Antitrust and Unfair Competition Law

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Antitrust and Unfair Competition Law Section Antitrust in the News

▼Court Applies Rule of Reason to Grant Motion for Judgment on the Pleadings to Dismiss Challenge to McDonald's No-Solicitation and No-Hire Provision

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In *Deslandes v. McDonald's USA, LLC*, Judge Jorge L. Alonso granted McDonald's motion for judgment on the pleadings against a Sherman Act Section 1 claim based on a no-solicitation and no-hire provision (collectively, "no-hire provision") in McDonald's franchise agreements. The court applied the rule of reason–rather than the per se rule or quick look analysis–and concluded plaintiffs' amended complaints did not state a claim. The court denied plaintiffs' request for leave to amend, terminating the case in McDonald's favor. No. 17 C 4857, 2022 WL 2316187 (N.D. Ill. June 28, 2022).

Some McDonald's restaurants are owned and operated by subsidiaries of McDonald's, but many are owned and operated by franchisees. Plaintiffs alleged that a no-hire provision in McDonald's franchise agreements violates Section 1. The challenged no-hire provision provided as follows:

> Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [ ] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months. (Am. Complt. ¶ 87). *Id.*, *1.

Plaintiffs alleged that the no-hire provision violated Section 1 under the per se rule or quick look analysis. Defendants argued that the provision is subject to the rule of reason.

The court previously ruled on defendants' motion to dismiss that the provision is not subject to the per se rule because it is ancillary to an output-enhancing agreement—the franchise agreement itself increased output of burger and fries. *Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955, *8 (N.D. Ill. June 25, 2018) ("*Deslandes I*"). The court also ruled, however, that the restraint might be unlawful under quick look analysis because the McDonald's-owned restaurants competed with the franchised restaurants, and this adequately alleged a horizontal restraint. The court allowed plaintiff Deslandes to amend her complaint to add allegations to support a rule of reason claim, but she chose not to do so. 2022 WL 2316187, *2. Plaintiff Turner had filed her own complaint, which was consolidated with Deslandes's complaint.

Thereafter, the court denied plaintiffs' class certification motion because under the rule of reason individual issues would predominate. The court reached this conclusion because (1) restraints of trade presumptively call for rule of reason analysis (citing *NCAA v. Alston*, __U.S. __, 141 S.Ct. 2141 (2021); (2) vertical restraints, such as those between McDonald's and its franchisees where McDonald's did not own restaurants, are subject to the rule of reason (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 51 U.S. 877 (2007); and (3) McDonald's provided evidence of procompetitive effects sufficient to warrant rule of reason analysis. *Deslandes v. McDonald's USA, LLC*, 2021 WL 3187668 (N.D. Ill. July 28, 2021) ("*Deslandes II*"). The case proceeded on behalf of the two named plaintiffs rather than as a class action.

Defendants' motion for judgment on the pleadings argued that the court had already ruled that the no-hire provision is subject to the rule of reason, but plaintiffs failed to plead a rule of reason claim. The court agreed. In again rejecting quick look analysis, the court relied upon *NCAA v. Alston* to explain that the no-

hire provision "falls in 'the great in-between' of restraints that require rule-of-reason analysis. This Court cannot say that it has enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned, which means, under *Alston*, that the Court must apply rule-of-reason analysis to this case." 2022 WL 2316187, *4. The court also rejected per se analysis, finding the no-hire provision is an ancillary restraint subject to the rule of reason (rather than a naked restraint subject to the perse rule). As the court explained, even though the restraint has "horizontal elements (in that the franchisees competed with the franchisor for labor), the restraint is not *per se* unlawful because it 'may contribute to the success of a cooperative joint venture that promises greater productivity and output.'" *Id.*, *5 (citing *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985)).

The court also rejected plaintiffs' request to proceed with a rule of reason claim based on the allegations in the amended complaints even though they did not expressly allege a rule of reason claim. The court had previously noted that there were 517 quick-service restaurants within 10 miles of plaintiff Deslandes's home, and 253 quick-service restaurants within 10 miles of plaintiff Turner's home. *Id*. *3. The court concluded that—putting aside whether the complaint expressly alleged a "rule of reason" claim—the court could dismiss any rule of reason claim "for failure to include allegations of market power in a relevant market, because those are the facts necessary to render plausible a claim that a restraint is unlawful under rule-of-reason analysis. Deslandes and Turner failed to include such facts." 2022 WL 2316187, *5-6. The court also rejected plaintiffs' argument that "McDonald's restaurants constitutes a market all its own, separate from the market for employment by other quick-serve restaurants." *Id.* The court concluded that plaintiffs failed to allege "a relevant market or that [McDonald's] had market power in that relevant market." *Id.*, *6.

The court also denied plaintiffs' request for leave to amend their complaints. It explained that plaintiffs had multiple opportunities to amend their complaints and had failed to do so. In addition, the court concluded any rule of reason claim would be futile because the relevant local markets had many other quick serve restaurants, and plaintiffs could not plausibly allege that McDonald's had market power in those markets. *Id.*

The court granted McDonald's motion for judgment on the pleadings and terminated the case. Plaintiffs filed a notice of appeal on July 27.

The *Deslandes* opinion likely will encourage defendants to rely on last year's U.S. Supreme Court's decision in *NCAA v. Alston* to argue that a full rule of reason analysis—and not a quick look analysis or the per se rule—is the appropriate standard for evaluating no-solicitation and no-hire provisions in franchise cases. But even outside of the franchise context, defendants are likely to cite the opinion for the broader proposition that no-hire provisions ancillary to legitimate business collaborations should be evaluated under full rule of reason analysis.