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Antitrust Considerations for Biosimilar Reverse Payment Litigation – Not So Similar Afterall?

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I. INTRODUCTION

Biologic drugs, a therapeutic class of large-molecule prescription products that are manufactured using living organisms, include a wide range of treatment products such as vaccines, blood components, allergenics, and gene therapy.[1] Currently, biologics are the fastest-growing class of therapeutic products in the U.S.,[2] accounting for 93 percent of the growth in net drug spending in the U.S. since 2014.[3] Biologics differ from small-molecule drugs such as penicillin in that small molecule drugs have simpler chemical structures than biologics and are typically manufactured by combining specific

[1] "What Are 'Biologics' Questions and Answers," *U.S. Food & Drug Administration*, available at https://www.fda.gov/about-fda/center-biologics-evaluation-and-research-cber/what-are-biologics-questions-and-answers; "Biosimilar and Interchangeable Products," *U.S. Food & Drug Administration*, available at https://www.fda.gov/drugs/biosimilars/biosimilar-and-interchangeable-products ("Biosimilar and Interchangeable Products").

[2] Biosimilar and Interchangeable Products; "Biologic Medicines: The Biggest Driver of Rising Drug Prices," *Forbes*, available at https://www.forbes.com/sites/theapothecary/2019/03/08/biologic-medicines-the-biggest-driver-of-rising-drug-prices/#5acad9b18b00 ("Biologic Medicines: The Biggest Driver of Rising Drug Prices").

[3] Biologic Medicines: The Biggest Driver of Rising Drug Prices.

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chemical ingredients.[4] Compared to small-molecule drugs, the cost of treatment with biologics can be substantially higher, with some treatment regimens costing tens of thousands of dollars per year on average (and over $100,000 in certain cases), compared to only several hundred dollars per year for many small-molecule drugs.[5] The top selling prescription drug in the world in 2018 (by revenue) was Humira, a biologic used to treat many inflammatory conditions and manufactured by AbbVie,[6] with global sales totaling $19.9 billion in 2018.[7] Other top selling biologic drugs include: Opdivo ($7.6 billion); Keytruda ($7.2 billion); Enbrel ($7.1 billion); Herceptin ($7.0 billion); Avastin ($6.8 billion); Rituxan ($6.8 billion); Eylea ($6.6 billion); Remicade ($5.9 billion); and Stelara ($5.2 billion).[8]

II. BIOSIMILARS VS. GENERICS

Biosimilars and generics are each classes of pharmaceutical products approved by the U.S. Food & Drug Administration ("FDA") through distinct, abbreviated pathways that avoid duplicating potentially costly clinical trials.[9] However, biosimilars are not generics and there are important differences between biosimilars and generic drugs. The FDA defines a generic as "a medication created to be the same as an existing approved [reference] drug in dosage form, safety, strength, route of administration, quality, and performance characteristics."[10] The FDA defines biosimilars as biological products that are shown to be "highly similar to and [have] no clinically meaningful differences from" existing reference biologics.[11] In the case of biologics, slight differences (*i.e.*, acceptable within-product variations) are expected during the

[4] See, e.g., "Biological Product Definition," *U.S. Food & Drug Administration*, available at https://www.fda.gov/files/drugs/published/Biological-Product-Definitions.pdf; "How do Drugs and Biologics Differ?" *Biotechnology Innovation Organization*, available at https://archive.bio.org/articles/how-do-drugs-and-biologics-differ; Biologic Medicines: The Biggest Driver of Rising Drug Prices.

[5] "Profitability in the Biosimilars Market," *BioProcess International*, available at https://bioprocessintl.com/upstream-processing/upstream-contract-services/profitability-in-the-biosimilars-market-344001/; Gu, Tao et. al., "Comparing Biologic Cost Per Treated Patient Across Indications Among Adult US Managed Care Patients: A Retrospective Cohort Study," *Drugs Real World Outcomes*, Vol. 3 No. 4 (2016), pp. 369-381, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127933/; Gutierrez, Bryan J., "Financial Analysis of Biosimilar Development Candidates: A Case Study on the US Biosimilar Business," *Harvard Extension School,* (2015), available at https://dash.harvard.edu/bitstream/handle/1/24078352/GUTIERREZ-THESIS-2015.pdf?sequence=1&isAllowed=y ("Gutierrez 2015"), p. 1.

[6] "Top 15 pharmaceutical products by sales worldwide in 2018," *Statista*, available at https://www.statista.com/statistics/258022/top-10-pharmaceutical-products-by-global-sales-2011/ ("Top 15 Pharmaceutical Products by Sales Worldwide in 2018"); "Biologic License Application (BLA): 125057," *U.S. Food & Drug Administration*, available at https://www.accessdata.fda.gov/scripts/cder/daf/index.cfm?event=overview.process&varApplNo=125057; "Humira," *Drugs.com*, available at https://www.drugs.com/humira.html.

[7] Top 15 Pharmaceutical Products by Sales Worldwide in 2018.

[8] Numbers are worldwide revenues in USD. See, Top 15 Pharmaceutical Products by Sales Worldwide in 2018; "Drugs@FDA: FDA-Approved Drugs," *U.S. Food & Drug Association*, available at https://www.accessdata.fda.gov/scripts/cder/daf/index.cfm.

[9] Biosimilar and Interchangeable Products.

[10] "Generic Drug Facts," *U.S. Food & Drug Administration*, available at https://www.fda.gov/drugs/generic-drugs/generic-drug-facts.

[11] "Biosimilar Development, Review, and Approval," *U.S. Food & Drug Administration*, available at https://www.fda.gov/drugs/biosimilars/biosimilar-development-review-and-approval#process ("Biosimilar Development, Review, and Approval").

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manufacturing process for biological products, regardless of whether the product is a biosimilar or a reference product.[12] The approval process for biosimilars is distinct from that of generics in recognition of the aforesaid difference.[13] For example, the generic drug approval process applies to small-molecule drugs such as penicillin, but does not apply to biosimilar products such as Amjevita.[14]

In recent years as patents have expired and biosimilars have entered the marketplace, claimants have initiated antitrust litigations stemming from "Pay-for-Delay" or "Reverse Payment" allegations relating to biosimilar entry agreements. Namely, "Reverse Payment" cases involve allegations of unlawful payment made in order to delay the entry of competition. In some biologics cases, plaintiffs have alleged anticompetitive behavior by reference biologic and biosimilar manufacturers, accompanied by claims of economic harm that could range into billions of dollars.[15] For example, several lawsuits have been filed against AbbVie Inc. ("AbbVie") and various biosimilar producers related to previous litigation settlements involving AbbVie's biologic drug, Humira.[16] The plaintiffs in these cases have argued that AbbVie has used its patent portfolio covering Humira to enter agreements with eight other biopharmaceutical companies in order to delay the introduction of biosimilars in the U.S.[17] Specifically, the plaintiffs have alleged that various AbbVie patent litigation settlements amounted to "a concerted effort to delay biosimilar entry in the U.S." thereby "restrain[ing] competition in the market for Humira."[18]

From an economic perspective, antitrust analyses of biologic "Reverse Payment" matters share some similarities with that of small-molecule "Reverse Payment" matters. However, differences between the economic and market conditions for biologic and small-molecule drugs mean that practitioners cannot mechanically translate analyses and arguments from small-molecule cases to biologic cases.

Bringing a biosimilar to market can be substantially more costly than doing so for a small-molecule generic, due in part to more complex manufacturing

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12 Biologic Medicines: The Biggest Driver of Rising Drug Prices; Blackstone, Erwin A. and P. Fuhr Joseph, "The Economics of Biosimilars," *American Health & Drug Benefits*, Vol. 6 No. 8 (2013), pp. 469-478, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4031732/ ("Blackstone and Joseph 2013"); Biosimilar and Interchangeable Products.

13 Blackstone and Joseph 2013; Biosimilar Development, Review, and Approval.

14 "FDA approves Amjevita, a biosimilar to Humira," *U.S. Food & Drug Administration*, available at https://www.fda.gov/news-events/press-announcements/fda-approves-amjevita-biosimilar-humira.

15 Complaint, *Pfizer Inc., Plaintiff, v. Johnson & Johnson and Janssen Biotech, Inc., Defendants,* Case 2:17-cv-04180-JCJ, ("Pfizer v. Johnson and Johnson"); "Six Lawsuits Target AbbVie's Humira and its Patent Thicket," *Regulatory Affairs Professionals Society*, available at https://www.raps.org/news-and-articles/news-articles/2019/4/six-lawsuits-target-abbvies-humira-and-its-patent ("Six Lawsuits Target AbbVie's Humira and its Patent Thicket"); Complaint for Violations of the Sherman Antitrust Act, the Clayton Act and State Antitrust and Consumer Protection Statutes, *Sheet Metal Workers' Local Union No. 28 Welfare Fund, Plaintiff, v. AbbVie, Inc., Amgen, Inc., Fresenius Kabi AG, Momenta Pharmaceuticals, Inc., Mylan NV, Pfizer Inc., Defendants*, Case 1:19-cv-02674 ("Sheet Metal Workers Local Union No. 28 Welfare Fund v. AbbVie et. al.").

16 Six Lawsuits Target AbbVie's Humira and its Patent Thicket; Sheet Metal Workers Local Union No. 28 Welfare Fund v. AbbVie et. al.

17 Six Lawsuits Target AbbVie's Humira and its Patent Thicket; Sheet Metal Workers Local Union No. 28 Welfare Fund v. AbbVie et. al.

18 Six Lawsuits Target AbbVie's Humira and its Patent Thicket; Sheet Metal Workers Local Union No. 28 Welfare Fund v. AbbVie et. al.

processes for biologics.[19] Industry studies have reported that it can be difficult to replicate biologics in different batches of the same drug, whereas many small-molecule generics are relatively easy to manufacture and can be made virtually identical to their reference products.[20] Biosimilars can take seven to eight years to develop, costing approximately $154 million on average and as high as $250 million.[21] Small-molecule generics by comparison usually cost less than $10 million to develop, and can obtain regulatory approval in less than two years from submission of an abbreviated new drug application ("ANDA").[22] The costs, uncertainty of success, and potential liabilities (such as adverse reactions to new biologic treatments) have been cited as economic factors that have hindered development of vaccines (a type of biologic), an area that is drawing increased attention since the spread of the COVID-19 pandemic.[23] When assessing antitrust concerns for conduct involving biologics and biosimilars, practitioners should carefully scrutinize potential procompetitive benefits that may result from changes in conduct, as well as the effects that such changes may have on the economic incentives for development of future biologics and biosimilars.

Another difference between biologics and small-molecule drugs is that biologics may be covered by larger portfolios of patents. Humira, for example, is covered by over 200 patents.[24] The complexity that such a large number of patents may introduce to the litigation process may further contribute to the cost of development of biosimilars.[25] Avoidance of litigation costs is often a key economic consideration in generic and biosimilar settlements.[26]

Furthermore, differences in federal and state regulations of small-molecule and biologic prescription pharmaceuticals can also impact the nature of competition between the reference product and follow-on products. Below is a non-exhaustive list of regulatory differences concerning small-molecule and biologic drugs:

- For small-molecule drugs, all states mandate some form of automatic substitution away from the reference product and in favor of some alternative product, typically an AB-rated generic. However, to date,

19 Biologic Medicines: The Biggest Driver of Rising Drug Prices; Blackstone and Joseph 2013.

20 Blackstone and Joseph 2013; Vulto, Arnold G. and Orlando A. Jaquez, "The process defines the product: what really matters in biosimilar design and production?" *Rheumatology (Oxford)*, Vol. 56 (2017), pp. iv14-iv29, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5850795/.

21 Blackstone and Joseph 2013; Gutierrez 2015, pp. 34, 43.

22 Blackstone and Joseph 2013; Gutierrez 2015; "FDA Under Pressure to Speed Up Generic Approvals," *Policy & Medicine*, available at https://www.policymed.com/2017/04/fda-under-pressure-to-speed-up-generic-approvals.html.

23 "Big Pharma May Pose an Obstacle to Vaccine Development," *The New York Times*, available at https://www.nytimes.com/2020/03/02/opinion/contributors/pharma-vaccines.html.

24 As of March 2019, AbbVie was asserting 75 of those patents in litigations against biosimilar manufacturers. See, Blackstone and Joseph 2013; Biologic Medicines: The Biggest Driver of Rising Drug Prices.

25 Biologic Medicines: The Biggest Driver of Rising Drug Prices.

26 Economic literature has documented litigation costs as a factor affecting potential outcomes of settlement negotiations. For instance, Lederman, in analyzing which cases were likely to settle and which were not, explained that the existence of litigation costs creates a "'surplus' (the aggregate of the amounts each would have spent to go to trial) that they can divide between them." See, Lederman, Leandra, "Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle," *Case Western Reserve Law Review*, Vol. 49 No. 2 (1999), p. 319, available at https://pdfs.semanticscholar.org/9451/e66407693eb9c9045cea74290f885dd4e50f.pdf?_ga=2.247329860.17507962.1588016253-1608573178.1588016253.

there is no automatic substitution for biosimilars in the U.S., as no biosimilar has been certified by the FDA to be interchangeable to a reference biologic.[27] Therefore, reference biologic products currently cannot be substituted with biosimilars at the pharmacy level, and a biosimilar product must be prescribed by a health care prescriber for it to be administered to the patient.[28]

- New small-molecule drugs (referred to as new chemical entities) are given a minimum of 5 years of regulatory exclusivity whereas new biologics are given 12 years of exclusivity.[29]

- Patents claimed by manufacturers to support small-molecule reference drugs are publicly disclosed by federal mandate.[30] No such federal mandate exists for biologics.[31]

- Upon the filing of a patent-infringement lawsuit, small-molecule generics are stayed from entering the market for 30 months by federal mandate.[32] No such federal mandate exists for biosimilars.[33]

III. Economic Considerations in Biosimilar "Reverse Payments" Cases

While the economic impact of individual regulatory differences must not, in practice, be assessed in a vacuum independent of the facts of a case, we discuss below potential implications of one area of regulation on economic analyses of biosimilar "Reverse Payment" matters: the absence of automatic substitution for biosimilars. We organize our discussion by areas of economic antitrust inquiry often applied to "Reverse Payment" matters, namely class certification, market power, competitive effects, and economic damages.

- **Class certification:** To establish class-wide damages, plaintiffs are required to demonstrate that impact to individual class members can be established using evidence common to the class and that they can use a

27 Biosimilars must meet the additional requirement of interchangeability for a pharmacist to exchange them with their reference products without consulting the prescriber. See, Biosimilar and Interchangeable Products; "Biosimilar Interchangeability: An Evolving Designation," *Examine Biosimilars*, available at https://www.examinebiosimilars.com/content/examinebiosimilars/en_us/biosimilars-interchangeability.html ("Biosimilar Interchangeability: An Involving Designation").

28 Biosimilar and Interchangeable Products.

29 Biologic Medicines: The Biggest Driver of Rising Drug Prices.

30 "Orange Book Preface," *U.S. Food & Drug Administration*, available at https://www.fda.gov/Drugs/DevelopmentApprovalProcess/ucm079068.htm ("Orange Book Preface").

31 Biologic Medicines: The Biggest Driver of Rising Drug Prices; H.R. 3590: Patient Protection and Affordable Care Act at 686-703, available at https://www.fda.gov/media/78946/download.

32 "If the brand product sponsor or patent holder files an infringement suit against the generic applicant within 45 days of the ANDA notification, FDA approval to market the generic drug is generally postponed for 30 months unless the patent expires or is judged to be invalid or not infringed before that time. This 30-month postponement, commonly referred to as the '30-month stay,' gives the brand product sponsor and patent holder a prescribed amount of time to assert patent rights in court before a generic competitor is approved and can market the drug." See, "Patent Certifications and Suitability Petitions," *U.S. Food & Drug Administration*, available at https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/AbbreviatedNewDrugApplicationANDAGenerics/ucm047676.htm.

33 Kowalchyk, Katherine and Cara Crowley-Weber, "Biosimilars: impact of differences with Hatch-Waxman," *Pharmaceutical Patent Analyst*, Vol .2 No. 1 (2012), available at https://www.future-science.com/doi/abs/10.4155/ppa.12.77?rfr_dat=cr_pub%3Dpubmed&url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrossref.org&journalCode=ppa.

formulaic approach to calculate the amount of damages awarded to purported class members. Given that there is no automatic substitution for biosimilars and that biosimilars, although "highly similar," are not interchangeable[34] with the reference biologic at the pharmacy-level, switching from a reference biologic to a biosimilar may require patient-by-patient assessment by prescribers. If this is the case, then it may be difficult to establish a one-size-fits-all method that appropriately accounts for harm to all users of the biologic and biosimilars at issue. Recent studies have found that biosimilars "have the potential to elicit an immunogenic response in treated individuals (immunogenicity), which may have an impact on the efficacy and safety profiles of the drug," and that "treatment-, patient-, and drug-property-associated factors" such as route of administration for treatment, patient genetic factors, and drug impurities can influence immunogenicity.[35] If case-by-case determinations need to be conducted by prescribers to authorize biosimilar switching, then class certification may be difficult, especially if the share of patients that might stay on the reference biologic is large.[36]

- **Market definition and market power**: An assessment of whether biologic and biosimilar producers have market power may depend, at least in part, on the scope of the relevant antitrust market for competition. In the case of biologics, the lack of automatic substitution away from the reference biologic and the possibility that biosimilars are not necessarily therapeutically "interchangeable" with the reference biologic may indicate that competition between reference biologics and biosimilars may resemble that of brand-to-brand small-molecule pharmaceutical competition. That is, biosimilars, which cannot be automatically substituted for the reference brand biologic,[37] are commonly branded and compete with the reference product on both price and non-price factors.[38] This stands in contrast to competition between suppliers of small-molecule generics, which occurs within the context of automatic substitution regulations and often revolves around competition on net price (*i.e.* prices net of rebates and discounts).[39]

[34] According to the FDA, an "interchangeable" product is a biosimilar product that meets additional requirements outlined by the Biologics Price Competition and Innovation Act. An "interchangeable" biosimilar may be substituted for the reference biologic product without the involvement of the prescriber. "Biosimilar and Interchangeable Products," *U.S. Food & Drug Administration*, available at https://www.fda.gov/drugs/biosimilars/biosimilar-and-interchangeable-products.

[35] Pineda, Carlos et. al., "Assessing the Immunogenicity of Biopharmaceuticals," *BioDrugs*, Vol. 30 (2016), pp. 195-206, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4875071/; Edwards, Christopher J., et. al., "Switching to biosimilars: current perspectives in immune-mediated inflammatory diseases," *Expert Opinion on Biological Therapy*, Vol. 19 No. 10 (2019), pp. 1001-1014, available at https://www.tandfonline.com/doi/full/10.1080/14712598.2019.1610381.

[36] In a small-molecule "Reverse Payment" matter, the First Circuit found in *Asacol* that the plaintiffs had not established that common issues would predominate because at least ten percent of the proposed class was uninjured due to brand loyalty. See, 907 F.3d 42 at 61 (1st Cir. 2018).

[37] Biosimilar Interchangeability: An Evolving Designation.

[38] "Biosimilar Product Information," *U.S. Food & Drug Administration*, available at https://www.fda.gov/drugs/biosimilars/biosimilar-product-information; "IQVIA Data Show Biosimilars Struggling for Market Share in the US," *Journal of Clinical Pathways*, available at https://www.journalofclinicalpathways.com/news/iqvia-data-show-biosimilars-struggling-market-share-us; Winegarden, Wayne, "Incenting Competition to Reduce Drug Spending: The Biosimilar Opportunity," *Pacific Research Institute*, 2019, available at https://www.pacificresearch.org/wp-content/uploads/2019/07/BiosimilarsCompetition_F.pdf, pp. 6-7, 9, 11-14.

[39] Competition across products, including small-molecule generics, should be examined on a case-by-case basis as there may be settings in which small-molecule generics may compete on price and non-price factors. For example, in some

When the reference biologic and its biosimilars compete in multiple price and non-price dimensions, the relevant antitrust market may be broader than the reference biologic and its biosimilars and include other branded and/or non-branded pharmaceuticals. In a relevant antitrust market that includes many therapeutic alternatives, it may be less likely that any individual biologic possesses market power.

- **Competitive Effects and Economic Damages:** Properly calculated economic damages should reflect how plaintiffs' economic positions would differ absent the alleged conduct-at-issue. The damages expert should be able to reliably distinguish the alleged harm caused by the conduct-at-issue from the influence of other unrelated market factors.[40] In "Reverse Payment" matters, plaintiffs often claim economic damages based on claims of how drug prices would have been lower but-for the alleged unlawful settlement agreement. When assessing such economic damages claims for biologic "Reverse Payment" matters, it is important to consider the nature of competition between the reference biologic and biosimilars. As discussed above, competition between reference biologics and biosimilars may resemble that of brand-to-brand pharmaceutical competition along both price and non-price dimensions. Potential economic implications of such brand-to-brand nature of competition are that a biosimilar may not be sold at much of a discount, if at all, relative to the reference biologic, and that (compared to examples of so-called "generic erosion") a reference biologic may not lose sales to a biosimilar entrant. Whether product prices would be lower in the but-for world is a key economic question when assessing competitive effects for "Reverse Payment" matters. Likewise, price and sales erosion are often central factors in economic damages calculations for "Reverse Payment" matters.

IV. CONCLUSION

Biologics and biosimilars open new treatment possibilities for patients as well as potentially new competitive considerations for antitrust regulators and practitioners. Experiences from recent biologic "Reverse Payment" litigation indicate that the economic differences between how biologics and small-molecule drugs are prescribed and sold will likely increase the complexity of antitrust analyses. However, the fundamental economics behind these analyses remain unchanged, and in each case, we must carefully weigh the pro- and anti-competitive consequences based on the facts the case.

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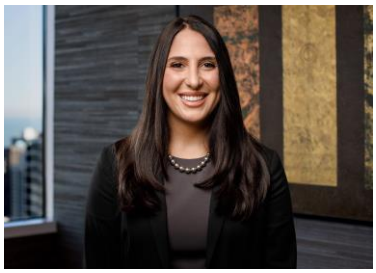
settings, generics are sold under brand names as "branded generics" and compete as differentiated products. See, e.g., "Branded Generics – Meeting Medical Needs in Emerging Markets," *Abbott*, available at http://brandedgenericsinemergingmarkets.com/.

[40] See e.g., Allen, Mark A. et. al., "Reference Guide on Estimation of Economic Damages," in *Reference Manual on Scientific Evidence* (Third Edition), Washington, DC: National Academies Press, 2011, p. 432, available at https://www.nap.edu/read/13163/chapter/10.

A Look at the ABA Antitrust Section International Cartel Workshop from Two Unique Perspectives

By Amy Starinieri Gilbert, Jason Chrestionson, Sean McClelland, and Kali Yallourakis



Amy, Jason, Sean, and Kali are all associates in the Antitrust, Trade, and Commercial Litigation department in the Chicago office of McGuireWoods LLP. Their practices focus on antitrust and commercial litigation, as well as global cartel investigations. Amy, Jason, Sean, and Kali assisted in planning and coordinating th e 2020 International Cartel Workshop in San Francisco in February.

In February, just before the United States pressed pause amidst the ongoing COVID-19 pandemic, antitrust practitioners from all over the globe joined together in San Francisco, California, for the 13th International Cartel Workshop. Over the course of three days, the workshop featured an experienced faculty of private attorneys and government enforces who, through numerous interactive panels, demonstrated a hypothetical global cartel investigation and explored current antitrust issues. While in San Francisco, we had the chance to chat with two esteemed antitrust practitioners to ask them, among other things, how their work with regard to criminal cartels informs their civil practice. Our two esteemed guests included Lisa Phelan and Bruce Simon.

Lisa Phelan, former Chief of the National Criminal Enforcement and Washington Criminal I Sections of the Antitrust Division of the U.S. Department of Justice, is a partner in Morrison & Foerster's Global Antitrust Law Practice and Investigations + White Collar Group. With more than 25 years of service at the DOJ as one of the leading authorities in criminal antitrust matters, Ms. Phelan's experience with criminal investigations, litigation, and enforcement is unmatched. As Chief of the National Criminal Enforcement and Washington Criminal I Sections of the Antitrust Division, Ms. Phelan supervised and

coordinated all investigative and litigation work on international and national criminal cartel cases.

Bruce Simon is a Partner Emeritus at Pearson, Simon & Warshaw, LLP, and a regular speaker at the International Cartel Workshop. Mr. Simon has been on the cutting-edge of plaintiffs' side antitrust litigation for many years, including notable cases like *In re TFT-LCD (Flat Panel) Antitrust Litigation*. Accordingly, he provides a valuable perspective on what criminal cartel practitioners––particularly those in the defense bar worried about civil class action exposure––should keep in mind when a new investigation unfolds.

We extend our gratitude to Ms. Phelan and Mr. Simon for their time and willingness to share their wisdom and experience with young lawyers.

Interview with Lisa Phelan

Below is a summary of our interview of Ms. Phelan, though not a word-for-word recitation of the conversation.

Q: Your esteemed career precedes you, but in summary, could you tell us what your practice entails?

A: I practice a lot of criminal defense and have done several no-poach cases. I also represent both companies and executives, litigate civil damages actions, and defend monopolization cases in front of the FTC, as well as help my clients develop effective compliance programs.

Q: How, if at all, does your work on cartel investigations inform your civil practice, or vice versa?

A: With either criminal or civil work, you develop a sense of where the lines are and how close you are getting to those lines [of what is legal and what is not]. Only exposure to both criminal and civil practice will help you appreciate the lines. There are some crossovers between civil and criminal. For instance, if you are doing a standard investigation ahead of an M&A transaction, you can discover evidence of a criminal cartel, which transforms the standard investigation into a criminal matter.

As a former DOJ attorney, I know how government enforcers think. It is definitely a benefit knowing the operating procedures on the government side. Often times in civil investigations, the attorneys and parties are talking past each other, and it is important to recognize where the other is coming from.

Q: Any important lessons you learned from your work on criminal cartel investigations that have served you in your civil practice?

A: You will be a better antitrust lawyer if you have exposure to both civil and criminal work. As a civil lawyer, you are somewhat

blind to the criminal aspects. In criminal work, you learn not to always accept the version of the story you are given. You start to develop certain instincts, and you take those with you into civil practice, where there are often conflicting stories as well.

Q: Which do you prefer, civil or criminal work?

A: I still mostly prefer criminal work, but I like civil as well.

Q: Any lessons from the ICW this year that you think are important for all antitrust attorneys, not just those involved in criminal cartel investigations?

A: As we saw in one of the ICW demonstrations, in your interaction between counsel and client, give the client a full picture of what they are up against. You hate to scare them, but you need to be realistic with them. All lawyers can take away that lesson—do not shield clients; be open and honest.

The variety of perspectives ICW provides is also invaluable. Most companies are operating in a global environment—systems and jurisdictions vary from country to country. It is important to get other international perspectives.

Q: I understand that you have a particular interest in supporting young lawyers; what advice do you have for young lawyers, particularly in the antitrust bar?

A: Antitrust work can be extremely rewarding. As a young lawyer, to feel like you are making a difference in bringing down the price of things [for the betterment of the economy] . . . it can feel like you are having a huge impact.

If young attorneys are interested in cartel work, this is such a supportive bar. On the flight over to San Francisco, I was reviewing the attendee list for the ICW. I knew 140 of the attending attorneys. It is valuable to know each other as friends, and come together and learn from each other. Those friendships can also be sources of work referrals in the future. Building a network in that way will serve you well going forward.

If you jump around too much between groups, it is hard to build that familiarity. Developing these lasting relationships is worth the non-billable time. To just be able to talk things through with colleagues you trust makes a real difference in what you can accomplish. Ultimately, that is in the best interest of your clients.

Q: How many times have you been to ICW and where do you think the next one should be held?

A: I have been to every ICW since 1997, with the exception of one. I think the next one should be in Canada, or another accessible location, to ensure that young lawyers can attend without it being cost prohibitive.

Interview with Bruce Simon

Below is a summary of our interview of Bruce Simon, though not a word-for-word recitation of the conversation.

Q: Good afternoon, Bruce. We're very excited to talk with you because, being one of the premier attorneys on the plaintiffs' side, we imagine your perspective will be different than other attendees' considering that the bulk of practitioners at the International Cartel Workshop have defense-focused practices. Would you mind telling us how you came to practice in the criminal cartel space?

A: Well I started with a very small firm forty years ago doing personal injury work. I then went to a defense firm for a few years before I finally ended up on the plaintiffs' side. I started out doing mainly securities cases and professional liability cases, as well as Ponzi-scheme type cases. Soon, that morphed into getting into more economic damages cases, including antitrust. From there, the antitrust cases morphed into international cartel cases. And, once I got involved in those kinds of cases, it all compounded on itself. You start to gain the expertise, you get to be the go-to person on the plaintiffs' side, and soon you get appointed as lead counsel. It all kind of builds upon itself.

Q: What facilitated the jump for you from defense work to the plaintiffs' side of things?

A: I was on the defense side at a firm here in [San Francisco] called Gordon & Reese. Back then I was one of the first twenty attorneys they had, and now they must be up to two or three hundred attorneys. Most of the work I did there was insurance defense work, but even though it was good hourly work, they had lots of business, and it was a great firm, it just didn't appeal to me.

I didn't feel like a non-lawyer, an insurance administrator or somebody like that, should be telling me what is right to do with my cases. You have the claims adjuster directing the case, and that seemed to tie my hands a lot. I didn't have the freedom to handle the case the way I wanted to do it. Then I got on the plaintiffs' side and there you get to figure everything out yourself, so you can control your own destiny.

One of the big things I've learned is that, when you're doing a huge plaintiffs' case, whether it be an international cartel case or just another huge case involving millions of documents, a large number of depositions, expert work, et cetera, you become very

tuned-in to what your case needs to look like when you try the case. If you go down too many dry holes between the start of the case and when you get to the point of actually reaching trial (if you don't settle), you really can bog yourself down and cost yourself a lot of money. So, one of the things I've learned is this: think about the case from the very beginning with the point of view of a trial. I write the complaint as if I was going to give that as my opening argument at the time of trial, and then I develop the evidence and go from there.

Q: Can you tell us about some of the cases you're currently working on right now?

A: Right now a large number of my cases are not international cartel cases. In fact, I've got a few cases going on right now that are very active that don't have a DOJ investigation that started the case.

One of them is a poultry case, back in Chicago. That one is interesting because we now have the AGs and the DOJ interested in the matter, about three years after we started the case. That sort of thing has happened in other cases that I've had. It's kind of nice actually—it means we're obviously going in the right direction and created something of interest to them.

The mix has gotten different. I don't know if that is because there aren't as many cartel investigations or DOJ investigations as there were before. But, I think it's also because, once you are fairly successful, you start to get calls about cases that aren't necessarily DOJ-related.

Q: How has your familiarity with cartel investigations informed your other antitrust work, and vice-versa?

A: I think one of the ways cartel experience impacts my civil practice is that when you look at a cartel investigation and you look at how massive it is, it really requires you to focus your attention. I think that's really the difference, in a lot of respects, between the plaintiffs' bar and the defense bar (although good defense attorneys show these attributes as well). Cartel work really requires a nimbleness to be able to move and shoot in the case and, once you learn that skill, it carries over to any of your cases.

At least in the cartel cases that I've been involved in, you have a criminal case going on at the same time. That criminal case will have certain rules that will make that case converge and start to ripen faster than the civil case. On our side of things, we'll often have a broader case, either by time period or product. We'll often have information coming from a source that the government doesn't have. All this can make the work a little different. But the

pace of the criminal case still pushes the civil case along pretty fast.

Q: How do you avoid discovery logjams when your civil case gets stayed by the court while the criminal case is resolved?

A: If you look at it from the wrong point of view, it can be a distraction. At the beginning of the case, you get motions to stay, which can slow you down. But if they're not indefinite, you'll at least get the documents that were produced by the defendants to the grand jury at the beginning of the case. Those get you right to the core of the matter.

It really gives a focus to the case—it allows you to know where the government is going and allows you to understand the difference between the government's approach and your approach. I think that's extremely helpful.

Q: How does that experience differ from developing the case independently from a government action?

A: You know, being out there creating the case yourself—which we've done—is challenging. You don't have that kind of guidance, knowing what the government's looking at.

What's really interesting is when you start the case yourself and then the government comes in and starts looking at it, too. Then they're getting the guidance from our cases to inform where they go. But that doesn't happen a lot.

Q: What one or two things do you think that practitioners—be they criminal side, civil side, plaintiffs, defendants—should take away from this year's International Cartel Workshop?

A: Well, the one thing that made my ears perk up is that the burden might be more and more on the private bar to deal with cartel cases. As the U.S. government and other countries deal with this mass of potential cases that they have, it seems like there's a little bit of paralysis out there. Even though I believe that the DOJ and others are all doing the best that they can, things have gotten so gigantic that it's almost hard for them to deal with it. So, I think it has to be of our own initiative on the plaintiffs' side to do so. On the defense side, underestimating the civil cases is a dangerous proposition because I think the civil cases may increasingly start to make the case for the government (rather than the usual other way around).

Another takeaway was, as always, that the people that you meet and the relationships you develop are unrivaled at these conferences. I've been doing this for a long time and I continue to come and participate because I see people I've developed relationships with and who do the same thing that I do. It's great

to experience the comradery and to see what's new and exciting. For young attorneys who are just getting started out in their practice, these events are fantastic to come to. You get a lot of face time with the people you want to have face time with.

I also want to make sure plaintiffs continue to participate in these conferences at a greater rate. But it's a great event and you know, I would encourage everybody—even if they don't do cartel work—to come because they are going to get a benefit from coming to this thing.

Our conversations with Ms. Phelan and Mr. Simon both underscored two important points. The first is the importance of taking a step back to ensure one has the right perspective. While large criminal cartel matters may sometimes lurch along over the course of multiple years, both Ms. Phelan and Mr. Simon were clear that in order to be an effective antitrust practitioner, one should always strive to ensure that the immediate task at hand is directly traceable to a successful outcome for the client. The second is the value of relationships, including across the aisle. In an antitrust dispute, you might find yourself working with the same opposing counsel for years on end. Having met them beforehand at a networking event like the International Cartel Workshop might just make that relationship a little more collegial and productive (or, perhaps, even give you a bit of insight into their perspective).

* * * * * * * * *

Poaching Per Se

By Halli Spraggins and Heidi Smucker

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I. INTRODUCTION

In recent years, courts have scrutinized restrictive anti-poach provisions, found in employment agreements, as former and current employees challenged the legality of these clauses under federal antitrust laws. Anti-poach agreements frequently prevent employers from hiring employees of competitors stymying competition in the labor market. Litigants typically allege violations of Section 1 of the Sherman Act asserting the clauses constitute market allocation. Notably, plaintiffs also contend that these anti-poach agreements should be treated as *per se* anticompetitive whereas defendants have predictably sought to have the claims evaluated under the rule of reason.

Lower court rulings assessing the legality of anti-poach provisions have been inconsistent. At the motion to dismiss stage, some district courts have declared the no-poach agreements to be *per se* antitrust violations, while a minority have applied rule of reason instead, and others have declined to pick a form of analysis altogether.[1] However, courts have largely sided with plaintiffs and analyzed anti-poach agreements under a *per se* approach, or at a minimum allowed plaintiffs' claims to survive a motion to dismiss. The Antitrust Division of the Department of Justice has also filed several statements of interest expressing support for plaintiffs' interpretation of anti-poach agreements as *per se* restraints on trade.

II. ANTI-POACH AGREEMENTS

Employers have utilized anti-poach agreements for several years. These agreements often include covenants not to compete, which prevent employees from working for another franchise, a particular employer, or in a similar trade and position. "Anti-poaching agreements are typically defined as agreements between two or more companies not to compete for each other's employees."[2] The nature of these agreements and how they have been applied, have changed

[1] *See e.g.*, ERIC A. POSNER, THE ANTITRUST CHALLENGE TO COVENANTS NOT TO COMPETE IN EMPLOYMENT CONTRACTS (Sept. 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453433.

[2] Holly Marie Wilson, *Anti-Poaching Agreements: The Good, the Bad and What's to Come*, REMINGER: RETAIL, HOSPITALITY, & ENT. FACILITIES LIABILITY-SPRING 2019 NEWSL. (Apr. 18, 2019), https://www.reminger.com/publication-797.

over time. "While noncompetes were traditionally understood to be justified only for specialized and well-compensated employees, it turns out they are frequently imposed on low-skill employees. . . ."[3] In a seminal case, the sandwich shop chain Jimmy John's included non-compete agreements in its employment contracts that prohibited sandwich makers from working at any other sandwich shop within three miles.[4] Instead of protecting trade secrets, anti-poach agreements have morphed into a roadblock that deter low-income workers from finding a higher-paying job within a familiar line of work. Research demonstrates that these agreements may also discourage workers from quitting or seeking alternative employment.[5] Moreover, the breadth of these agreements has expanded and now includes agreements not to solicit, recruit, or hire employees thereby further restricting an employee's ability to move from one employer to another.

III. APPLICABLE LAW

A. APPROPRIATE APPLICATION OF *TWOMBLY*

Some commentators have suggested that courts have improperly allowed plaintiffs' claims challenging anti-poach agreements to proceed beyond the motion to dismiss stage asserting plaintiffs have failed to allege, among other things, a relevant market.[6] While Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*[7] placed a higher pleading burden on plaintiffs, it was not intended to require plaintiffs to satisfy multiple pleading standards—i.e. per se *and* rule of reason. *Twombly* simply requires that a complaint contain enough plausible allegations of fact, including "to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]."[8] Furthermore, an antitrust complaint "is not obliged to plead under each possible rule," but rather show that the agreement would "fall under one of three rules of analysis, the rule of reason, per se, or quick look."[9] This approach was most recently recognized in the Southern District of Illinois's ruling on Jimmy John's second motion to dismiss:

> If the evidence in this case shows that the franchisees are truly as independent as [the plaintiff] pleads, this case will likely result in a quick look analysis. If the evidence of franchisee independence is Herculean, then the per se rule might even apply. And if the evidence of franchisee independence is weak, or if Jimmy John's carries its burden under the quick look approach, then the rule of reason may rear its head and burn this case to the ground. But that is a matter for a later stage in these proceedings.[10]

[3] *See* Posner, *supra* note 1, at 2.
[4] *Id.*
[5] *Id.*
[6] *See* Defendants' Mot. to Dismiss, I*n re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-cv-00825-JHM, ECF 59 (W.D. Ky. Apr. 5, 2019).
[7] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
[8] *Id.* at 556, 570.
[9] *See United States v. eBay*, 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013).
[10] *Conrad v. Jimmy John's Franchise, LLC*, No. 3:18-cv-00133-NJR-RJD, 2019 WL 2754864, at *1 (S.D. Ill. May 21, 2019); *see also In re Papa John's*, 2019 WL 5386484, at *9 ("The Court declines to announce a rule of analysis at this juncture.") (internal quotations and citations omitted).

Applying this standard, a court does not need to determine whether plaintiffs are likely to prevail following discovery.[11]

Courts employ three types of analysis when examining alleged antitrust violations: *per se*, quick look, and rule of reason.[12] A restraint is a *per se* violation where it is "so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality."[13] Where a restraint "always or almost always tend[s] to restrict competition and decrease output," courts will find the restraint is *per se* unreasonable,[14] and following such a determination, courts do not need to engage in industry analysis.[15] Notably, the Supreme Court has indicated that *per se* analysis does not govern where a plaintiff challenges "the core activity" of a joint venture,[16] but courts may find *per se* is still appropriate where plaintiffs instead challenge restraints effectuated through an agreement.[17]

Courts have historically viewed agreements among competitors to "divide markets" as *per se* unlawful[18] and market allocation agreements as "classic per se antitrust violation[s]."[19] Today, it is still good law among federal courts that horizontal competitors conspiring to divide markets is *per se* illegal when the conduct has no demonstrable competitive benefits.[20] Yet, antitrust claims face considerable analytical hurdles in order to survive a motion to dismiss—claims involving no-poach agreements are no different. Plaintiffs have repeatedly moved their claims beyond the motion to dismiss stage by showing how no-poach agreements disrupt employment markets. For example in *Hunter v. Booz Allen Hamilton, Inc.,* the court denied a motion to dismiss regarding defendants' express agreements not to hire one another's employees.[21] The court

[11] "In deciding a motion to dismiss the court is not opining on whether the plaintiff will be likely to prevail on the merits; rather, when considering a motion to dismiss, the court accepts as true all well-pled factual allegations in the complaint and views them in a light most favorable to the plaintiff." *Cole's Wexford Hotel, Inc. v. UPMC*, 127 F. Supp. 3d 387, 396 (W.D. Pa. 2015).

[12] *See, e.g.*, *United States v. eBay, Inc.*, 968 F. Supp. 2d at 1037 (stating that pleadings alleging an unreasonable restraint on trade "must include allegations showing that the restraint will fail under one of three rule of analysis").

[13] *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5, 8 (2006) (quoting *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

[14] *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

[15] *See, e.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

[16] *Texaco*, 547 U.S. at 1.

[17] *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No: 17cv205-MMA (MDD), 2018 WL 3032552, at *12 (S.D. Cal. June 19, 2018) (emphasizing the plaintiffs agreed that the subcontractor agreements at issue were "legitimate" and instead challenged "the no-poaching restraints, included in these legitimate agreements, as unlawful restraints") (internal quotations omitted).

[18] *Leegin Creative Leather Prods.*, 551 U.S. at 886.

[19] *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (citing *Topco Assocs*., 405 U.S. at 608).

[20] *See, e.g.*, *In re Animation Workers Antitrust Litig*., 123 F. Supp. 3d 1175, 1181-84, 1208-13 (N.D. Cal. 2015) (finding plausible per se violation of Sherman Act based on non-solicitation agreements); In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (stating plaintiffs plausibly alleged a per se violation of Sherman Act where defendants agreed not to cold call their competitors' employees); *see also Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955, at *6-7 (N.D. Ill. June 25, 2018) (explaining that "because a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement would be a per se violation of the antitrust laws," but adopting quick look analysis because no-hire agreement was part arguably procompetitive intrabrand franchise agreement); *Butler v. Jimmy John's Franchise,*
LLC, 331 F. Supp. 3d 786 (S.D. Ill. 2018) (holding that the per se rule applied to a naked no-poach agreement between competitors, but declining to reach the question in a franchise context, suggesting that either per se or quick look could apply depending on the extent to which franchisees are actually independent, and therefore competitors).

[21] *Hunter v. Booz Allen Hamilton, Inc*., 418 F. Supp. 3d 214, 219 (S.D. Ohio Nov. 12, 2019).

considered the economic impact of the agreements which "prevented Plaintiffs and Class members from seeking better-paid employment opportunities with other Defendants. . . .,"[22] and found that "[d]efendants exercised and maintained this power, and did in fact suppress wages, benefits, and other aspects of compensation and eliminate competition."[23] As such, Plaintiffs' complaint plausibly alleged an antitrust injury.

In *In re Papa John's Employee & Franchisee Employee Antitrust Litigations*, a case filed in the Western District of Kentucky, the court saw no need to analyze the anticompetitive effects of a standard franchise agreement which included a no-poach provision that effectively created an agreement among franchisees not to compete for labor among themselves.[24] Plaintiffs' complaint included factual allegations proving that the no-poach provision led to anticompetitive effects in the relevant labor market by suppressing wages and decreasing employees' job mobility.[25] The court concluded that anti-poaching agreements "are so clearly unreasonable that their anticompetitive effects within geographic and product markets are inferred."[26]

To date, the only anti-poach agreement that has not survived a motion to dismiss was in *Ogden v. Little Ceasar, Inc*., where the plaintiffs failed to allege any explicit agreement either to fix wages or to divide the labor market into any discernible exclusive territories.[27] Plaintiffs only alleged that "Little Caesar franchisees contracted, combined, and/or conspired to not solicit, poach, or hire each other's management employees."[28] The Eastern District of Michigan concluded this was insufficient to establish that their claims could properly proceed under a *per se* analysis.

B. ANTITRUST DIVISION STATEMENTS OF INTEREST

In recent years, the Antitrust Division at the Department of Justice has taken a particular interest in anti-poaching agreements and adopted the position that these agreements are detrimental to labor market competition.[29] This focus on anti-poach agreements began towards the end of 2016, following the Division's announcement that it "intended to proceed criminally against naked no-poach and wage-fixing agreements."[30] From the start, the Division has categorized anti-poaching agreements as "per se unlawful because they eliminate competition in the same irredeemable way as agreements to fix

[22] *Id*.
[23] *Id*. at 222.
[24] No. 3:18-cv-00825-JHM, 2019 WL 5386484, at *1 (W.D. Ky. Oct. 21, 2019).
[25] *Id*. at *4.
[26] *Id*. at *8.
[27] 393 F. Supp. 3d 622, 632 (E.D. Mich. 2019).
[28] *Id.* at 627.
[29] "When companies agree not to hire or recruit one another's employees, they are agreeing not to compete for those employees' labor. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment. Under the antitrust laws, the same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services." Press Release, U.S. Dep't of Justice, No-Poach Approach: Division Update Spring 2019 (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach [hereinafter No-Poach Approach].
[30] Press Release, U.S. Dep't of Justice, No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements (Apr. 10, 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

product prices or allocate customers."[31] Over the last three years, the Division has filed several statements of interest under the Division's expanded amicus program. These statements illustrate the Division's position that Section 1 of the Sherman Act applies to employers' non-compete agreements for employees.

1. In re: Railway Industry Employee No-Poach Antitrust Litigation

In April 2018, the Antitrust Division brought a civil lawsuit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation ("Wabtec"). Following a subsequent civil settlement, current and former Wabtec employees filed over fifteen private lawsuits. In the defendants' motion to dismiss, Wabtec argued that the rule of reason, rather than the per se rule, was the proper method of analysis for assessing no-poach employment agreements. The Division's Statement of Interest disagreed and urged the District Court for the Western District of Pennsylvania to classify the anti-poaching agreements as per se restraints on competition, unless such agreements were necessary to facilitate a separate business transaction between competitors.[32]

2. Seaman, et al. v. Duke University, et al.

The Division has also examined anti-poaching agreements outside of the class action context. In *Seaman v. Duke University*, Dr. Danielle Seaman, a former Assistant Professor of Radiology at Duke School of Medicine in the Cardiothoracic Imaging Group, brought a claim against the university after the University of North Carolina Chapel Hill School of Medicine refused to hire her due to a no-poach agreement between the two medical schools.[33] Similar to defendants in prior no-poach class action cases, the university's motion to dismiss asked that the court examine the no-poach agreement under a full rule of reason analysis.[34] The Division's Statement of Interest categorized the no-poach agreement as a *per se* illegal restraint on competition and further labeled the universities' agreement as a form of market allocation.[35]

3. Fast Food Franchises

Finally, the Division has also recently filed three statements of interest in three no-poach cases filed against Auntie Anne's, Arby's, and Carl's Jr. In each of these cases, former employees alleged that the franchisor and franchisees entered into agreements that prohibited employees from obtaining employment with another franchisee or franchisor. The Division's statements of interest argued that *per se* analysis is appropriate where courts find there is a horizontal no-poach agreement between rival franchisees within the same

[31] *Id.*

[32] Statement of Interest, at 4, *In re: Railway Industry Emp. No-Poach Antitrust Litig*., 395 F. Supp. 3d 464 (W.D. Pa. 2019) (No. 18-798, MDL No. 2850).

[33] Second Am. Compl., at 52, *Seaman v. Duke Univ*., No. 15-cv-00462 (M.D.N.C. Mar. 7, 2019), ECF 109.

[34] Def.'s Mot. to Dismiss, at 1, *Seaman v. Duke Univ.*, No. 15-cv-00462 (M.D.N.C. Mar. 7, 2019).

[35] "Agreements between competitors not to solicit or hire each other's employees harm competition in labor markets in the same way that agreements between them to allocate customers or divide product markets harms competition in those markets. Like other types of allocation agreements, such no-poach agreements between competing employers are per se unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration between the employers, in which case the rule of reason applies." Statement of Interest, at 19, *Seaman v. Duke Univ*., No. 15-cv-00462 (M.D.N.C. Mar. 7, 2019), ECF 325.

brand. Additionally, the Division responded to the defendants' assertion that franchisors and franchisees cannot conspire with each other by countering that courts can, in fact, consider franchisors and franchisees to be separate entities that are capable of conspiring within the meaning of Sherman Section 1. However, the Division also conceded that in circumstances where no-poach agreements are an ancillary restraint within a vertical franchise agreement between a corporate parent and the franchisee, then rule of reason analysis is appropriate, even when the agreement has horizontal components.

IV. CONCLUSION

When examining the Division's statements addressing which antitrust analysis is appropriate in no-poach cases, the outcome depends on the type of restraint alleged. The Division's position is clear: horizontal agreements among competitors to fix wages or to refrain from hiring each other's employees is a naked restraint on trade and *per se* illegal.[36] This hardline rule softens considerably where "the facts show that no-poach agreements are reasonably necessary to a separate, legitimate business transaction or collaboration among employers."[37] Here, the Division urges that a restraint "is exempt from the *per se* rule if it is ancillary to a separate, legitimate venture between the competitors."[38] The Division defines a restraint as ancillary if it is "subordinate and collateral to a separate, legitimate transaction, and reasonably necessary to make the main transaction more effective in accomplishing its purpose."[39]

Furthermore, the Division states "there are two ways for a no-poach agreement to be subject to the rule of reason and not the per se rule: verticality and ancillarity."[40] Notably, the Division only identifies these two analytic options and clarifies that "the quick-look form of rule of reason analysis is inapplicable because the court should weigh the anticompetitive effects against the procompetitive benefits of franchise no-poach agreements that qualify as either vertical or ancillary restraints."[41] Despite the Division's clear stance on what and when different antitrust analysis applies in no-poach cases, the courts have not blindly followed this guidance.[42] Courts have still found a quick look analysis is appropriate in some instances.[43]

When examining case outcomes at the motion to dismiss stage, the type of analysis courts apply often hinges on how they characterize franchisor-

[36] *See* No-Poach Approach, *supra* note 32 ("[N]aked no-poach agreements between rival employers within a franchise system are subject to the per se rule.").

[37] Statement of Interest of the United States, at 10, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, Civ. No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019).

[38] *Id.*

[39] *Id.*

[40] *See* Michael Murray, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Presentation at the Santa Clara University Law Review Symposium: Antitrust Enforcement in Labor Markets: The Department of Justice's Effort 13 (Mar. 1, 2019), https://www.justice.gov/opa/speech/file/1142111/download [hereinafter Murray, *Justice's Efforts*].

[41] No-Poach Approach, *supra* note 32.

[42] *See, e.g.*, *In re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-cv-00825-JHM, 2019 WL 5386484, at *5 (W.D. Ky. Oct. 21, 2019) (noting the DOJ's arguments but stating the court would not "abdicate its duty to apply the law to the facts of this case by blindly deferring to the DOJ's analysis").

[43] *See, e.g.*, *Deslandes v. McDonald's USA, LLC,* No. 1:17-cv-04857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018) (rejecting the argument that quick look was inappropriate in no-poach cases).

franchisee relationships. Where a franchisor has a vertical relationship with franchisees, but also competes with these franchisees by operating company-owned locations, the no-poach agreements are deemed per se illegal.[44] The type of evidence introduced and form of pleadings under Section 1 claims also makes a considerable difference in what analysis courts apply. For instance, in *Ogden v. Little Caesar, Inc.*, the plaintiffs expressly rejected any application of rule of reason, a decision that seemingly doomed their case.[45] Conversely, the plaintiffs in *In re Papa John's Employee & Franchisee Employee Antitrust Litigation* pointedly pleaded their claims under all three types of analysis and even "relied exclusively on direct evidence to prove that Defendants' No-Hire provision [had] caused anticompetitive effects in the labor market—suppression of wages and decreased job mobility."[46] The plaintiffs' strategic decision to plead their claims such that the allegations withstood scrutiny under all three types of analysis was a well-calculated move. Because the pleadings clearly painted a picture of horizontal restraints under per se, quick look, and rule of reason, the court was able to summarily deny the defendant's motion to dismiss and leave open the possibility of utilizing any one of these analyses at a later point in the litigation.[47]

Courts should employ this strategic move in order to avoid applying rule of reason to no-poach antitrust claims, as this type of analysis "produces greater uncertainty for resulting litigation."[48] Claims brought under rule of reason analysis are objectively a greater uphill battle for claimants because of the heightened pleading requirements and greater uncertainty in the level of proof required to demonstrate a defendant's market power.[49] The modern trend towards default use of rule of reason analysis further necessitates that courts adopt *per se* or quick look analysis in no-poach cases to adequately enforce antitrust laws within this newer context.[50]

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[44] *Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207, 2019 WL 2247731 (E.D. Mich. May 24, 2019). *But see Ogden v. Little Caesar, Inc*., 393 F. Supp. 3d 622 (E.D. Mich. 2019).

[45] *Cf. Ogden v. Little Caesar, Inc*., 393 F. Supp. 3d 622 (E.D. Mich. 2019) (ruminating how the plaintiff "tethered the viability of his pleading to the application of either the *per se* or 'quick look' rules of decision").

[46] *In re Papa John's*, 2019 WL 5386484, at *1.

[47] *Id.* ("As in *Blanton v. Domino's Pizza Franchising LLC*, the Court declines to announce a rule of analysis at this juncture. Plaintiffs do not tether the viability of their claim to any one rule. Accordingly, more factual development is necessary before a standard of review is selected.") (internal quotations and alterations omitted).

[48] Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 613-14 (2020).

[49] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829-30 (2009) (finding defendants won 221 out of 222 cases examined under the rule of reason between 1999-2009 that reached final judgment).

[50] *Cf., e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284-86 n.7 (2018) (implying that evaluating a restraint on employees' wages or mobility under the rule of reason case will make these cases increasingly difficult to plead and prove).

DISCLAIMER

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