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Antitrust

Kentucky Federal Court Questions Proposed \$5 Million Settlement in Anti-poaching Class Action

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With respect to antitrust doctrine, the court questioned whether a franchise anti-poaching claim should be analyzed as a *per se* illegal horizontal restraint or as a vertical restraint subject to the rule of reason. While the plaintiffs in all of the civil class actions have claimed that franchise anti-poaching provisions should be *per se* illegal, the court found that proposition "not entirely obvious" because the restraint operated within a single brand in a highly competitive market where employees enjoyed high levels of mobility. Generally, condemnation of a restraint as *per se* illegal is appropriate only where the courts have experience with that restraint and the outcome of a rule of reason analysis would be clear. Here, in contrast, no full rule of reason analysis has ever been conducted on an anti-poaching claim, and the effects of the purported restraint are not self-evident. As the court noted, "why would anyone work at Papa John's if no-poach provisions systematically suppress wages within that company relative to other restaurants?" In other words, if the provision suppressed wages as postulated, employees would naturally migrate to other systems and employers. The court also raised questions regarding the plaintiff's proposed product and geographic markets, which typically are required in antitrust cases. The plaintiff proposed a single-brand, national class of Papa John's employees. Given the mobility of employees between brands and the fact that fast-food workers generally would only look for jobs near their homes,

Related People

Michael L. Sturm

Partner
Washington, D.C.
202.295.2241
michael.sturm@lathropgpm.com

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the court questioned whether a market of all fast-food workers in a smaller geographic market would be better aligned with economic reality, if less advantageous to the plaintiff. In view of these and other concerns, the court granted the plaintiff 30 days to supplement the record in order to continue to pursue potential certification of a settlement class.