

BLOGS

Antitrust

Seventh Circuit Reverses Dismissal of Anti-Poaching Class Action Against McDonald's

In an important case of first impression that drew amicus participation from the Department of Justice, the Federal Trade Commission, and the International Franchise Association, the Seventh Circuit reversed a judgment in favor of McDonald's and revived a potential employee class action which alleges that the anti-poaching provision formerly found in McDonald's franchise agreements violates the Sherman Act.

In an important case of first impression that drew amicus participation from the Department of Justice, the Federal Trade Commission, and the International Franchise Association, the Seventh Circuit reversed a judgment in favor of McDonald's and revived a potential employee class action which alleges that the anti-poaching provision formerly found in McDonald's franchise agreements violates the Sherman Act. The employees assert that the anti-poaching provision, which generally prevented franchisees from hiring employees of McDonald's or of other franchises without consent, constituted a per se violation of Section 1 that suppressed wages systemwide. While the district court had granted judgment on the pleadings and had also rejected class certification after years of discovery, the Seventh Circuit held that the judgment should be reversed and the case remanded. The Seventh Circuit also suggested that the district court should reconsider the denial of class certification based upon the principles discussed in its opinion, although it did not mandate such reconsideration or direct the outcome.

The Seventh Circuit began by agreeing that the employees could not state a claim under the rule of reason because, among other deficiencies, the mobility of workers geographically and between chains precluded a finding that McDonald's had market power. The court reaffirmed the normal rule rejecting purported single-brand markets for antitrust purposes. With little analysis, however, the Seventh Circuit concluded that the employees had plausibly alleged a per se illegal horizontal restraint, because McDonald's both operated restaurants itself and served as franchisor. The court did not discuss precedent that generally deems restraints within such "dual distribution" frameworks to be vertical. Under Supreme Court precedent, all vertical restraints must be assessed under the rule of reason.

Because the court found a potentially per se unlawful horizontal restraint, the remaining question was whether the district court had properly concluded that the anti-poaching provision qualified as an ancillary restraint to the lawful, output-enhancing franchise agreement. Because the restraint applied in the input market for labor, the fact that the franchise agreement might enhance the output of burgers and fries was not relevant. Further, the record did not allow the court to conclude that the restraint was justified by its incentivization of employee training and avoidance of potential free riding on training provided by other franchisees. An alternative explanation, i.e., that the provision merely served to reduce wages

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to the benefit of McDonald's and its franchisees (and potentially consumers) was also plausible. The court thus remanded the matter for trial. In doing so, the court noted questions regarding the breadth of the provision, which appeared to suggest skepticism as to whether the provision could ultimately be justified as an ancillary restraint.