COMMITTEE PROGRAM RECAP: Information Exchanges: Antitrust, RICO, and Tort Theories of Liability

REPORT: FTC Non-Compete Hearing

FREEING COMPETITION FOR FRANCHISE WORKERS: The Washington State Initiative that Brought Nationwide Change
From the Co-Chairs

We are pleased to present the Summer 2020 edition of Competition Torts News. Our featured content provides helpful updates on federal and state enforcement of non-compete and no-poach provisions, potential theories of liability involving information exchanges, and recent civil RICO case highlights:

- First, Heather T. Rankie of Zelle LLP provides an update from the Competition Torts Committee’s teleconference discussion on information exchanges, with a focus on issues concerning the exchange of nurse wage information against the backdrop of the current COVID-19 pandemic.

- Second, Madeline Gootman of White & Case LLP reports on the Federal Trade Commission’s workshop earlier this year on issues surrounding non-compete clauses in employment agreements.

- Third, Rahul Rao of the Washington State Attorney General’s Office, Antitrust Division, offers his analysis and insights on the state’s initiative to end the use of franchise no-poach clauses nationwide.

- Last, our Case Notes and Civil RICO Issue Grid highlight some recent decisions of note and include a handy update on civil RICO case law in the United States on an issue-by-issue basis.

As always, we encourage all of our members to reach out and become more involved in our Committee’s activities. Whether you are interested in writing or speaking opportunities, we would love to hear from you and to help you get involved!
Committee Program Recap:

Information Exchanges: Antitrust, RICO, and Tort Theories of Liability

On July 2, 2020, the Competition Torts Committee hosted a webcast panel of attorneys and an economist for a discussion of the wave of antitrust class actions over the exchange of nurse wage information, the class-certification hurdles that such theories face, the potential intersection of antitrust, RICO, and business tort theories of liability in such cases, and whether COVID-19 could lead to a new wave of nurse wage litigation. As organizer Matthew Reynolds noted in his remarks, this topic is particularly timely given the current global pandemic, which has reinforced the importance of nurses and other healthcare professionals and reignited discussion about nurse wages, benefits, and working conditions. The panel was moderated by Lin Y. Chan and featured panelists Daniel A. Small, Professor Orley C. Ashenfelter, and David J. Stander.

DRAWING THE LINE BETWEEN LEGAL AND ILLEGAL INFORMATION EXCHANGES

Class-action litigator Daniel Small began with an overview of information exchanges in the context of antitrust law. He noted that an agreement to exchange competitively sensitive information on its own is not necessarily illegal and a rule-of-reason analysis is applied to determine whether the agreement has pro-competitive effects. In that vein, certain information exchanges are akin to gathering market intelligence, such as information obtained
from a third-party data provider or by checking a competitor’s publicly posted prices.

Information exchanges can cross the line into being unlawful under the Sherman Act under certain circumstances. Daniel provided three examples. First, information exchanges can be actionable when the information exchanged allows competitors to monitor each other’s compliance with a price-fixing or wage-fixing conspiracy.

Second, an information exchange can be actionable when it facilitates an unlawful agreement. This could occur when a competitor’s agreement to exchange information results in price or wage fixing. A historical example of this is the U.S. Department of Justice’s civil action against domestic airlines that used price exchange information in a computerized fare information system to facilitate fixing fares. In that case, the defendant airlines posted future fare information in the system in a way that could be seen by competitors. As reflected in the consent decree, the availability of competitor future fare information led the defendant airlines to reach agreements on fare amounts.

Third, information exchanges can violate antitrust law when they soften competition. Hypothetically, this could occur when a hiring hospital experiences a nurse shortage. It would make sense for such a hospital to increase wages to retain current nurses and compete with other hospitals to hire new nurses. Normally, it might take competitors a few weeks to learn of this strategy, during which time the hiring

“[A]n agreement to exchange competitively sensitive information on its own is not necessarily illegal and a rule-of-reason analysis is applied to determine whether the agreement has pro-competitive effects.”
hospital would benefit from its retention and hiring efforts. However, if this information was immediately exchanged, competitors could promptly match the wage increases. As a result, the first hospital would obtain no competitive benefit, and all hospitals would incur higher labor costs. Competition will likely soften because the first hospital will be deterred from raising its wages in the first place.

Relatedly, an actionable conspiracy involving an information exchange in the labor context will often be in a profession with a moderate level of specialization among affected employees. Nurses fit this profile because of their degree of education and training, and because they have a limited number of potential employers. On the other hand, employees with significantly less specialization of skills, education, and/or training have many potential employers, thereby making it difficult to achieve the level of coordination necessary for an effective conspiracy. Likewise, employees who are too specialized or unique—such as basketball stars or CEOs—have unique talents and individualized pay, making a conspiracy regarding their compensation less likely.

“The agencies typically do not challenge price and cost information sharing where the information (1) is collected by a third party; (2) is three months old or older; and (3) is adequately anonymized prior to dissemination.”

1 Heather is Counsel in the San Francisco office of Zelle LLP and a Vice-Chair of the ABA Antitrust Section’s Competition Torts Committee.
2 Matt is a Partner at Huth Reynolds LLP and a Vice-Chair of the ABA Antitrust Section’s Competition Torts Committee.
3 Lin is a Partner at Lieff Cabraser Heimann & Bernstein, LLP.
4 Daniel is a Partner at Cohen Milstein Sellers & Toll PLLC.
5 Professor Ashenfelter is the Joseph Douglas Green 1895 Professor of Economics at Princeton University.
6 David is a veteran federal prosecutor and currently maintains a civil prac-
considerations of information exchanges, beginning with the Federal Trade Commission and Department of Justice safe-harbor guidelines for the health care industry. Broadly speaking, absent extraordinary circumstances, the agencies typically do not challenge price and cost information sharing where the information (1) is collected by a third party; (2) is three months old or older; and (3) is adequately anonymized prior to dissemination.

Economic analysis of information exchanges is often fact-intensive and supported by a contextual understanding of the market at issue. A successful conspiracy involving information sharing of employee compensation is plausible in the nursing market because although nurses are highly skilled, their compensation range is relatively narrow. Other labor markets may be more varied in skills, compensation, and other factors, such that a “no-poaching agreement” may be a more likely means of facilitating a conspiracy, such as those challenged in actions against certain high-technology companies based in Silicon Valley. Depending on the industry, information exchanges may, inter alia, facilitate an illegal agreement or be used to police one.

Moderator Lin Chan turned the discussion to the data sets needed for such economic analysis. There are many sources of payroll data that economists and litigants may rely on. Publicly available sources include the Bureau of Labor Statistics’ employment situation reports and Census Bureau data. These can be utilized to gain an initial understanding of a particular market. Payroll processors also possess significant non-public data that may be accessed, on an anonymized basis, for research or litigation purposes.

Defining the relevant market may be necessary when information sharing is not ancillary to the direct effects in an antitrust action. This is achieved through empirical analysis involving substitution across types and can require substantial data. In this connection, Professor Ashenfelter noted a new academic study by a recent Princeton Ph.D. graduate on the effect of mergers on wage rates.

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8 For a brief discussion of this case, see Anne K. Bingaman, Assistant Attorney Gen., U.S. Dep’t of Justice, Antitrust Div., Consolidation and Code Sharing: Antitrust Enforcement in the Airline Industry (Jan. 25, 1996), available
Asked about whether economic analysis is indispensable in information-exchange cases, panelist Daniel Small noted that he was aware of only one case in which an information exchange alone was found to have given rise to a per se violation of Section 1 of the Sherman Act (thus not requiring economic proof of product and geographic markets): *United States v. Container Corp. of America*. In that case, the U.S. Department of Justice alleged a price-fixing agreement among sellers of corrugated containers where, upon request, a competitor would provide to other competitors its latest pricing to specific customers. The nearly invariable response was to match the price charged by the competitor. The Supreme Court held this sufficient to establish a per se violation of the Sherman Act.

“Though the panelists were unaware of successful civil RICO cases involving illegal information exchanges in the antitrust context, a RICO racketeering or conspiracy claim is conceivable.”

**CLASS CERTIFICATION HURDLES**

Daniel Small next discussed some of the class certification challenges encountered and overcome in the nurse wage litigations. One challenge was determining the types of nurses to include in the class, which ultimately included a core group of “bedside” nurses who received similar pay despite some variation in their specialties. These nurses included those working, for example, in emergency rooms, operating rooms, and intensive care units, and who had a range of experience and training. Ultimately excluded from the class were advanced practice and managerial nurses, who tended to have additional qualifications, such as advanced degrees, different training, and/or the ability to prescribe medication.

Proving common impact presented another challenge to obtaining class certification because the defendant hospitals did not exchange wage information on each type of nurse in the class. To address that, Professor Ashenfelter provided an opinion, rooted in monopsony theory, that there was high elasticity across the nursing positions in the class. He used the wages
of temporary nurses, employed by temporary agencies rather than the defendant hospitals, to determine a competitive benchmark for nurse wages. This analysis supported both common impact and a damages amount.

THE POTENTIAL INTERSECTION OF ANTITRUST, RICO, AND TORT THEORIES
Panelist David Stander provided a brief refresher on the civil and criminal applications of the Racketeering Influenced and Corrupt Organizations Act (“RICO”), including conduct that can constitute the “predicate acts” required for a RICO violation, and the federal statute’s “pattern” and “enterprise” requirements. Civil RICO litigants, unlike criminal RICO prosecutors, are held to a preponderance of the evidence standard, and usually bring cases based on wire fraud and mail fraud. Notably, even per se antitrust violations are not considered predicate acts under RICO.

RICO law nevertheless could potentially be applied to challenge information exchanges where competitively sensitive information is exchanged and causes monetary harm. Because of the racketeering nature of RICO claims, civil cases have strict requirements, including the element of conducting an enterprise, which requires that a defendant conduct the affairs of a group. In addition to the predicate acts, plaintiffs must also demonstrate continuity, with courts typically requiring a duration of over a year, absent threat of future continuity.

Though the panelists were unaware of successful civil RICO cases involving illegal information exchanges in the antitrust context, a RICO racketeering or conspiracy claim is conceivable. Likewise, business torts such as conversion may provide avenues for challenging improper information exchanges.

INITIAL PREDICTIONS REGARDING COVID-19 AND ITS IMPACT ON NURSE WAGES

At the conclusion of the program, the panel was asked to offer comments on potential legal issues surrounding the COVID-19 pandemic and its effect on nurses and other health care professionals.

Panelist Daniel Small observed that prior to the nurse wage litigation, there was generally a shortage of nurses, which was viewed as an economic anomaly but for efforts to suppress their pay. In the current pandemic environment, although there is increased demand for nurses in particular locations, there does not appear to be an overall surge in demand for nurses generally. Indeed, many hospitals’ revenues are down because they are not performing income-generating elective surgeries, while also incurring additional costs associated with COVID-19. It is possible that hospitals will look to ways to keep their costs down, including ways that might violate the antitrust laws.

Professor Ashenfelter described some of the overall shocks from COVID-19 on the labor market generally. While unemployment has risen, wages for those who remained employed for the first half of the year are stable. As for nurses, an increase in wages for temporary nurses—essentially “hazard pay” for nurses sought to deploy to pandemic hotspots—may positively shock demand. Panelists and audience members alike will be watching as the pandemic continues to unfold, and data on these issues continue to emerge.
Report:

**FTC Non-Compete Hearing**

On January 9, 2020, the Federal Trade Commission (FTC) held a workshop on the issues surrounding non-compete clauses in employment agreements. Non-compete clauses are covenants in employment agreements that restrict an employee – typically for some limited duration – from joining a competitor upon termination of employment. The purpose of the workshop was to consider whether the FTC should promulgate a rule restricting the use of non-compete clauses in employment contracts and to invite public comment on a range of related questions.

Restraints in the employment context more broadly have been an area of increasing antitrust focus in recent years. In 2016, the FTC and Antitrust Division of the Department of Justice (DOJ) issued joint Antitrust Guidance for Human Resource Professionals, which outlines the agencies’ position that no-poach agreements are per se illegal. Since then, the DOJ has increasingly ramped up enforcement efforts challenging such agreements, having entered into consent decrees with several companies for no-poach practices. In the same vein, a growing number of states have banned outright the use of non-competes or restricted their use among low wage workers; a number of class action lawsuits challenging non-competes by franchise operators are currently pending. The FTC workshop highlights this broader trend and reflects a rising concern by policymakers that non-compete agreements are wide-spread and needing further study, if not regulation. The all-day workshop consisted of presentations
and panels from private practitioners, law professors, industry lawyers, and FTC Commissioners. Presenters discussed the downsides that non-compete clauses create, such as low wages and wage stagnation, decreased worker mobility, diminished competition among employers in the labor market, and lowered levels of innovation, among others. The presenters offered two main justifications for non-compete clauses: (1) protecting intangible assets such as trade secrets, and (2) promoting employer investment in workers and their training.

Commenters, such as Jane Flanagan of the Chicago-Kent College of Law at the Illinois Institute of Technology, pointed out that non-compete clauses are very effective from the employer perspective because they do not usually require litigation to have their intended effect. Even in states where non-competes are categorically unenforceable, such as California, numerous contracts still contain non-compete clauses. This suggests that the value to the employer of such a clause comes not from its legal capacity to restrain an employee but from the impression that it makes upon an employee, many of whom do not have access to the legal resources necessary to investigate their options under a non-compete or challenge the enforceability of such a clause.

Other discussions focused on the legal implications of non-compete clauses and litigation challenges. Randy Stutz of the American Antitrust Institute explained that non-competes limiting low-skilled, low wage workers who are not provided access to trade secrets are lacking in any justification and ought to be actionable. However, he noted that while such non-compete agreements are most easily condemned on a policy level, they are the hardest to prosecute under an antitrust theory because of the difficulty in show-
The last panel of the conference focused on the issue of whether the FTC should engage in the rulemaking process to address the issues inherent to non-competes. The debate largely focused on the merits of a formal rule versus a general statement of policy or guidance document, as suggested by Richard Pierce of George Washington University School of Law. Other panelists, such as Kristen Limarzi of Gibson Dunn and Aaron Nielson of Brigham Young University Law School, lauded rulemaking over guidance documents because of the possibility of public participation and a greater ability to address the nuances of specific situations. When later discussing different substantive possibilities to address the negative impacts of non-competes, the panelists largely agreed that a per se rule banning non-compete clauses would be inappropriate. Reasons include existing case law, which evaluates vertical restraints under the rule of reason, and the pro-competitive benefits of non-competes in some circumstances, such as highly skilled labor.

There was also debate regarding whether the FTC even has the ability to promulgate a rule regulating employee non-competes in the first instance. FTC Commissioner Noah Phillips commented that any efforts by the FTC to reach non-competes under its existing powers would raise separation of powers issues. He explained that Congress is required to provide “an intelligible principle” to guide an agency when delegating legislative direction, and expressed concern that Congress had not delegated such rulemaking au-

“FTC Commissioner Noah Phillips commented that any efforts by the FTC to reach non-competes under its existing powers would raise separation of powers issues.”
authority to the FTC in the area of non-competes. In contrast, Commissioner Rebecca Kelly Slaughter expressed strong support for potential rulemaking in her address, advocating for a broad rule that would largely ban non-competes.

Following the hearing, the FTC accepted public comments on the use of non-competes. Over 300 comments were submitted, including public comments from the ABA Section of Antitrust Law, to which the Competition Torts Committee contributed. The Antitrust Section’s comments note that, due to the limited research available on this subject, the issue of restricting the use of employment non-competes raises more questions than answers, echoing sentiments of a number of presenters at the workshop. The Section’s comments also encourage the FTC to properly “define a problem that invokes its expertise, even as it entertains suggestions and proposals from the public regarding the need for intervention and remedial action.”

Freeing Competition for Franchise Workers:

The Washington State Initiative That Brought Nationwide Change

For a little over two years, Washington State has relentlessly engaged in an initiative to end the use of franchise no-poach clauses nationwide. Through its efforts, Washington has eliminated no-poach clauses from about 225 corporate chains, representing nearly 200,000 locations across the United States. The elimination of these clauses has expanded competition for the labor of millions of workers throughout the country.

WHAT ARE NO-POACH PROVISIONS?
In general, a no-poach provision is an agreement—either standalone or within a broader contract—between two employers, where one or both employers agree not to hire, solicit, or recruit the other’s employees. In the franchise context, a no-poach provision is typically a clause within a franchise agreement—a lengthy contract between a franchisor and a legally distinct franchisee—that restricts employee mobility within that franchise system.

Franchise no-poach provisions have many variations. For example, some no-poach provisions prohibit hiring another location’s employees, while others prohibit recruiting efforts as well. Other no-poach provisions prevent poaching only a franchisor’s employees. Some protect
only company-owned locations. Some only restrict franchisees from hiring or recruiting other franchisee employees. And finally, some no-poach provisions contain all of the above restrictions.

Despite their variations, all no-poach provisions in some form restrict the ability of franchise entities to hire or recruit new employees. Thus, all no-poach provisions have the same effect: they decrease competition for the labor of franchise workers, which may cause reduced employment opportunities and stagnated wages. They can also diminish competition for better benefits and working conditions.

BACKGROUND ON WASHINGTON STATE’S INITIATIVE
In January 2018, Washington began investigating franchise systems’ use of no-poach provisions. Seven months after launching its investigation, Washington secured legally binding agreements, through an Assurance of Discontinuance (AOD), from seven fast food franchisors to eliminate and immediately stop enforcing no-poach clauses from their franchise agreements nationwide. The AOD also required the franchisor to provide notice of the AOD nationwide to the entire franchise system.

While Washington’s initiative to end franchise no-poach provisions began in the fast food industry—where many workers make the minimum wage and may be especially vulnerable to wage suppressive conduct—Washington believes that all franchise no-poach provisions are per se violations of Washington’s antitrust laws and its federal analogues.

“Despite their variations, all no-poach provisions in some form restrict the ability of franchise entities to hire or recruit new employees. Thus, all no-poach provisions have the same effect: they decrease competition for the labor of franchise workers, which may cause reduced employment opportunities and stagnated wages.”
Through its initiative, Washington investigated nearly every franchise system with a significant presence in the state. As the investigation revealed, most franchise systems used agreements containing no-poach provisions either at the time of the investigation or recently before then. For those systems—about 225 corporate chains—the Washington Attorney General’s Office secured binding commitments to eliminate these clauses nationwide. In total, these settlements impact nearly 200,000 locations nationwide, and free competition for the labor of millions of workers across the United States.

While most franchise systems accepted Washington’s settlement terms during the investigative phase, one franchisor refused. In October 2018, Washington sued Jersey Mike’s Franchise System and its Washington franchisees in state court in Seattle. This was the first suit brought by a state attorney general against a company for using no-poach clauses. Washington’s complaint set forth a per se theory of liability, and alleged a quick-look analysis in the alternative. Rejecting Jersey Mike’s motion to dismiss, the Court left intact both per se and quick-look arguments. The parties eventually settled in August 2019—two months before trial—on terms substantively identical to all other AODs, plus $150,000. Washington has not needed to sue any other franchise system over no-poach provisions.

1 Within the Antitrust Division, Rahul works on the office’s labor competition enforcement and litigation efforts, including Washington State’s initiative to end the nationwide use of franchise no-poach agreements. 

Disclaimer: The views expressed in this article are Mr. Rao’s, and do not necessarily represent the views or position of the Washington State Attorney General or the Attorney General’s Office.

2 Washington’s interest in franchise no-poach provisions was sparked in part from a September 2017 New York Times article titled, “Why Aren’t
Although the investigation began with the fast food sector, Washington’s initiative to eliminate franchise no-poach clauses expanded across several industries, including: automotive services, child care, commercial cleaning and housekeeping, convenience stores, custom window treatment, electronic repair, home healthcare, home repair, hotels, insurance adjustors, parcel services, tax preparation, and travel agencies.

**FRANCHISE NO-POACH PROVISIONS CONSTITUTE BOTH PRICE FIXING AND MARKET ALLOCATION AGREEMENTS THAT ARE PER SE UNLAWFUL**

Both Section 1 of the Sherman Act and Washington’s Consumer Protection Act prohibit “[e]very contract, combination . . . or conspiracy” in restraint of interstate trade or commerce.\(^6\) Naked restraints of trade among horizontal competitors—such as those competing for employees in a labor market—are per se unlawful.\(^7\)

Most common in the category of per se violations are agreements among horizontal competitors to fix prices or to divide markets.\(^8\) Whether any specific price was literally “fixed” is immaterial; simply suppressing prices also constitute a violation.\(^9\) Market allocation among competitors—by customers or geography—is also per se unlawful. Under per se analysis, once a plaintiff shows that such competitor agreements exist, courts conclude that these agreements are unreasonable as a matter of law.\(^10\)

While the most well-known horizontal conspiracy cases involve an agreement among sellers to raise prices, antitrust laws equally apply to horizontal agreements among buyers to stifle competition.\(^11\) This includes labor markets, where employers compete to buy labor from workers who sell it.\(^12\) No-poach agreements among competing employers are “a type of customer allocation scheme which courts have often condemned in the past as a per se” violation of antitrust laws.\(^13\)

In the franchise context, franchisees, among themselves and with the franchisor, are direct competitors for labor. As separately owned and operated entities

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with discretion to make independent hiring and employment decisions—such as whom to hire and how much to pay—these clauses are agreements among employers not to compete for workers. And because franchise agreements are uniform within a system, each franchisee knows that other franchise units are subject to the same no-poach restriction. Thus, agreements among employers not to compete for workers—even if done through an intermediary—constitute both horizontal labor market allocations and price fixing conspiracies, and are per se unlawful.

Even if not per se unlawful, no-poach agreements clearly create anticompetitive effects in the relevant labor markets. In the franchise context, a worker trained in a particular franchise’s practices and systems would be valuable to another unit within the same franchise. Indeed, franchise units enter into no-poach agreements because they recognize the risk that workers may otherwise switch franchise locations for better pay, benefits, or working conditions. Therefore, no-poach agreements necessarily stifle the ability of workers to improve their position by limiting their bargaining power with their current employer, eliminating the threat of moving to a competing employer, and limiting their ability to achieve a better salary or working conditions from a competing employer. No-poach provisions thus compromise a market that would otherwise allow qualified, trained workers to capitalize on their value to the franchise.

**RULE OF REASON ANALYSIS IS INAPPROPRIATE FOR FRANCHISE NO-POACH AGREEMENTS**

As interest in franchise no-poach provisions has ballooned, franchisors and others have sought to shield no-poach provisions from per se treatment. Such advocates claim that a no-poach clause contained within a franchise agreement, absent some other agreement between franchisees, constitutes a vertical restraint and is thus subject to rule of reason analysis. Moreover, they assert that even if

“[E]ven if parties operate at different distribution levels, if they agree to a restraint that has a horizontal anticompetitive effect, it is subject to the per se rule.”
there were some alleged agreement among franchisees, the no-poach provision would be ancillary to the broader franchise agreement. Both arguments fail.

First, this position ignores agreements that include no-poach clauses that restrain competition between the franchisor and franchisee. Such provisions restrict a franchisee from poaching a franchisor-owned retail store’s employee or a franchisor corporate office’s employee. The restraint would be characterized as vertical only where the no-poach provision restricts only franchisees from poaching each other’s employees. Yet even in that situation, the franchise agreement’s uniformity—that they are all identical, and thus all parties know and intend to be bound by the restriction—creates a hub-and-spoke conspiracy with the franchisor as the hub.

Moreover, the orientation of the restraint, by itself, does not determine the mode of analysis. Rather, one looks at economic *effect*, not formalistic line drawing, to inform which antitrust analysis to apply.\(^\text{18}\) Thus, even if parties operate at different distribution levels, if they agree to a restraint that has a horizontal anticompetitive effect, it is subject to the per se rule. In the franchise no-poach context, the restraint impairs horizontally positioned parties who would otherwise compete in labor markets. It thus demands per se treatment.

It is also incorrect that no-poach provisions are ancillary restraints that escape per se treatment. An agreement is not ancillary under the doctrine if the restraint is, among other things, not reasonably necessary to effectuate the main transaction.\(^\text{19}\) Washington’s successful initiative to eliminate no-poach provisions nationwide undercuts any argument that these clauses

serve restaurants. Underlying that article was research by leading labor economists—Alan Krueger and Orley Ashenfelter, both of Princeton University—suggesting that downward pressure from no-poach agreements may be partly responsible for the stagnating wages. See Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (September 28, 2017), Working Paper #614, Princeton University Industrial Relations Section, available at https://dataspace.princeton.edu/jspui/handle/88435/dsp014f16c547g.

are *necessary* to the franchise agreements. That 100\% of relevant franchise systems in Washington State—about 225 corporate chains—immediately eliminated their no-poach provisions with no subsequent harm to the franchise system, shows that the restraints were never necessary. Without this showing of necessity, one cannot trigger the ancillary-restraints doctrine, and the restraints remain per se unlawful.

**CONCLUSION**

Antitrust law applies equally to buyers and sellers, including those who buy labor. In a labor market, firms that compete to hire or retain employees are direct, horizontal competitors for those units of labor—i.e., workers. This horizontal, competitive relationship in a labor market exists without regard to their relationship in any other market.

And while franchise no-poach provisions may create analytical confusion, once one strips away the complexity of the business arrangement, it becomes apparent that the units within a franchise system are independent centers of employment decision-making that compete with one another for workers in a labor market. And at their core, by eliminating this competition, franchise no-poach provisions are no different than any other market allocation or price fixing agreement; the conduct that courts have always treated as per se unlawful.


6. See, e.g., supra Note 4. See also 15 U.S.C. § 1; RCW 19.68.030 (Washington’s Consumer Protection Act); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) (listing elements of a Section 1 claim).


8. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); see also *United States v. Socony-Vacuum Oil*, 310 U.S. 150, 218 (1940) (“[T]his Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se.”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000).

9. *Socony-Vacuum Oil*, 310 U.S. at 222; see also *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 422 (1990) (constraining supply is “the essence of ‘price-fixing’”).

and such limited potential for procompetitive benefit, [ ] they are deemed unlawful per se.

11 Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) (finding antitrust liability “even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers.”) (footnotes omitted); see also Knevelbaard Dairies, 232 F.3d at 988–89 (“[A] buying cartel’s low buying prices are illegal and bring antitrust injury.”).

12 United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991) (agreements among competitors limiting upstream inputs—such as labor—can be per se unlawful).


14 In its complaint against Jersey Mike’s, Washington argued that the franchise agreements document “a ‘hub and spoke’ contract, combination, and/or conspiracy to restrain trade and commerce in which all Defendant Franchisees agreed with the Franchisor not to solicit or hire other Franchisees’ workers. Because the agreement is standard and because the terms of the franchise agreement are made public, Franchisees know the basic contents of each other’s agreements.” See supra Note 4.

15 United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (“The court thus finds that the United States’ allegations concerning the agreement between eBay and Intuit [not to hire each other’s employees], taken as true, suffice to state a horizontal market allocation agreement.”); Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 157–58 (N.D.N.Y. 2010) (holding that information exchange between defendants to fix nurse wages was illegal per se and tantamount to a conspiracy to fix prices); see Brown, 936 F.2d at 1045 (holding that agreements among competitors limiting upstream inputs can be per se unlawful).

16 If courts were to apply a “quick-look” analysis (as opposed to per se), which involves some consideration of proffered defenses or justifications, “an observer with even a rudimentary understanding of economics” could easily conclude that the agreements in question create anticompetitive effects on customers and markets. See Cal. Dental Ass’n v. Federal Trade Commission, 526 U.S. 756, 770 (1999).


In Torres, employees of an Italian restaurant chain sued their employer, alleging that despite often working more than forty hours a week, they never received overtime pay for that work. Rather than suing under the Fair Labor Standards Act, however, they brought a RICO claim, and the district court dismissed the claim as precluded by the FLSA.

The Sixth Circuit agreed, but only in part. It explained that while the FLSA, which regulates wages and working conditions, provides the sole remedy for federal minimum wage and overtime violations, it did not preclude suits for other damages arising out of the same underlying activity (like a failure to pay employee taxes as part of a greater tax evasion scheme):

“when a RICO claim that is based on a dispute between an employer and an employee alleges damages that are distinct from unpaid wages, even if the RICO-predicate act arises from conduct that also violates the FLSA, then the RICO remedies do not fall within the ambit of the FLSA’s remedial scheme and are therefore not precluded.” The Sixth Circuit then remanded the case to determine whether the RICO claim could still withstand a motion to dismiss.

CLICK HERE FOR CASE
Case Notes (cont.)

Personal Jurisdiction

The Third Circuit Joins the Majority View that Section 1965(b) Governs the Personal Jurisdiction Analysis of “Other Parties”

*Laurel Gardens, LLC v. McKenna*, 948 F.3d 105 (3d Cir. 2020)

Plaintiffs alleged RICO violations against defendants, competitors in the landscaping and snow removal business, namely that they tried to steal customers from Plaintiffs through various acts of bribery, mail fraud, wire fraud, and a host of other unsavory acts. Plaintiffs filed suit in the Eastern District of Pennsylvania, and certain of the defendants named were successful in having the RICO claims against them dismissed for lack of personal jurisdiction, as they and their business, according to the District Court, placed them out of reach of that Court’s governing long-arm statute, as they lacked the requisite contact with the state of Pennsylvania for either specific or general jurisdiction.

Because Rule 4(k)(1)(C) allows for personal jurisdiction “when authorized by a federal statute,” on appeal the Third Circuit was confronted with whether to join the majority view that 18 U.S.C. § 1965(b) is the correct RICO provision that governs such circumstances, or whether to join the minority of Circuits in finding that, instead, § 1965(d) governs.

The Third Circuit then conducted a lengthy, well-reasoned analysis in which it elected to join the majority view that “§ 1965(b) provides for nationwide service and jurisdiction over ‘other parties’ not residing in the district, who may be additional defendants of any kind, including co-defendants, third-party defendants, or additional counter-claim defendants … [as long as there is] a showing that the ‘ends of justice’ so require.”

The Third Circuit then determined that personal jurisdiction could be found against all of the defendants, because while some of them resided outside of Pennsylvania, more than half of them were Pennsylvania residents or entities, the RICO allegations involved a hub and spoke conspiracy centered in Pennsylvania, and including three out-of-state defendants was warranted by the “ends of justice” accordingly.
# Civil RICO Issue Grid

| Second Circuit                                                              |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
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| Circuit/Case | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | MD | LN | Q | Den |
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### Circuit/Case

| Circuit     | Case Details                                                                 | MD | CA | DC | VA | MA | MA | FL | AL | GA | TX | OK | UT | MT | NE | IA | MO | AR | WA | NV | OH | PA | MI | WI | OK | CO | ID | WY | MT | MO | ND | NE | KS | KY | TN | WA | OR | HI | AK | ID |
|-------------|------------------------------------------------------------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Sixth Circuit | **Torres v. Vitale, 954 F.3d 866 (6th Cir. 2020), reh'g denied (Apr. 24, 2020)** | ● | ● | ● |
|             | **Bachi-Refitt v. Reffitt, 802 F. App'x 913 (6th Cir. 2020)** | ● | ● | ● |
| Ninth Circuit | **City of Almaty v. Khrapunov, 956 F.3d 1129 (9th Cir. 2020)** | ● | ● | ● |
|             | **Blue Oak Med. Grp. v. State Comp. Ins. Fund, 809 F. App'x 344 (9th Cir. 2020)** | ● | ● | ● |
|             | **Ozeran v. Jacobs, 798 F. App'x 120 (9th Cir. 2020)** | ● | ● | ● |
|             | **Dennis v. JP Morgan Chase Bank, No. 19-35271, 2020 WL 4037564 (9th Cir. July 17, 2020)** | ● | ● | ● |
### Circuit/Case

| Circuit/Case                                                                 | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z | Date |
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