its prosecutorial crosshairs squarely on no-poach agreements and has ensured our awareness of it, particularly in 2018.

On January 19, 2018, Assistant Attorney General Markham Delrahim, speaking at a conference, warned that, “‘[i]n the coming couple of months you will see some [DOJ] announcements [about no-poach cases.]’” 82 He further warned that the number of no-poach prosecutions may be surprising: “‘[T]o be honest with you, I’ve been shocked about how many of these there are, but they’re real[.]’” 83 AAG Delrahim also reinforced the DOJ’s plans to criminally prosecute no-poach conduct that began or continued after the issuance of the Guidance: “‘If the activity has not been stopped and continued from the time when the DOJ’s policy was made, a year and a couple of months ago, we’ll treat that as criminal.’” 84

A few days later, Principal Deputy Assistant Attorney General Andrew C. Finch delivered a speech with the same message that “the Division expects to initiate multiple no-poach enforcement actions in the coming months” and that “[f]or agreements that began after [the Guidance], or that began before but continued after that announcement, the Division expects to pursue criminal charges.” 85

---

79 241 F.2d 656-57.
80 272 U.S. 362-63.
83 Id.
84 Id.
On April 3, 2018, DOJ Antitrust announced its first no-poach prosecution following the Guidance, as discussed further below.

The following day, Kate Patchen, Section Chief of the San Francisco Office of the DOJ, stated at a Federal Bar Association event that their top prosecutorial priorities are no-poach agreements (listed first), along with large international cartels, obstruction of justice cases, and fraud or bid-rigging conduct involving taxpayer funded contracts and projects.\(^{86}\)

And, in case we still missed the point, DOJ’s Antitrust Division Update for Spring 2018 is titled “NO MORE NO-POACH: THE ANTITRUST DIVISION CONTINUES TO INVESTIGATE AND PROSECUTE ‘NO-POACH’ AND WAGE-FIXING AGREEMENTS.”\(^{87}\) After again explaining the competitive harm no-poach agreements cause in labor markets and, specifically, to employees, and affirming that naked no-poach agreements amount to per se antitrust violations, the Update leaves us with a clear warning:

Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy.\(^{88}\)

Indeed, DOJ’s highly public campaign against no-poach agreements has placed more than market participants on notice of the Division’s intent. But how DOJ will carry out its intent and, perhaps more importantly, how these prosecutions will affect the continuing evolution of no-poach jurisprudence, remain in development.

3. First Post-Guidance Enforcement Actions

a. DOJ Enforcement: Rail Industry Employees

To date, federal antitrust regulators have brought one no-poach case after the announcement of the Antitrust Guidance on no-poach. On April 3, 2018, the DOJ filed a complaint, with concurrent proposed final judgment and competitive impact statement, against rail equipment supplier companies for engaging in three different no-poach agreements beginning in 2009, 2011, and 2014.\(^{89}\) The complaint charged that the companies entered into “naked” no-poach agreements with each other, even though one company was acquired by another company within two years of the alleged start date.

---

86 Ms. Patchen spoke at an event presented by the Northern District of California Chapter of Federal Bar Association entitled “Views from the Top: Hot Issues & Trends in White Collar Fraud Enforcement,” on April 4, 2018. The author attended the event and noted Ms. Patchen’s remarks. The author also spoke with Ms. Patchen about how DOJ Antitrust generally discovers the conduct or evidence that leads to no-poach prosecutions.


88 Id.

of the no-poach agreement between them.\textsuperscript{90} Interestingly, even though the complaint does not state any end date, or even end year, for the no-poach agreements, DOJ apparently determined that each agreement ended before the 2016 Antitrust Guidance was issued, and therefore prosecuted the companies civilly instead of criminally.\textsuperscript{91}

Over a dozen purported nationwide antitrust class actions were filed in Maryland, Pennsylvania, and South Carolina in the wake of the DOJ’s prosecution becoming public.\textsuperscript{92} On August 13, 2018, the Judicial Panel on Multidistrict Litigation finalized transfer of these actions to the Western District of Pennsylvania, where they are now proceeding before Chief Judge Joyce Flowers Conti.\textsuperscript{93}

\textbf{b. No-Poach Private Enforcement}

So far, two major nationwide no-poach class action lawsuits have made their way into federal court with no related publicly disclosed government investigation.

Shortly after the conclusion of the High Tech class action, a Duke University radiologist brought a purported class action alleging that the medical schools of Duke and UNC agreed beginning in 2012 not to hire each other’s employees for positions of the same rank.\textsuperscript{94}

As much of the conduct producing evidence of the agreement occurred before the High Tech prosecution and class action and before the Antitrust Guidance, the defendants did not conceal the agreement perhaps as carefully as they would following those warnings. In fact, the UNC Chief of Cardiothoracic Imaging stated in emails to plaintiff Seaman that he “received confirmation today from the Dean’s office that lateral moves of faculty between Duke and UNC are not permitted,” that the “guideline” was “agreed upon between the deans of UNC and Duke a few years back,” and that it “was generated in response to an attempted recruitment by Duke a couple of years ago of the entire UNC bone marrow transplant team” where “UNC had to generate a large retention package to keep the team intact.”\textsuperscript{95}

Unsurprisingly, the defendants based their dismissal arguments on state action immunity rather than on insufficiency of allegations as to the no-poach agreement. The

\begin{flushleft}

\textsuperscript{91} United States v. Knorr Bremse AG et al., Competitive Impact Statement, filed April 3, 2018, https://www.justice.gov/atr/case-document/file/1048891/download, at p. 12 (“The United States has pursued the agreements at issue in the Complaint by civil action rather than as a criminal prosecution because the United States uncovered and began investigating the agreements, and the Defendants terminated them, before the United States had announced its intent to proceed criminally against such agreements.”).

\textsuperscript{92} In Re: Railway Industry Employee No-Poach Antitrust Litigation, MDL No. 2850 (JPML filed April 25, 2018).

\textsuperscript{93} Id., Conditional Transfer Order Finalized, ECF No. 94.

\textsuperscript{94} Seaman v. Duke University et al., 1:15-cv-00462 (M.D.N.C. filed June 9, 2015).

\textsuperscript{95} Id., First Amended Complaint—Class Action, ECF No. 15 at 15-16.
\end{flushleft}
court handily denied dismissal in a four-page memorandum opinion after taking oral argument primarily on immunity.  

In January 2018, following the completion of class discovery, the court granted final approval of the settlement between the UNC defendants and the purported class.

On February 1, 2018, the court certified the third nationwide class to proceed with their antitrust no-poach claims. As in High Tech, the defendants vigorously disputed the Rule 23(b)(3) requirements of predominance and superiority rather than the Rule 23(a) threshold requirements. The court found plaintiffs sufficiently showed that antitrust violation, antitrust impact, and measure of damages are susceptible to proof by plaintiffs, and contrary proof by defendants, on a class-wide basis to meet predominance as a faculty class. In particular, the court noted that such class-wide proof consisted of the testimony of the defendants’ employees, defendants’ internal and external correspondence, including the email communications described above, and expert evidence, including from the same expert witness considered by the court in High Tech. However, the court found that including both faculty and non-faculty in the class would defeat predominance, as the common evidence among faculty plaintiffs is not the same as the common evidence among non-faculty plaintiffs. The court further found that including non-faculty as well as faculty could cause confusion at trial and raise significant manageability and fairness issues to defeat superiority. Accordingly, the court certified a class of over 5,000 faculty members, and denied certification otherwise. The class action is currently proceeding against the remaining Duke defendants.

Meanwhile, on the eve of the Antitrust Guidance, a group of plaintiffs brought a purported class action against LG and Samsung for agreeing not to recruit or hire each other’s employees. Here, the direct admission of the agreement to a plaintiff came from a recruiter acting as an agent on behalf of Samsung Electronics America. The recruiter for Samsung contacted plaintiff A. Frost, then an LG employee, about open positions at Samsung’s U.S. headquarters in New Jersey, and then stated in a written message to plaintiff Frost that “I made a mistake! I’m not supposed to poach LG for Samsung!!! Sorry! The two companies have an agreement that they won’t steal each other’s employees. Sorry ’bout that!!!” In addition, another plaintiff, Jose Ra, alleges that, when he sought employment at Samsung while an employee of LG, a Samsung manager told him that LG and Samsung

96 Id., Order, ECF No. 39.
97 Id., Order Granting Final Approval of Class Action Settlement, ECF No. 185.
98 Id., Memorandum Opinion and Order, ECF No. 189.
99 Id. at 5-21.
100 Id.
101 Id.
102 Id. at 14-16, 18-21.
103 Id. at 18-21.
104 Id. at 21, 25.
105 Frost v. LG Corp., et al., 5:16-cv-05206 (N.D. Cal. filed Sept. 9 2016).
106 Id., Second Amended Consolidated Class Action Complaint, ECF No. 159 at 18.
do not hire each other’s employees.\footnote{\textit{Id.} at 19.} Plaintiff Ra further alleges that his co-workers at LG told him about a “gentlemen’s agreement” reached between LG and Samsung in Korea not to hire each other’s employees and that the agreement “trickles down” to the respective U.S. subsidiaries.\footnote{\textit{Id.}} In addition, the head of HR at another LG subsidiary confirmed in a major business publication that the companies have an “understanding” not to hire from each other across levels because they have the biggest product portfolio in the market.\footnote{\textit{Id.} at 19-20} The allegations also describe the corporate control structure of the defendants’ corporate families and how it facilitates defendants’ headquarters’ control over the human resources functions of its subsidiaries to enforce the no-poach agreement.\footnote{\textit{Id.} at 20.} Nonetheless, the court found the pleadings insufficient on their face.\footnote{\textit{Id.}, Judgment, ECF No. 198.}

The case is currently on appeal to the Ninth Circuit.\footnote{\textit{Id.}, Notice of Appeal, ECF No. 200.} After 14 years of silence from the federal appellate courts, the first no-poach antitrust case since \textit{Eichorn} and \textit{Weisfeld}, and first in the modern era of enforcement, may land before the Ninth Circuit in 2019.\footnote{\textit{Id.}, Time Schedule Order, ECF No. 201.}

No-poach agreements now occupy center stage in both government and private enforcement with the common goal of protecting employees from competitive harm—that is, loss of job opportunities, mobility, information, and the ability to use that information as well as competing offers to negotiate better terms of employment. Never in the evolution of no-poach antitrust jurisprudence has it been more clear, and courts more ready to accept and recognize, that “[t]he same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services” because “workers, like consumers, are entitled to the benefits of a competitive market.”\footnote{No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute “No-Poach” and Wage-Fixing Agreements, U.S. Department of Justice Spring Update 2018, https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.} In some ways, we found our way back to the path that the Supreme Court set us on in \textit{Anderson} in 1926, with the added benefit of the class action device. So where do we go from here?

**IV. THE NEW ENFORCEMENT FRONTIER**

**A. Criminal Prosecutions**

Not that anyone is counting, but, at press time, nearly two years have passed since the DOJ announced in the Antitrust Guidance that criminal no-poach prosecutions are coming. In the interim, the Antitrust Division has brought one civil case against the rail
equipment suppliers, likely based on evidence from existing discovery previously obtained during the Wabtec-Faiveley merger process.\textsuperscript{115}

However, that may soon change. On May 17, 2018, Deputy Assistant Attorney General Barry Nigro, delivering a prepared keynote speech at an ABA conference, stated that:

\textit{We are investigating other potential criminal antitrust violations} in this industry, including market allocation agreements among healthcare providers and no-poach agreements restricting competition for employees. We believe it is important that we use our criminal enforcement authority to police these markets, and to promote competition for all Americans seeking the benefits of a competitive healthcare marketplace.\textsuperscript{116}

DAAG Nigro’s remarks are more of a promise more than a hint. The Antitrust Division likely would not make such a statement in such a forum unless a public announcement is imminent. Viewed in combination with AAG Delrahim’s statements in January that public announcements of no-poach prosecutions will be made “[i]n the coming couple of months” that he is “shocked about how many of these there are,” and reinforcing that “they’re real,” we should expect at least one, possibly more, additional no-poach prosecutions, and very likely a criminal prosecution, announced before long. And that may be just the beginning.

\textbf{B. Franchises and Fast Food No-Poach}

\textbf{1. Government Enforcement}

State regulators have taken the lead from federal regulators in no-poach antitrust enforcement in at least one important area. While the federal prosecutions in \textit{High Tech}, \textit{Animators}, and \textit{Knorr-Bremse} have all focused on skilled workers in specialized or technical industries, state regulators are now extending antitrust protection to more vulnerable low-wage workers.

In a letter to various fast food companies released on July 9, 2018, the Attorneys General of seven states, including California, requested documents about no-poach provisions in the companies’ franchise agreements that would “impact some employees’ ability to obtain higher paying or more attractive positions with a different franchisee.”\textsuperscript{117} The letter states the state regulators “are concerned about the use of No Poach Agreements among franchisees and the harmful impact that such agreements may have on employees

\begin{tabular}{ll}
\end{tabular}
in our States and our state economies generally.”118 The letter further states, perhaps ominously for the companies, that “[w]hen taken in the aggregate and replicated across our States, the economic consequences of these restrictions may be significant.”119

Five days later, seven fast food companies, including McDonald’s, Arby’s, and Jimmy John’s, entered into binding agreements with the state of Washington to drop no-poach provisions from their franchise agreements and to stop enforcing no-poach provisions in existing franchise agreements at all of their locations nationwide.120 More fast food companies are likely to follow suit.

2. Private Enforcement

In the past two years, four no-poach class actions against fast food companies have been filed in federal court.121 One was voluntarily dismissed in July 2018. One of the remaining cases, Deslandes, is proceeding in the Northern District of Illinois and recently survived a motion to dismiss and could be poised to create important new antitrust law.122

In Deslandes, the plaintiff brought her case under both a per se theory and, in the alternative, a quick-look theory. On June 25, 2018, the court denied defendants’ motion to dismiss. In an unpublished opinion, a federal district court ruled for the first time that, because no-poach agreements are essentially agreements to divide a market, a naked horizontal no-poach agreement is a per se violation of antitrust law.123 The court also found that McDonald’s franchise agreements are procompetitive because they increase the output of burgers and fries.124 The court further concluded that, because the no-poach provision at issue is a competitive restraint in one market that is ancillary to a procompetitive franchise agreement in another market, the provision should be analyzed under the intermediate quick-look analysis.125 Deslandes’ no-poach antitrust claims easily survived quick-look.126


119 Id.


122 In Butler, the other remaining case, the motions to dismiss have been fully briefed as of May 10, 2018, but no order has issued.


124 Id. at *20.

125 Id.

126 Id. at *20–24.
Moreover, the court’s threshold finding in Deslandes that McDonald’s restaurants can and do compete with each other such that they are capable of conspiring within the meaning of the Sherman Act § 1 is significant. It at least scrapes the edges of the Supreme Court’s reasoning in Copperweld that put an end to the intra-enterprise conspiracy doctrine in federal jurisprudence. In fact, the district court’s reasoning brings it closer to the line of cases invoking the intra-enterprise conspiracy.

Further, the court’s finding directly contradicts established law in at least one federal circuit. The Ninth Circuit held since the early 1990s that franchises within the same fast food company do not compete with each other and are incapable of conspiring within the meaning of § 1. Nonetheless, if given the opportunity to consider another no-poach case involving a franchise or related corporate entities, Ninth Circuit today perhaps may reach a different conclusion and may not again declare that “[the] case is essentially an effort to turn a labor dispute into an antitrust action for treble damages.” In fact, the Ninth Circuit could very well become the first federal appeals court finally to rule on whether naked no-poach agreements amount to per se antitrust violations.

V. CONCLUSION

The jurisprudence surrounding no-poach agreements as antitrust violations has progressed more in the past 10 years than in the preceding century. This remarkable evolution was made possible by both the government and private enforcement attorneys who came to recognize that workers deserve the same antitrust protection for competition for their services as consumers do for competition for their purchases—but this story is still developing.

In the meantime, please do not participate in unlawful no-poach agreements.

127 Id. at *2-5.
128 467 U.S. at 761-66.
130 Williams v. I.B. Fischer Nevada, 999 F.2d 445, 447 (9th Cir. 1993) (citing to and agreeing with the district court’s reasoning and conclusions in Williams v. Nevada, 794 F. Supp. 1026 (D. Nev. 1992). In that case, the plaintiff employee of Jack-in-Box brought antitrust claims against the restaurant franchisee and franchisor based on “no-switching” provisions in the franchise agreement. In granting the defendants’ motion for summary judgment, the district court found, and the Ninth Circuit later affirmed, that:

[T]he cornerstone of the Ninth Circuit analysis for a § 1 violation—competition between entities—does not exist in this case. In a fast-food franchise the franchisor does everything to promote a uniform, non-competitive environment between the franchises: . . Additionally, here, as in Thomsen, the “no-switching” agreements do not involve anyone outside the Jack-in-the-Box system.

Id. at 1031 (citing Thomsen v. Western Elec. Co., Inc., 680 F.2d 1263 (9th Cir. 1982) for its finding that the defendants, subsidiaries of the same corporate parent, were part of the same “corporate enterprise” and were incapable of conspiring within with meaning of the Sherman Act § 1).
131 680 F.2d at 1267.
132 Frost v. LG Corp., et al., 5:16-cv-05206 (N.D. Cal. filed Sept. 9 2016).