POACH-NO-MORE: ANTITRUST CONSIDERATIONS OF INTRA-FRANCHISE NO-POACH AGREEMENTS

INTRODUCTION

Labor market power has been a major topic of public discourse over the last year or so.[1] Many economists are puzzled by the fact that the United States economy has experienced steady private-sector job growth, yet wages have hardly increased.[2] Some economists, such as Alan Krueger, have attributed the stagnating wage growth to labor-market monopsony power:[3] "the ability for an employer to suppress wages below the efficient or perfectly competitive level of compensation."[4]

Among the many different sources of monopsony power, Krueger argues that a significant source of employer monopsony power are constraints that employers place on their workers' ability to find new jobs, even after they leave their old one.[5] Such constraints are

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[1] *See, e.g.*, Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 540–42 (2018) (discussing the role of antitrust law in offsetting concerns involving labor market power's contribution to wage inequality and economic stagnation); ALAN B. KRUEGER & ERIC A. POSNER, HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 12-13 (2018) (discussing low-income workers' vulnerability to labor market collusion).

[2] *See* José Azar, Iona Marinescu & Marshall I. Steinbaum, *Labor Market Concentration*, 10 (Nat'l Bureau of Econ. Research, Working Paper. No. 24147, 2019), https://www.nber.org/papers/w24147.pdf (showing that labor market concentration is high and increasing concentration is associated with lower wages).

[3] For the basic economics of labor markets and monopsony, see, e.g., RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 130– 45 (12th ed. 2015).

[4] *See* David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 772 (1994) (suggesting that a rise in minimum wage for fast-food workers that yields no change in employment levels is evidence of monopsony in labor markets).

[5] *See, e.g.*, Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, IZA INST. LAB. ECON. 2–4 (July 2018), http://ftp.iza.org/dp11672.pdf (finding that post-employment constraints imposed on low-wage fast food workers are evidence of monopsony power).

becoming increasingly popular in the fast-food franchising industry,[6] and the effects of employee mobility and wages for already-low-wage workers are pernicious.[7]

Imagine, for example, that a part-time worker is employed by a McDonald's in Ithaca, NY.[8] She needed more hours than she was being scheduled for, so she decided to find a job at a nearby McDonald's that offered more shifts.[9] Upon arriving to her orientation at the nearby McDonald's, a manager told her that the store learned that it cannot hire her—due to the franchise's rule against intra-franchising hiring. This reality is one that many fast-food workers grapple with.[10]

These constraints have become known as "no-poach" agreements. Unlike non-compete agreements, which require employees to sign a contract with their employer to agree not to join a competitor post-employment, no-poach agreements are agreements between or among employers not to hire each other's workers.[11] In the franchising context, normally, no-poach clauses are embedded in the standard franchise agreement between the franchisor and franchisee whereby

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[6] *See id.* at 4 (finding that 58 percent of major franchise chains include noncompetitive clauses in their franchising contracts that restrict employee mobility); Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171, 174 (2019) (finding that out of 44 of the top 50 fast-food franchise systems' contracts, 36 contracts contained restrictions on job mobility and only 4 of those 36 were tailored to managerial employees).

[7] *See* Krueger & Ashenfelter, *supra* note 5, at 17–19 (discussing the effects of no poach agreements); *see also* Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. TIMES (Sept. 27, 2017) https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html.
For further discussion, see *infra* Part III.A.i.

[8] This hypothetical is based on the story of Maria Sanchez. *See* Rachel Abrams, *7 Fast-Food Chains to End 'No Poach' Deals That Lock Down Low-Wage Workers*, N.Y. TIMES (July 12, 2018), https://www.nytimes.com/2018/07/12/business/fast-food-wages-no-poach-deal.html.

[9] *Id.*

[10] *See* Krueger & Ashenfelter, *supra* note 5, at 2–4.

[11] *See* Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, 26 ANTITRUST, Summer 2012, at 1 n.2.

the franchisee agrees not to hire employees of the franchisor's other franchisees.[12] As an example, McDonald's franchise agreements contain the following provision:

> *Interference With Employment Relations of Others.* During the term of this Franchise, 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.[13]

Recently, no-poach agreements have been challenged in several courts on the grounds that they violate Section 1 of the Sherman Antitrust Act.[14] In some contexts, such as between technology companies in Silicon Valley, no-poach agreements have been deemed as presumptively anticompetitive agreements between two competitors, thus constituting a per se violation of Section 1 of the Sherman Antitrust Act.[15] Nonetheless, the no-poach agreements in the franchise context raise three novel issues for antitrust law.

First, what is the significance of the fact that these agreements are "intra-franchise," i.e., that they are between firms that are contractually bound by the franchise agreement rather than between independent firms? To put this inquiry in perspective, Section 1 of the Antitrust Act only applies when businesses are separate, but not when they are divisions of a single entity.[16]

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[12] *Id.*

[13] Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *5 (N.D. Ill. 2018).

[14] *See, e.g.*, *id.* at *8; Butler v. Jimmy John's Franchise, LLC., F. Supp. 3d 786, 792 (S.D. Ill. 2018); Yi v. SK Bakeries, LLC, 2018 U.S. Dist. LEXIS 220966, at *5 (W.D. Wash. 2018). Some other cases have been filed. *See* Class Action Complaint ¶ 1, Ion v. Pizza Hut, LLC., No. 17-788 (E.D. Tex. 2017).

[15] *See* In re High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103, 1179–82 (N.D. Cal. 2012) (holding that defendants—including Apple, Google, and Intel—per se violated Section 1 of the Sherman Antitrust Act by imposing naked, horizontal no-poach agreements on employees).

[16] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 761 (1984) (holding that single economic units are incapable of conspiring for the purposes of antitrust law).

Therefore, if McDonald's owned all of its restaurants, rather than franchised them, then it would be impossible to argue that the restraints on employee mobility violated antitrust laws, as the organization would constitute a single-entity. Thus, is the franchising model itself single-entity for antitrust purposes?

Additionally, antitrust law considers different types of agreements differently. Agreements that exist between entities along a supply chain, known as vertical agreements, are generally viewed as less suspect, as opposed to those agreements among competitors, known as horizontal agreements. Moreover, antitrust law is concerned with the pro- or anticompetitive justifications with a given agreement. These considerations are integral to determining what rule of analysis applies to analyze the no poach agreements. With respect to the vertical versus horizontal distinction, when a franchisor imposes no-poach agreements within its franchise system on the franchisees, do the no-poach agreements count as vertical agreements or horizontal agreements? If they are non-price fixing vertical agreements, then they are presumptively subject to the rule-of-reason standard.[17] Yet, if they are horizontal agreements, in some cases can also be subject to the rule-of-reason or "quick look" standards, but others are considered so injurious to competition that they are per se condemned.[18] In the Jimmy John's case, the U.S. District Court for the Southern District of Illinois struggled to categorize no poach agreements.[19] Ultimately deflected the answer by concluded that "the Court cannot decide at this early stage in the

[17] *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (ruling that vertical restraints are not illegal *per se* unless they include some agreement on price or price levels); Euromodas, Inc. v. Zanella, 368 F. 3d 11, 16 (1st Cir. 2004) ("[V]ertical restraints often have both procompetitive and anticompetitive effects. For this reason, such restraints generally not deemed to be *per se* illegal but are tested under a rule of reason analysis.").
[18] *See, e.g.*, *Copperweld Corp.*, 467 U.S. at 768 (holding that some horizontal agreements are so anticompetitive that they are condemned per se, but other horizontal agreemens that have potential procompetitive effects can be judged under the rule of reason).
[19] *See* Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018).

proceedings which rule will apply."[20] As Professors Marinescu and Posner describe, "the distinction between horizontal agreements and vertical agreements is hopelessly tangled." But it remains significant to the antitrust analysis.[21]

The competitive nature of the agreements are also at issue.[22] If they are plainly anti-competitive, then they should be considered per se illegal.[23] Nonetheless, McDonald's, among other franchises, and the Department of Justice have argued that because the no-poach agreements have pro-competitive benefits, particularly in the product market, and are ancillary to the franchise agreement, they should be evaluated under the rule of reason.[24]

This Note endeavors to address each of these novel legal issues with respect to no-poaching agreements. This Note argues that franchisees should be considered separate entities for antitrust purposes. Assuming that to be true, the no-poach agreements seem to have horizontal aspects that suggest they deserve a higher level of scrutiny. This, coupled with the significant empirical literature discussing the non-competitive effects of no-poach agreements, courts should, ideally, render the agreements per se violations of Section 1. Nonetheless, antitrust

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[20] *Id.*

[21] *See* Iona Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, at 34 (Working Paper, March 10, 2019).

[22] In each of the different standards, a plaintiff must essentially demonstrate some anticompetitive effect of the practice in a relevant market. *See, e.g.*, Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F. 2d 537, 543 (3d Cir. 1993) (rule of reason); *Business Electronics Corp.*, 485 U.S. at 723 (per se); National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109 (quick look).

[23] *Business Electronics Corp.*, 485 U.S. at 723.

[24] *See* Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc., et al., No. 2:18-cv-00244-SAB, Richmond & Rogers v. Bergey Pullman Inc., et al., No. 2:18-cv-00246-SAB, Harris v. CJ Star, LLC et al., No. 2:18-cv-00247-SAB (E.D. Wash. 2019) (arguing that when no-poach restrictions within a franchise system warrant rule of reason analysis, they warrant full rule of reason analysis, not a quick look).

law, as it currently stands, is unlikely to render the agreements as per se violations, but given the effects of the agreements, at a minimum, a quick look standard is entirely appropriate.[25]

Ultimately, this Note also demonstrates that antitrust analysis is not well-equipped to tackle labor-market issues. Simply put, antitrust law's hyper focus on consumer welfare poses a significant issue for antitrust claims in the labor market to succeed.[26] Many of the novel antitrust issues hinge on legal form, but much of that legal form was structured with product market principles.

This Note proceeds in four Parts. Part I of this Note reviews the relevant antitrust consideration and describes the basic principles of analyzing claims under Section 1 of the Sherman Act.

Part II of this Note analyzes the franchising organizational structure and whether it can constitute a single entity under antitrust law. In essence, Part II argues that significant competition exists between franchisees, particularly in the labor market, suggesting that franchisees, in and of themselves, are separate businesses. Moreover, franchisees retain significant independence in they operate independent of one another, even despite a franchise agreement, which otherwise unites them.

Part III of this Note wrestles with the mode of analysis that applies to no-poach agreements. At the outset, Part III examines the empirical literature to demonstrate the economic (both procompetitive and anticompetitive) effects of the no-poach agreements. Then, Part III wrestles with the horizontal versus vertical distinction, concluding that the horizontal aspects

[25] For further discussion, see *infra* Part III.B.iii.
[26] For detailed discussion on this point, see Clayton J. Masterman, Note, *The Customer is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1398–1413 (2016).

warrant greater scrutiny. With those economic effects in mind, the horizontal aspects of the agreements, the prior litigation of no-poach agreements, and assuming that the franchises otherwise constitute separate business entities, Part III advocates for application of the per se standard, or at least a quick-look standard.

Finally, Part IV reflects on the challenges imposed under antitrust law by the various legal form inquiries that otherwise muddle the analysis for labor market constraints. Part IV then advocates for antitrust reform and considers several proposals for rethinking antitrust analysis to deal with labor market antitrust claims and no poach agreements.

I. SECTION 1 OF THE SHERMAN ACT: THE FRANCHISE-ANTITRUST CONUNDRUMS

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[27] Courts have interpreted this provision to require (1) that some agreement exists between two or more separate business entities,[28] and (2) that such an agreement would unreasonably restrain competition in some economic market.[29] If both elements are met, then the court will apply three different modes of analysis, depending on the circumstances surrounding the restraint of trade. Both elements present legal obstacles in the context surrounding franchise systems' no-poach agreements.

A. *Agreements Between Two or More Separate Entities*

As a threshold matter, determining whether a no-poach agreements within franchise systems constitute an unlawful contract, combination, or conspiracy ("agreement") between two

[27] 15 U.S.C. § 1.
[28] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 761 (1984) (requiring that entities be separate entities to be liable under antitrust law).
[29] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 31, 87 (1911) (holding that Sherman Act only applies to unreasonable restraints of trade).

or more parties is complex. The law is largely inconclusive as to whether a franchisor and its franchisees are capable of agreeing for the purposes of establishing a Section 1 violation.

The U.S. Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.* that single business entities are incapable of conspiring under the Sherman Act.[30] In *Copperweld*, the Court reasoned that a parent corporation and its subsidiaries were incapable of conspiracy because they shared a "unity of interest."[31] The Court elaborated that the parent corporation and its subsidiaries shared a common objective and were guided by one "corporate consciousness," and thus, there would be no justification for Section 1 scrutiny.[32]

In the wake of *Copperweld*, franchisors were quick to assert that their systems fell under the new-found "single entity" exemption from Section 1 of the Sherman Act. Indeed, the U.S. District Court for the District of Nevada, in *Williams v. I.B. Fischer Nevada*, held that the franchisor's control over the franchisees was significant: the franchise sets operating policies by dictating things such as the restaurant hours of operation, the types of equipment that can be used by the restaurant, that the franchisee carry insurance that is approved by the franchisor, and even how far the owner of the franchise may live away from their restaurant.[33] The Ninth Circuit affirmed the District Court's ruling, holding that "[t]o be capable of conspiring, corporate entities must be 'sufficiently independent of each other'" and that the franchisor and its franchisees were clearly a "common enterprise."[34] Several other courts reached similar conclusions to the Ninth Circuit in holding that franchise systems fell under the *Copperweld* single-entity exception.[35]

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[30] *See Copperweld Corp.*, 467 U.S. at 761.
[31] *Id.* at 771.
[32] *Id.*
[33] *See* Williams v. I.B. Fischer Nevada, 794 F. Supp. 1026, 1031 (D. Nev. 1992).
[34] *See* Williams v. I.B. Fischer Nevada, 999 F.2d 445, 448 (9th Cir. 1993).
[35] *See, e.g.*, Search Intl, Inc. v. Snelling & Snelling., Inc., 168 F. Supp. 2d 621, 625 (N.D. Tex. 2001); Hall v. Burger King Corp., 912 F. Supp. 1509, 1548 (S.D. Fla. 1995).

Nonetheless, in *American Needle, Inc. v. National Football League*,[36] the Supreme Court brought the categorization of franchise systems as single-entities into question again.[37] In *American Needle*, the Court held that the National Football League, which is otherwise comprised of 32 franchised, separately-owned football teams, was not a single-entity, and that each football team was not "categorically beyond the coverage of Section 1."[38] Relevant to that analysis, the Court emphasized that each team had a "separate corporate consciousness," "their objectives are not common," and "the teams compete with one another . . . to attract fans, for gate receipts, and for contracts with managerial and playing personnel."[39]

While *American Needle* certainly opened the possibility for franchises to be considered separate entities for the purposes of antitrust analysis, *American Needle* failed to articulate a clear standard for defining when the single-entity exception applies.[40] Although the inquiry determining whether an entity is a single-entity is a fact intensive inquiry, when applied to franchising, practitioners seem to agree that the exception will be more likely to apply where the franchisor exerts a significant among of control on the franchisees such that it limits competition between the franchisor and the franchisee, and among franchisees.[41]

B. *Unreasonable Restraints*

Antitrust analysis requires identifying a relevant market and an unreasonable restraint on that market.[42] Based on the determination of this inquiry, courts will determine which mode of

[36] *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 186 (2010).
[37] *See* Barry M. Block & Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After* American Needle, 30 FRANCHISE L.J. 216, 216–17 (2011).
[38] *See Am. Needle, Inc.*, 560 U.S. at 183.
[39] *Id.* at 196.
[40] *See* Block & Ridings, *supra* note 37, at 220.
[41] *Id.* at 218.
[42] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 31, 87 (1911).

analysis to apply. As for the first part of the inquiry, while most claims under Section 1 involve the restraint of trade in product markets, courts have acknowledged that the labor market is a market for antitrust purposes, where employers are purchases of labor and employees are sellers of labor.[43] Thus, section 1 also applies to restraints in the labor markets. The second part of the inquiry is more nuanced. In general, antitrust analysis asks two questions at this stage: (1) is the restraint vertical[44] or horizontal;[45] and (2) if it is horizontal, whether the restraint is ancillary or naked.[46]

The distinction between horizontal and vertical agreement is critical to the determination of the legal treatment the agreement merits. While the majority of Section 1 claims are analyzing under the "rule of reason" (or its abbreviated version, known as "quick look"), certain horizontal agreements are considered so injurious and condemned as *per se* violations of Section 1.[47]

Assuming that a horizontal agreement exists, the Court will look to determine whether it is considered naked or ancillary.[48] If a restraint is considered naked, the restraint is per se unlawful. Courts find that agreements are naked if they serve no legitimate purpose or serves a legitimate business purpose but is not narrowly tailored in scope.[49] Ancillary agreements, on the other hand, are agreements that "are part of a larger endeavor whose success they will

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[43] *See, e.g.*, Eichhorn v. AT&T Corp, 248 F.3d 131, 140–41 (3d Cir. 2001) (holding that a labor market is a market for antitrust purposes).
[44] Vertical agreements typically involve entities that are upstream or downstream of one another, such as manufacturers and distributors.
[45] Horizontal agreements are defined as agreements among direct competitors at the same level of the market structure.
[46]The distinction between ancillary and naked is defined *infra* p. 10.
[47] For discussion on the distinction, *see infra* Part I.C.
[48] *See* Polk Bros. v. Forest City Enters., 776 F.2d 185, 190 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote.").
[49] *See id.*; PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1908b (2d. ed. 2000).

promote."[50] Ancillary agreements are typically analyzed under the rule of reason, including by quick look. [51]

C. *Modes of Antitrust Analysis*

As briefly described above, the court will essentially apply three different modes of analysis to determine whether a restraint violates Section 1: the per se rule, the rule of reason, or the quick look approach.

At the one extreme, some restraints are considered per se illegal. The Supreme Court has held that conduct "that always or almost always tend[s] to restrict competition," should be per se illegal.[52] Courts have established that some practices fall presumptively under this mode of analysis: horizontal price fixing,[53] the geographic division of markets,[54] and group boycotts.[55] Under the per se mode of analysis, defendants are precluded from demonstrating any procompetitive effects.[56]

At the other extreme, the vast majority of restraints challenged under Section 1 are analyzed under the rule of reason.[57] Rule of reason analysis entails a balancing of the perceived threat of harm to competition from the challenged conduct against the likelihood that it will yield efficiencies that promote competition.[58] This standard requires a court to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as

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[50] Polk Bros., 776 F.2d at 190.
[51] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
[52] Business Electronics Corp. v. Sharp Electronics Corp. 485 U.S. 717, 723 (1988).
[53] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221–22 (1940).
[54] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).
[55] *See* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1969).
[56] *See, e.g.*, In re Cardizam CD Antitrust Litigation, 332 F.3d 896, 909 (6th Cir. 2003) (holding that any procompetitive effects are irrelevant if a restraint is subject to *per se* analysis).
[57] *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 61 IOWA L. REV. 1207, 1214 (2008).
[58] *See* National Society of Professional Engineers v. United States, 435 U.S. 679, 691 (1978).

imposing an unreasonable restraint on competition."[59] Courts will consider "specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect," as well as "market power and market structure."[60] Judge Richard Posner has described the rule of reason as "little more than a euphemism for non-liability,"[61] and empirically, defendants almost always win under rule of reason analysis.[62]

The rule of reason analysis has been particularly criticized in the no-poach agreement as a dead end for plaintiffs' class-action claims.[63] Because the rule of reason analysis requires the plaintiff to allege market power, applying the rule of reason might cut against class certification, creating an additional obstacle for plaintiffs to successfully claim that no-poach agreements violate Section 1.[64] Moreover, because plaintiffs bear the initial burden of proving an anticompetitive effect, the plaintiffs must endure significant litigation costs.[65] Thus, for low-wage workers, the benefits of a class-action suit are especially crucial, and a rule of reason analysis would almost certainly defeat that.[66]

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[59] Cont'l T.V., Inc. v. GTE Sylvania, Inc.. 433 U.S. 36, 49 (1977).
[60] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).
[61] Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14 (1977).
[62] *See* Lemley & Leslie, *supra* note 57, at 1214; *see also* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829 (2009) (finding that defendants won 221 out of 222 rule-of-reason cases that reached final judgment from 1999-2009).
[63] *See* Marinescu & Posner, *supra* note 21, at 21 (discussing the reasons why class action certification is necessary in no poach litigation and how the rule of reason undermines class certification).
[64] *See id.*
[65] *See id.*
[66] *See id.*

Occasionally, courts will also apply a "quick look" analysis, which is a subset of the rule-of-reason analysis.[67] Under this mode of analysis, the anticompetitive effects of a challenged restraint are fairly obvious, but per se condemnation is not warranted.[68] The quick look version of rule of reason requires an "enquiry meet for the case," which will enable the court to "see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."[69]

Generally, courts will apply quick look to business practices whose adverse effects on markets and consumers are obvious to "an observer with even a rudimentary understanding of economics."[70] Thus, the challenged restraints are presumed to be anticompetitive, shifting the burden of proof to the defendant, who must demonstrate that any anticompetitive effects are outweighed by the procompetitive effects of the challenged conduct.[71]

The quick look analysis is preferred by plaintiffs[72] in the franchising no-poach litigation.[73] Significantly, under a quick look analysis, the plaintiff need not show that the entity

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[67] *See* National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 109 n.35 ("[T]he rule of reason can sometimes be applied in the twinkling of an eye.")
[68] *See* United States v. Brown University, 5 F.3d 658, 669 (3d Cir. 1993) (describing the standard as an "intermediary" standard—between rule of reason and per se condemnation).
[69] California Dental Ass'n, v. FTC, 526 U.S. 756, 781 (1999).
[70] *Id.* at 770.
[71] *See, e.g.*, Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 543 (3d Cir. 1993).
[72] Of course, per se is technically preferred. However, as discussed in Part III, *infra*, given the nature of the restraints, it seems unlikely that a court would apply the per se rule. Therefore, plaintiffs are left to argue for the rule-of-reason or quick look modes of analysis.
[73] *See, e.g.*, Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *20 (N.D. Ill. 2018) (noting that plaintiff claims that the restraint is unlawful under quick-look analysis); Butler v. Jimmy John's Franchise, LLC., F. Supp. 3d 786, 797 (S.D. Ill. 2018) (noting that plaintiff, Butler, pleads that the Court should apply quick-look analysis).

has market power.[74] Moreover, because the burden initially lies with the defendant—not the plaintiff, like under rule of reason—it is significantly more likely that a court will rule in favor of the plaintiff.[75]

II. FRANCHISE FAMILIES AS SEPARATE ENTITIES

This section tackles the inquiry of whether franchise families constitute separate entities. As described in Part I.A, after *American Needle*, the status of franchise families as separate entities has been brought into question. In light of *American Needle*, experts have argued that the operative inquiry for determining the status of a franchise system is "control."[76] Put very simply, if a franchisor significantly controls the operations of each of its franchisees, then it is more likely to be a single entity for antitrust purposes. However, in reality, the control is somewhat more limited, warranting the treatment of the franchisees as separate entities for antitrust purposes.

In Section A, this Note argues that *American Needle*, while considering control, endorses a more functional consideration of the organization. As a general matter, the legal focus on control has led to rather contradictory positions taken by franchisors (and employees) across antitrust law and labor and employment law.

Section B discusses two other considerations that suggest franchise families should be considered separate entities. Section B focuses on the "vertical relationship" between the franchisor and the franchisee and compares franchising to other organizational forms, such as antitrust law's treatment of resale price maintenance constraints. Section C, on the other hand,

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[74] *See* Lemley & Leslie, *supra* note 57, at 1213–16.
[75] *See* California Dental Ass'n, v. FTC, 526 U.S. 756, 770 (1999) ("[Q]uick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.").
[76] *See* Block & Riding, *supra* note 37, at 218.

demonstrates that franchises should not be single entities because franchisors and franchisees have different goals and are in fact, to some extent, in competition with one another.

A. *Letting Go of "Control": A Quick Re-Look at American Needle*

In *American Needle*, the Court effectively shifted the focus of the analysis of the single-entity defense from requiring a showing of control, as was the case under *Copperweld*, to focusing on whether a "complete unity of interests" exists.[77] Despite this, some scholars still focus on the need to establish control.[78] While control may be probative of a complete unity of interests, *American Needle* suggests that some control may not be entirely dispositive: the National Football League benefited from the "umbrella arrangement" of uniting the Football teams, but the NFL's team remained independent centers of decisionmakers and their interests did not always align.[79]

While some commentators opine that focusing the analysis on control makes more economic sense,[80] control is arguably more challenging to discern. Moreover, the focus on whether control exists for the purposes of a *Copperweld* defense claim raises an inherent contradiction in current pending litigation across antitrust law and labor and employment law. Indeed, the argument that franchisors exert enough control over franchisees to constitute a single-entity under antitrust law directly contradicts franchisors' arguments that they are not a single-entity with their franchisees under labor and employment law.

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[77] *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 197 (2010).
[78] *See* Block & Riding, *supra* note 37, at 218; *see also* Judd E. Stone & Joshua D. Wright, *Antitrust Formalism is Dead – Long Live Antitrust Formalism – Some Implications of* American Needle v. NFL, 2009 CATO SUP. CT. REV. 369, 378 (2009-2010) (critiquing antitrust law for moving away from a focus on control under the single-entity doctrine).
[79] *See Am. Needle, Inc.*, 560 U.S. at 196.
[80] *See* Stone & Wright, *supra* note 78.

At least in the context of the National Labor Relations Act ("NLRA"), joint-employment status hinges on whether the franchisor, directly or indirectly, exercises or reserves control over workers' terms and conditions of employment.[81] Relevant to franchises, if a franchisor and its franchisees were to be considered joint employers under the purposes of the NLRA, then both the franchisor and the franchisee would be liable for unfair labor practice violations and, if the employees were to unionize, collective bargaining.[82]

McDonald's has consistently rejected the argument that it constitutes a joint-employer with its franchisees under the NLRA and other workplace statutes.[83] Specifically, McDonald's argues that it does not exert control over its workers' terms and conditions of employment, rather asserting that it exerts nominal control and control for brand protection purposes.[84] Of course, under antitrust law, in asserting a single-entity defense, McDonald's would need to argue the exact opposite: that it did control the franchisees sufficiently to constitute a single-entity.[85]

One particular highlight of the joint-employment litigation, however, is just how challenging it is to discern that control exists.[86] On the one hand, as Professor Griffith notes, "courts are too quickly accepting that franchisor directions to franchisees are mere recommendations because they are formally characterized as such."[87] In *Singh v. 7-Eleven*, for example, the U.S. District Court for the Northern District of California dismissed a claim against a franchisor under the Fair Labor Standards Act because the franchising contract "creates an

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[81] *See* Browning-Ferris, 362 N.L.R.B No. 186 slip op. at 8 (2015).
[82] *See id.* at 2.
[83] *See* McDonald's, USA, 363 NLRB No. 144 slip op. at 3 (2017).
[84] *See id.*
[85] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 761 (1984); Am. Needle, Inc. v. NFL, 560 U.S. 183, 186 (2010).
[86] *See* Griffith, *supra* note 6, at 174 (discussing the challenges in the joint-employment status debate).
[87] *See* Griffith, *supra* note 6, at 208.

arm's-length business relationship and does not create any fiduciary, special, or other relationship."[88] On the other hand, as proponents of imposing joint-employment liability on franchisors would argue, such "recommendations" are merely stylized requirements and should be probative of control.[89]

Perhaps one way to rectify this contradiction between positions is to argue that under labor and employment law, control (whether indirect or direct) must be over the actual terms and conditions of employment.[90] On the other hand, antitrust law considers a broader sense of control, including control over operations.[91] However, assuming that to be true, these disparities in defining control could lead to a perverse outcome: in some cases, an organization can be a single entity for antitrust purposes without also constituting a joint employment relationship for labor law purposes. Such a legal fiction seems largely counterintuitive and nonsensical.

Nevertheless, the joint employment issue in the labor and employment law context is instructive to advocate for a consideration of the organizational structure beyond mere control. It demonstrates how challenging the "control" inquiry is in practice. In joint employment litigation, parties disagree over what constitutes control, whether direct or indirect control is probative of joint-employment status, and how much control is enough to establish joint-employment status.[92]

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[88] No. C-05-04534(RMW), 2007 U.S. Dist. LEXIS 16677 (N.D. Cal. Mar. 8, 2007).
[89] *See* Griffith, *supra* note 6, at 208.
[90] *See* Browning-Ferris, 362 N.L.R.B No. 186 slip op. at 2 (2015) (*quoting* Boire v. Greyhound Corp., 376 U.S. 473 481 (1964)) ("[T]he question is whether one statutory employer 'possesse[s] sufficient control over the work of the employees to qualify as a joint employer with' another employer.").
[91] *See* Stone & Wright, *supra* note 78, at 387.
[92] *Compare* Browning-Ferris, 362 N.L.R.B. at 2 (2015) (holding that indirect, direct, and reserved control all are probative of joint-employment status). *with* Hy-Brand Industrial Contractors, Ltd., 365 N.L.R.B. 156, 159 (2017) (reversing *Browning-Ferris* and holding that only direct control is probative of joint-employment status and that indirect or reserved control is insufficient to establish joint-employment status).

All such inquiries are widely debated and hardly simple. In fact, some labor and employment lawyers would likely prefer an analysis that considers other criteria, such as whether the "unity of interests" (or something broader, such as economic realities) were considered.[93] As alluded to earlier, it is entirely inconsistent that a franchise can be a single-entity for antitrust purposes but would not be a reciprocal joint employer in the labor law context.

In sum, *American Needle* can be read to embrace a broader, more functionalist approach to discerning whether a business is a single-entity or separate entities. While franchises have raised the single-entity defense in current litigation, not a single judge has ratified the defense, perhaps signaling a shift towards embracing a broader, more functionalist view.[94]

B. *Looking to Other Considerations*

In proposing a more functionalist role, based on the reading of *American Needle*, this section provides two theories as to why franchisors and franchisees should not be considered single entities.

i. *The Franchisor and The Franchisee: A Vertical Relationship*

At this point, it is well-established that antitrust law allows a business to exert vertical restraints on "subordinate" organizations without the organizations being re-classified as a single entity.[95] Indeed, several contexts, the Court has held that vertical constraints that one actor

[93] *See, e.g.*, FedEx Home Delivery, Inc., 361 N.L.R.B. 610, 630 (Johnson, dissenting) (arguing that the majority opinion is attempting to change the test for employee status from common law control to economic realities).
[94] *See, e.g.*, Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *20 (N.D. Ill. 2018) (proceeding with the analysis rather than discussing whether the franchise system constitutes a single-entity); Butler v. Jimmy John's Franchise, LLC., F. Supp. 3d 786, 797 (S.D. Ill. 2018).
[95] *See, e.g.*, Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 408 (6th Cir. 1982) (applying rule of reason to vertical distribution restraints and not classifying the vertical supply chain as a single business).

imposes on another are subject to the rule of reason analysis.[96] For example, in *Continental Television, Inc. v. GTE Sylvania*, GTE Sylvania, a product distributor franchisor, restricted the geographical areas in which its franchised distributors could sell its products.[97] The Court ultimately ruled in that case that the vertical restraints had a pro-competitive nature and therefore did should be evaluated according to the rule of reason.[98] Significantly, because the Court characterized the restraint as a vertical restraint, rather than control, the Court clearly did not consider that the franchisor and its franchisees were one entity.[99]

Similarly, in the resale price maintenance context, the Court has held that such restraints are vertical, subject to the rule of reason analysis (rather than subject to per se treatment).[100] In *Leegin Creative Leather Products, Inc. v. PKSK, Inc.*, Leegin, the manufacturer, instituted a retail pricing and promising policy that refused to sell to retails that discounted its goods below the suggested process.[101] The Court, abandoning its previous rule to per se condemn these types of vertical agreements, held that the vertical price restraints should be subject to the rule of reason.[102] Again, the Supreme Court never held that the vertical restraint somehow transformed the manufacturer and its distributor into a single-entity for antitrust purposes.[103]

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[96] *See* M&H Tire Co., Inc v. Hoosier Racing Tire Corp., 733 F.2d 973, 979 (1st Cir. 1984) (holding that as a general rule vertical arrangements are subject to a rule of reason analysis); Borger v. Yamaha International Corp., 625 F.2d 390, 396 (2d Cir. 1980); Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274, 281 (5th Cir. 1984).
[97] *See* Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 42 (1977).
[98] *See id.* at 44–45.
[99] Though, it should be noted that this franchising model was significantly different from the ones contemplated in the fast-food franchising litigation.
[100] *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 885–86 (2007).
[101] *Id.* at 883.
[102] *Id.* at 890 (holding that because the restraints can stimulate interbrand competition by reducing intrabrand competition the restraint should be subject to rule of reason analysis).
[103] *Id.*

The argument here, therefore, is that the relationship between a franchisor and a given franchisee is, analogously, a series of vertical restraints. Some courts have reached a similar conclusion.[104] Moreover, a franchisor has a separate contract with each franchisee, which makes them look independent from other franchisees. Franchisees are not in a contractual relationship with each other. Accordingly, they do not necessarily constitute a "single entity." Therefore, the franchisor and the franchisee are at different levels along the chain and the constraints that the franchisor exerts on its franchisees through its contracts are vertical constraints. In the same way that Leegin effectively requires its distributors to not sell below a certain price, franchisor-McDonald's requires its franchisees to, among other things, purchase its supplies from approved suppliers.[105]

One objection to this is that the price resale maintenance cases deal with the *re-sale* of a product sold by the actor seeking to impose the restraint.[106] McDonald's (franchisor) does not sell hamburgers to the franchisees, who then resell them. Nonetheless, the Department of Justice has argued that the principles of resale price maintenance under antitrust law extend to intangible technologies.[107] Thus, McDonald's is in effect selling its *brand* to its franchisees, which in turn is

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[104] *See, e.g.*, Will v. Comprehensive Accounting Corp., 776 F.2d 665, 671 n.1 (7th Cir. 1985) ("A franchisor and its franchisees are part of a business organization not altogether different from vertical integration."); Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 720 (11th Cir. 1984) ("[R]estrictions of 'vertical' nature (between the parties at different levels of the market structure)—such as those which may be contained in franchising agreements—are analyzed under the rule of reason, because they promote interbrand competition by allowing the franchisor or manufacturer to achieve certain efficiencies in the distribution of his goods and services."); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356 (9th Cir. 1982) (holding that the rule of reason applies to vertical restraints in franchise agreements).
[105] *See* Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *4 (N.D. Ill. 2018).
[106] *See* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 L. & CONTEMP. PROBS. __ (forthcoming 2019) (Manuscript at p. 6).
[107] Dep't of Justice, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.2 (January 2017), https://www.justice.gov/atr/IPguidelines/download.

being re-sold. Considering the emphasis that franchisors place on protecting their brand, and the amount of constraints they place over the product of franchisees to protect its product—the brand—then this argument deserves more serious consideration.[108] The Third Circuit has endorsed, in some respect, this theory when it held that a tying prohibition for the Domino's franchise system was not a violation of antitrust law on the grounds that it was part of the brand.[109]

In light of the above, the constraints that the franchisor places on its franchisees are essentially vertical restraints on the franchisees. Indeed, those constraints are analogous to how a manufacturer might require its distributors to sell its products above a certain price.

Of course, a natural objection is that an organization, such as a franchisor, can exert so many vertical restraints that it does become a single-entity. In general, this proposition seems correct.[110] However, in the franchising context, the sort of restraints imposed are generally

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[108] *See* Miles A. Zachary, Aaron F. McKenny, Jeremy C. Short, Kelly M. Davis, and Di Wu, *Franchise Branding An Organizational Identity Perspective*, 39 J. OF THE ACAD. MARK. SCI. 629, 631 (2011); *see also* Paul A. Argenti and Bob Druckenmiller, *Reputation and the Corporate Brand*, 6 CORPORATE REPUTATION REVIEW 368, 368 (2004).

[109] *See* Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 433 (3d Cir. 1997) (holding that the restraint was subject to the rule of reason and not a violation of Section 1, the Third Circuit noted that "[t]e essence of a successful nationwide fast-food chain is product uniformity and consistency. Uniformity benefits franchisees because customers can purchase pizza from any Domino's store and be certain the pizza will taste exactly like the Domino's Pizza which they are familiar. This means that individual franchisees need not build up their own good will. Uniformity also benefits the franchisor. It ensures the brand name will continue to attract and hold customers, increasing franchise fees and royalties. For these reasons, . . . Domino's Pizza . . . requires that all pizza ingredients, beverages, and packaging materials used by a Domino's franchisee conform to the standards set by Domino's Pizza.")

[110] For example, if the franchisor is also setting the employees' terms and conditions of employment and leads no autonomy or ability for independent decision-making, then the franchise system begins to look a lot like a single-entity. In the cases involving no-poach agreements, the courts have generally noted that the franchisees retain a significant amount of autonomy. Moreover, as I discuss in Section II.B.ii, at least in the case of the franchisees at issue in the litigation, there seems to be a significant amount of competition between the franchisees and between the franchisee and the franchisor, suggesting competing interests. The totality of

contractual in nature.[111] Moreover Professor Stanworth emphasizes how franchisees do retain a high level of autonomy.[112] He argues that franchisees claim control over primarily all of its operations, including hours of operation, employment of personnel, book-keeping, service quality, local advertising, and even (in some cases) pricing and additions/deletions to products and services.[113] The franchisor, on the other hand, seems to focus a significant level of control over maintaining the product it sells to the franchisees: its brand.[114]

ii. *Different Goals, Separate Corporate Consciousness, and Economic Realities*

American Needle, as argued in Part II.A, embraces a much more functionalist approach to determining a single-entity.[115] The Court in *American Needle* held that one such consideration to determine whether a single-entity exists was whether the putative entities have a single stream of "corporate consciousness."[116] This section demonstrates that franchisees and franchisors, absent some unique incentives structure, likely have separate interests and even competing corporate goals. As such, they should be considered separate entities for antitrust purposes.

One example in which a franchisor and franchisee were at odds is demonstrated by *Queen's City Pizza v. Domino's Pizza*.[117] In that case, eleven Domino's franchisees and the International Franchise Advisory Council, Inc. ("IFAC"), a corporation consisting of

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these circumstances, in my view, suggest that they should be considered separate business entities for antitrust purposes.

[111] *See* Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. L. & ECON. 223, 224–25 (1978).

[112] *See* John Stanworth, *The Franchise Relationship: Entrepreneurship or Dependence*, 4 J. Marketing Channels 161, 167 (1995).

[113] *Id.*

[114] *Id.* at 174.

[115] *See* Stone & Wright, *supra* note 78, at 393.

[116] *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 196 (2010).

[117] Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 430 (3d Cir. 1997).

approximately 40% of the Domino's franchisees in the United States, sued the Domino's Pizza-franchisor on the basis that the franchisor restricted its ability to purchase competitively-priced pizza dough and other ingredients.[118] Although the Third Circuit held in the franchisor's favor, absent some narrow, unique circumstances, it seems commonsensical that a company ("single-entity") would not bring suit against itself.

Another example where the goals of a franchisor and its franchisees are at odds is articulated in the *Deslandes v. McDonald's USA, LLC.* case involving the no-poaching agreements.[119] In that case, the plaintiff attempted to move from a franchised McDonald's to a company-owned McDonald's (known as, "McOpCo.").[120] In analyzing the relationship between the franchisees themselves, and the franchisees and McOpCo., Judge Alonso concluded that:

> McDonald's restaurants compete with one another. Franchisees are not granted exclusive rights or territories and are specifically warned that they may face competition from other franchisees, new franchisees, and restaurants owned by McOpCos. Thus, restaurants owned by McOpCos compete directly with McDonald's franchisees (who, in turn, compete with each other) to sell hamburgers and fries to customers.[121]

Judge Alonso also elaborated, finding that franchisees, "as independent business owners," are also responsible for making day-to-day decisions and most employment decisions.[122] Nonetheless, Judge Alonso concisely argues that it is simply not the case that McDonald's franchisees do not compete with each other.[123]

While the anecdotes above illustrate some circumstances in which the franchisor and franchisees may be at odds, David Weil provides additional evidence to explain why franchisors

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[118] *Id.* at 434.
[119] Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *3 (N.D. Ill. 2018).
[120] *Id.*
[121] *Id.*
[122] *See id.* at 4.
[123] *Id.*

and franchises' interests are at odds.[124] First, "the franchisor benefits financially from increased sales (revenue), while the franchisee seeks to maximize profit (revenue less cost)."[125] Second, "although the franchisee has a stake in brand reputation, its stake is not as great as that of the franchisor."[126] Weil argues that these two interests, together, create an incentive where the franchisee "free rides" on the established brand, but may be willing to cut corners to reduce costs or improve its profits, even if the actions have some negative effect for the entire brand.[127]

The *Queen's City Pizza*, to some extent, illustrates the dilemma that Weil raises. Domino's had an interest in requiring its franchisees to purchase the ingredients it wanted to protect its brand.[128] Yet, the franchisees wanted more flexibility to benefit from a more competitive market, hopefully leading to cheaper alternatives.[129]

Weil also points out that the franchising structure itself suggests that the franchisor essentially acts as its own self-interested firm.[130] Weil discusses several examples, such as Subway, which "was perfectly happy to cycle through failed franchisees as long as it received its upfront payments and at least enough royalty payments to keep the Subway brand on the street."[131]

In sum, it seems hardly the case that a given franchisor is necessarily a single entity with its franchisees. In fact, it seems like such an argument would be difficult to put forth. Indeed, the

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[124] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 123–25 (2014).
[125] *Id.* at 126.
[126] *Id.*
[127] *See id.*
[128] *See* Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 433 (3d Cir. 1997).
[129] *Id.* at 434 ("Plaintiffs allege Domino's Pizza, Inc. refused to sell fresh dough to franchisees unless the franchisees purchased other ingredients and supplies from Domino's Pizza, Inc. As a result of these and other alleged practices, plaintiffs maintain that each franchisee store now pays between $ 3000 and $ 10,000 more per year for ingredients and supplies than it would in a competitive market.")
[130] *See* WEIL, *supra* note 124, at 127.
[131] *Id*.

relationship between franchisees and franchisors is rather attenuated and complex. The "economic" reality is that franchisees and franchisors at times have competing interests, many which are acknowledged by the franchisor itself. Many of the restraints that franchisors place on its franchisees indicate a vertical relationship. That being said, this relationship is further complicated where the franchisor itself is a competitor, such as the case of McOpCo. But, that hardly suggests that a franchisor and franchisee (or, at least, McDonald's) constitute a single-entity, and if anything, the opposite. Rather, it suggests that the vertical agreements have horizontal effects.

III. UNTANGLING ANTITRUST LAW AND NO-POACH AGREEMENTS

Given the characterization of franchising in Part II, this section uses those considerations to decipher how no-poach agreements should be classified and which mode of analysis should be used to analyze the no-poach agreements. First, this section considers the economic effects of no-poach agreements in the labor market. The economic effects are certainly important for the analysis, considering that plaintiffs must show anti-competitive effects to prevail on any claim. Moreover, the clearer the anti-competitive effects exist, the more likely the agreements might be considered per se illegal or at least evaluated under the quick look. Next, this section attempts to provide some classification for the agreements, in light of that empirical literature.

A. *Pro-Competitive or Anti-Competitive?: A Summary of Empirical Studies of No-Poach Agreements*

i. *Anti-Competitive Considerations in the Labor Market*

Alan Krueger and David Card has largely paved the way for much of the research on the effects of no-poach agreements on labor markets.[132] Professors Card and Krueger in their seminal piece on minimum wages and employment demonstrate the concern in the fast-food franchising industry.[133] They find that minimum wage increases were not associated with job loss, undermining significant theories in traditional economic thought.[134] They attributed their findings, however, to noncompetitive constraints and high employer labor market power, i.e., monopsony.[135] Some more recent studies produced similar results to them as well.[136] As a result, economists have become increasingly concerned with the phenomenon of labor market monopsony in the United States.[137] Krueger's work sparked a series of studies, many of which have focused on employee mobility restraints, such as non-compete agreements.

The White House Council of Economic Advisors identified a long-term macroeconomic trend of slow wage growth and rising inequality in the united states, citing, among other things, market concentration, employer collusion, employer use of non-compete clauses, market concentration, search costs and frictions, and regulatory barriers.[138] The Brief also demonstrates

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[132] *See* Naidu, Posner & Weyl, *supra* note 1, at 546 ("An important spark for this work was a classic study by Professors David Card and Alan Krueger, which found that employment levels were not affected by a minimum wage hike in New Jersey in 1992.").
[133] *See* David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 790–92 (1994).
[134] *See id.*
[135] *See id.*
[136] *See* JOHN SCHMITT, CTR. FOR ECON. & POL'Y RESEARCH, WHY DOES THE MINIMUM WAGE HAVE NO DISCERNIBLE EFFECT ON EMPLOYMENT? (2013) http://cepr.net/documents/publications/min-wage-2013-02.pdf.
[137] *See, e.g.*, Naidu, Posner & Weyl, *supra* note 1, at 537; Azar, Marinescu & Steinbaum, *supra* note 2; Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, NBER WORKING PAPER NO. 24307 (Feb. 2018) (examining how monopsony power in local labor market affects wage behavior by reducing employee wages).
[138] *See generally* White House Council of Economic Advisors, *Labor Market Monopsony: Trends, Consequences and Policy Responses* (Issue Brief, Oct. 2016).

that 18% of the U.S. labor force is subject to non-compete agreements, including low-wage workers who are unlikely to possess trade secrets.[139] Benmelech, Bergman, and Kim also demonstrate that labor market concentration allows employers to exploit monopsony power to reduce wages.[140]

Although somewhat different, significant economic literature has been devoted to understanding non-compete agreements as they have been applied to low-wage workers. Starr, Prescott, and Bishara indicated that 12 percent of low-income workers were subject to non-compete agreements.[141] Krueger and Posner emphasize that the practice of using non-compete agreements for low-wage workers is particularly concerning because "workers do not know their rights, cannot afford lawyers, receive little training, and are susceptible to threats from their former employers."[142] Furthermore, the concern—stemming from this idea of misinformation—is that non-compete agreements perpetuate labor market concentration.[143]

Most significantly, Krueger and Ashenfelter also analyzed the effects of no-poach agreements.[144] They examined the 2016 franchise contracts of 156 of the largest franchise chains in the United States to determine the prevalence of no-poaching agreements in the sector.[145] After examining the contracts, they found that 58% of major franchises included no-poaching agreements in their franchise contracts.[146] Griffith, in her study on franchising contracts among

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[139] *Id.* at 8.
[140] *See* Benmelech, et al., *supra* note 137.
[141] *See* Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force*, U. MICH. L. & ECON. RESEARCH PAPER NO. 18-013, at 3 (April 2019).
[142] *See* Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, THE HAMILTON PROJECT, at 5 (Feb. 2018).
[143] *Id.*
[144] Krueger & Ashenfelter, *supra* note 3, at 2–4.
[145] *Id.* at 5.
[146] *Id.* at 6.

the top 50 fast-food franchise systems, also found that 36 of the 44 franchisor contracts contained no-poach clauses, only 4 of which narrowed the no-poach clauses to managerial employees.[147]

Krueger and Ashenfelter then present three theoretical models to help predict the utilization of such agreements based on firm and industry characteristics.[148] In essence, they conclude that, based on their three models, franchises can use the agreements: (1) to "increase employer concentration and have the potential for driving a wedge between the value of a worker's marginal product and the wage;[149] (2) to reduce labor supply elasticity by preventing job offers from franchisees in the same chain;[150] and (3) to enable employers to reduce worker bargaining power over any surplus created from the employment relationship, including training.[151] Finally, they also observed that franchise companies in industries with high labor turnover were more likely to impose no-poaching agreements than those in low-turnover agreements[152] and that no-poaching agreements were comparatively less frequent in industries with higher average wages and education levels.[153]

In reflecting on their results, Krueger and Ashenfelter posit that the prevalence of such agreements may help explain the labor monopsony dilemma discussed at the outset of this section.[154] Moreover, Krueger and Posner also suggest that "the proliferation of no-poaching agreements has increased franchise companies' monopsony power over workers in recent decades."[155]

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[147] *See* Griffith, *supra* note 6, at 188.
[148] Krueger & Ashenfelter, *supra* note 5, at 8.
[149] *Id.* at 11.
[150] *Id.* at 14.
[151] *Id.* at 17.
[152] *Id.* at 19.
[153] *Id.*
[154] *Id.* at 20–21.
[155] Krueger & Posner, *supra* note 142, at 9.

Of course, in reflecting on these studies, one reaction would be to question how significant the franchise market power is in the broader labor market for low-wage workers, and also how significantly it restricts low-wage workers from going from one position to the next. In actuality, franchise and fast-food work, for example, as of 2018, only approximately 3.77 million workers were employed in the fast-food industry.[156] Relative to the entire U.S. labor market, this only represents approximately 2% of the labor market.[157] And, as relative to low-wage workers, the fast-food jobs only cover about 15% of low-wage jobs.[158] Therefore, at a glance, it may seem a bit suspect that practices in relatively small proportions of the labor market are causing wage stagnation and labor collusion trends in labor market across the entire country. This is not to say that it is any of the studies discussed are incorrect, but rather, that there is certainly a gap in the economic literature that warrants further consideration.

ii. *Pro-Competitive Arguments*

While plaintiffs point to the arguments in the labor market, interestingly, franchisors routinely cite to pro-competitive justifications in the product market. Franchisors focus primarily on economic and pro-competitive benefits that arise in the product market.[159] The pro-

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[156] IBIS World, Industry Market Research, Reports, & Statistics, *Number of Employees in the United States Fast-Food Restaurant Industry from 2004 to 2018*, https://www.statista.com/statistics/196630/number-of-employees-in-us-fast-food-restaurants-since-2002/.

[157] *See* FRED Economic Data, *Civilian Labor Force* (showing that size of labor force in 2018 was approximately 162 million workers). Taking this number, 3.77 million fast-food workers is only approximately 2.3% of the total labor force.

[158] U.S. Bureau of Labor Statistics, *How Should We Define "Low-Wage" Wage? An analysis using the Current Population Survey* (finding that about 23.6 million Americans make under $10.75 per hour). Accordingly, as a proportion of 23.6 million, low-wage workers represent about 15% of that. Note that these are crude calculations that do not account for many variables, such as age.

[159] *See generally* Defendant's Motion to Dismiss, Stigar v. Dough Dough, Inc., et al., No. 2:18-cv-00244-SAB, Richmond & Rogers v. Bergey Pullman Inc., et al., No. 2:18-cv-00246-SAB, Harris v. CJ Star, LLC et al., No. 2:18-cv-00247-SAB (E.D. Wash. Filed Oct. 22, 2018)

competitive benefits they allege can be boiled down to intrabrand competition and protecting training investment.

In essence, franchisors argue that "no-hire restriction[s] promote[] intrabrand competition for hamburgers by encouraging franchisees to train employees for management positions."[160] Put more simply, "better service equals happier customers."[161] Therefore, the restraint is procompetitive because by promoting intrabrand competition, the franchise brand is improved, thereby also improving interbrand competition.[162]

Moreover, some franchisors are also concerned about a "free rider" problem among their franchisees. The theory is that a franchisee might free-ride on the franchisee-specific training costs borne by another franchisee.[163] As a result, one franchisee may reduce the amount of training it provides.[164] Therefore, the no-poach agreements *between* franchisees prevents franchisees from free-riding and allows each franchisee to retain its investment in the employees.[165]

Some economists have expressed some skepticism towards this theory. Professor Salop, for example, argued that training for entry-level employees is minimal and unavoidable, and the agreements as written would not reduce free-riding by rival franchises.[166] Along other lines, this rationale seems suspect because the no-poach agreements apply to all employees, not just managerial employees, who might actually receive significant training. Moreover, as Judge

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[160] *See* Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *21 (N.D. Ill. 2018).
[161] *Id.*
[162] *Id.*
[163] *See* Catherine E. Schaefer, *Disagreeing Over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 Fordham L. Rev. 2285, 2307 (2019).
[164] *Id.*
[165] *Id.*
[166] *See Deslandes*, 2018 U.S. Dist. LEXIS at *23.

Alonso highlights in *Deslandes*, "every employer fears losing the employees that it has trained . . . [and] employers have plenty of other means to encourage their employees to stay."[167]

Finally, some franchisors will also point to consumer effects, namely lower prices for consumers.[168] Put differently, franchisors argue that because the restraints are ancillary to a broader, pro-competitive agreement, they are lawful.[169] Nonetheless, franchisors should be cautious of making this argument because monopsonistic practice in the labor market can have pro-competitive effects in product market.[170] A student note demonstrates that monopsonistic practices in the labor market can decrease firm labor costs, and decreased labor costs will result in prices lower prices than there would otherwise be, all else equal.[171] Accordingly, courts should not necessarily consider the fact that a practice yields cheaper prices for consumers sufficient to offset any anti-competitive practices in the labor market.[172]

B. *An Attempt to Formalize the Unformalizable*

i. *Horizontal or Vertical?*

As argued in Part II.B.i, the restraints in a franchising agreement are vertical restraints. Therefore, at first glance, the no-poach clauses are strictly vertical agreements. However, because these restraints affect the competition between franchisees, and between franchisees and the franchisor[173], the restraints also have horizontal aspects to theme. Moreover, they also have

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[167] *See* American Antitrust Institute, Letter to Assistant Attorney General Delrahim and Deputy Assistant Attorney General Murray, at 6 (May 2, 2019).
[168] *See* Masterman, *supra* note 26, at 1402–03.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 1404–09.
[172] *Id.*
[173] For example, McOpCo stores are essentially in competition with franchisee-McDonald's stores.

horizontal effects in that they regulate the competition in the labor market between franchisees.[174]

The Defendants in the *Deslandes* case, however, argued (ultimately unsuccessfully) that the Plaintiff failed to establish that the agreements were vertical. As the Department of Justice acknowledged in its brief in a case before the Second Circuit, "horizontal and vertical restraints do not always threaten competition in different ways or call for different analysis." Instead, "the 'horizontal-vertical distinction' is 'relevant only insofar as it helps identify competitive effects.'" Therefore, insofar as the no-poach agreement is part of a vertical restraint, but has horizontal effects, it can be subject to either per se condemnation (if it is rendered naked), rule of reason, or quick look. This result differs from traditional vertical restraints, which are generally only analyzed under the rule of reason standard.

ii. *Ancillary or Naked?*

Assessing the horizontal aspects of the no-poaching agreements, the horizontal aspects can be rendered ancillary or naked. As briefly discussed in Part I.B, an agreement may be ancillary if it is essentially part of a larger agreement that is otherwise procompetitive. Some scholars and the Department of Justice have also reasoned that the be reasonably related to the lawful purpose of the main contract.[175] To hold otherwise, would suggest that all anti-

[174] *See* Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *16–17 (N.D. Ill. 2018).
[175] *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, *supra* note 49 (emphasis added); Fed. Trade Comm'n & U.S. Dep't of Just., Antitrust Div., *Antitrust Guidelines for Collaborations Among Competitors* § 2.3, at 6–7 (April 2000).

competitive claims could be grouped together in an otherwise pro-competitive contract, and thereby subject to the rule of reason instead of being condemned as per se violations.[176]

In the *Deslandes* case, the plaintiffs conceded that the no-poach agreement was ancillary to the franchising agreement, which "increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive."[177] Surprisingly, the *Deslandes* plaintiff and court failed to acknowledge that for a restraint to be ancillary it must both hold the promise of procompetitive benefits *and* be reasonably related to the lawful purpose of the main contract.[178] Nonetheless, Judge Alonso acknowledges that it likely is not relevant to the purpose of the main contract.[179]

With respect to the no-poaching agreements, it seems difficult for the franchisor to point to how the no-poaching restraint would be connected to the main nature of the franchising agreement. At least in the cases involving these disputes thus far, no franchisor has articulated such an explanation, and in *Deslandes*, the plaintiff conceded that it was ancillary.[180] Other plaintiffs in no-poach agreements have also not raised this issue.[181]

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[176] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Div., *supra* note 170, at 6-7 ("[T]he Agencies assess the competitive effects of the overall collaboration and any individual agreement or set of agreements within the collaboration that may harm competition.").
[177] *See Deslandes*, 2018 U.S. Dist. LEXIS, at *20.
[178] *See id.* at *19–21 (discussing ancillarity of clause does not include consideration of the no-poach clause's purpose in light of the entire agreement).
[179] *See id.* at *20 ("That is not to say that the provision itself was output enhancing. The very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign.")
[180] *Id.* at 19 ("[P]laintiff has alleged a horizontal restraint that is ancillary to franchise agreements.")
[181] *See, e.g.*, Butler v. Jimmy John's Franchise, LLC., F. Supp. 3d 786, 792 (S.D. Ill. 2018) (no discussion of ancillary agreement).

The fact that the no-poach agreement are part of broader agreements is likely one of the main distinctions between the no-poach agreements in the franchising contexts and those, condemned as naked horizontal restraints, in the Silicon Valley technology cases.[182] Yet, again, the distinction is not all that different to the extent that franchisees may also compete with each other.

In light of the foregoing, generally, if an agreement is not ancillary, then it is considered naked and would therefore be subject to being per se condemned. It seems as though because there are valid claims that competition exists between franchises (i.e., focusing on the horizontal aspect of the restraint), the no-poach agreements within franchise systems are not all that different from the Silicon Valley cases.[183] But, perhaps plaintiffs are concerned that courts may be hesitant to determine whether a no-poach agreement is reasonably related to the entire contract. As such, they concede that such agreements are ancillary, with the hopes of convincing a judge that these should be evaluated under the "quick look" mode of analysis.

iii. *Mode of Analysis*

For the sake of analysis, assuming that the agreements were ancillary, plaintiffs only have one option to argue that the per se rule should still apply. Indeed, plaintiffs could argue that the franchisor orchestrated a collection of horizontal agreements, known as a "hub-and-spoke" conspiracy.[184] As Judge Reagan has acknowledged, such a theory is not outlandish. But Judge Reagan seemed very caught up in the fact that the firms involved deal with the same brand—

[182] *See* In re High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103, 1179–82 (N.D. Cal. 2012).
[183] *See id.*
[184] *See Butler*, F. Supp. 3d at 795 (S.D. Ill. 2018)

circling the analysis back to the characterization/nature of a franchise.[185] Such a theory might be useful, but the burden would be on the plaintiff to establish true franchisee independence.[186]

This likely suggests that plaintiffs will, as they have, argue that the case should result in a quick look analysis. Courts have become tangled in the formalities of characterizing the constraints—vertical or horizontal; naked or ancillary. Nonetheless, the Supreme Court has held that "[t]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect, and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[187] Judge Ginsburg explains that the quick-look is called for when a plaintiff can show that there is a "close family of resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."[188]

As such, a quick look analysis does make sense in this circumstance. In the two recent cases that have held that the plaintiffs have stated a claim, both judges acknowledged the "obvious" anti-competitive effects that the no-poach agreements would have.[189] Moreover,

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[185] *Id.* at 795–97.
[186] *Id.* at 797.
[187] California Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999).
[188] *See* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005).
[189] *See* Butler v. Jimmy John's Franchise, LLC., F. Supp. 3d 786, 792 (S.D. Ill. 2018) ("Although the franchisees are dealing in the same brand, they are still competitors, and anyone with a rudimentary understanding of economics would understand that the no-hire agreements have an anticompetitive effect on the labor market targeted by those firms."); Deslandes v. McDonald's USA, LLC., 2018 U.S. Dist. LEXIS 105260, at *20–21 ("The next question, then is whether plaintiff has plausibly alleged a restraint that might be found unlawful under quick-look analysis. The Court thinks she has. Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate. Plaintiff herself experienced the stagnation of her wages. A supervisor for a competing McDonald's restaurant told plaintiff she would like to hire plaintiff for a position that would be similar to plaintiff's position but that would pay $1.75-2.75 more per hour than she was earning. Unfortunately for plaintiff, the no-hire agreement prevented the McOpCo from offering plaintiff the job.")

concerns have also been raised in other contexts, albeit between two (clearly) independent business entities, that no-poach agreements are naked horizontal restraints subject to per se condemnation.[190] Finally, economic literature suggests that in the relevant market—the labor market—no-poaching agreements can have significant effects, like suppressing wages.[191] Certainly, therefore, the no-poach agreements seem anti-competitive to "an observer with even a rudimentary understanding of economics."[192]

The only "procompetitive" effects that franchisors can allude to are within the product market. Such arguments should not be considered for these cases, which allege anti-competitive restraints in the *labor* market . Efficiency benefits, or benefits in the product market, would be out-of-market, and therefore, should not be considered in the analysis as to whether an otherwise anti-competitive restraint in the *labor* market is unlawful.[193] Certainly, when analyzing product-market cases, the potential positive effects that a restraint in the labor market are irrelevant towards the analysis. Therefore, why should that be relevant here? As Judge Reinhardt argued, "driving down compensating to works in this way is not a benefit to consumers cognizable under our laws as a 'procompetitive' benefit."[194] Hence, some scholars argue that labor market antitrust cases and product market antitrust cases should be analyzed differently.[195] Even if some procompetitive effect exists in the product market, it is unlikely that that effect outweighs the detriment caused by the anti-competitive effect in the labor market.[196]

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[190] *See* In re High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103, 1179–82 (N.D. Cal. 2012).
[191] For full explanation of economic effects on the labor market, see discussion *supra* Part III.A.i.
[192] California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).
[193] *See, e.g.*, Polygram Holding, Inc. v. FTC, 416 F.3d 29, 38 (D.C. Cir. 2005).
[194] *See* California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1161 (9th Cir. 2011) (en banc) (Reinhardt, J., concurring in part and dissenting in part).
[195] *See* Naidu, Posner & Weyl, *supra* note 1, at 541 (citing Masterman, *supra* note 26).
[196] *See* Masterman, *supra* note 26, at 1409.

In light of the foregoing, it seems fairly clear that either the no-poach agreements should be per se condemned or subject to the quick look analysis. A full-blown rule of reason analysis is likely not applicable given the clearly anti-competitive effects of these agreements. Furthermore not "every case attacking a less obviously anti-competitive restraint . . . is a candidate for plenary market examination."

IV. RETHINKING THE NO-POACH ANALYSIS

The previous section clearly demonstrates how tangled the analysis can be (and has become). At each step of the analysis, courts are confused as to how to categorize franchisees, and much hinges on that categorization. In this section, I briefly discuss a few policy proposals that may be plausible to resolving, or at least, more clearly analyzing these sorts of claims. Of course, it should be mentioned that many scholars argue that such no-poach agreements should be plainly illegal or statutorily considered per se illegal under antitrust law.[197]

A. *Lessons from Restrictive Employment Covenants: Legitimate Interests*

Professors Marinescu and Posner propose one solution to re-imagining the analysis of no-poach agreements: to bring the analysis in line with the treatment of covenants-not-to-compete.[198] As literature discussed in Part III.A.i suggested, most no-poach agreements are currently tailored to all workers, despite many entry-level workers may not requiring or actually being given any training.[199]

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[197] *See, e.g.*, Krueger & Posner, *supra* note 122, at 13 ("Accordingly, we propose a per se rule against no-poaching agreements regardless of whether they are used outside or within franchises. In other words, no-poaching agreements would be considered illegal regardless of the circumstances of their use.").
[198] *See* Marinescu & Posner, *supra* note 21, at 35.
[199] *Id.*

Under the Restatement of Employment Law, a restrictive covenant is only enforceable if the employer can demonstrate that it furthers a legitimate interest of the employer.[200] A legitimate interest is then defined as a trade secret (or other protectable confidential information), customer relationships, investment in the employee, or purchase of a business owned by the employee.[201] In doing so, the employer can identify a protectible interest only when the employee has gained serious training and investment.[202] Considering whether a protectable or legitimate interest exists also allows the possibility for no-poach agreements to persist, insofar as they are narrowly tailored to an employee, most likely a managerial employee, who has been given significant training.[203]

Therefore, the no-poaching agreement clauses become much more acceptable in a very narrow set of interests, rather than broadly and in an undefined manner. This approach also seems to be much easier to analyze than getting caught up in the different form-inquiries in antitrust law. In some sense, antitrust law already considers inquiries like this when determining whether a restraint is ancillary or naked. Indeed, restrictive employment covenants not to compete that are otherwise enforceable are generally considered ancillary and evaluated under the rule of reason.[204] On the other hand, restrictive employment agreements that are broader than

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[200] *See* Restatement of Employment Law § 8.07 (2019).
[201] *Id.*
[202] *Id.*
[203] *Id.* However, it should be noted that "training" alone would not be sufficient; there would need to be some high investment in the employee's reputation in the market. Comment. B of the Restatement states, "An employer cannot protect as confidential any information in which it does not have a protectable interest, such as information that has entered the public domain and information that would be considered part of the general experience, knowledge, training, and skills that an employee acquires in the course of employment." Restatement of Employment Law § 8.07, cmt. B (2019). This is in line with Gary Becker's basic theory that "general training" belongs to the employees. *See generally* GARY S. BECKER, HUMAN CAPITAL (1964).
[204] *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214 (D.C. Cir. 1986).

necessary or do not protect a legitimate interest are considered naked agreements and *per se* illegal.[205] As such, it would not be terribly challenging for a court to conclude that a restraint that does not cover some legitimate interest should be condemned.

B. *Antitrust and Labor Markets*

One important suggestion would be to almost exclusively look at the effects a labor-market-related restraint has on the labor market, and not consider any effects in the product market.[206] Masterman argues that "where a restraint of trade plausibly affects different groups of consumers in different markets, courts should weigh the competitive effect of a restraint only in the markets in which the restraint directly occurs, unless the anticompetitive effect in the market is de minimis."[207] This approach has some support in relevant law.[208] This approach would likely result in application of the quick look analysis in cases like the franchising context, given the substantiated anticompetitive effects of the agreements.[209]

Economists have become increasingly weary of the use of antitrust law to solve labor monopsony-related issues. Marinescu and Posner suggest that Section 1 standards should be relaxed for labor market standards.[210] They argue that, among other things, for Section 1 claims in the labor market, the standard should only assess a relevant commuting zone for the purposes

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[205] *See, e.g.*, Ray Mart, Inc. v. Stock Building Supply of Texas, LP, 302 Fed Appx. 232, 236 (5th Cir. 2008) (holding that for an agreement to be ancillary and not *per se* condemned, the agreement must be evaluated under two steps: (1) identifying the otherwise enforceable agreement, and (2) determining whether the non-compete covenant is ancillary to otherwise enforceable agreements).
[206] As discussed in Part III.A.ii, franchisors' arguments essentially hinge on procompetitive effects in the product market.
[207] *See* Masterman, *supra* note 26, at 1419.
[208] *See, e.g.*, Clarett v. Nat'l Football League, 306 F.Supp. 2d 379, 408–09 ("[T]he League may not justify the anticompetitive effects of a policy because of procompetitive effects in a different market.")
[209] *See* Masterman, *supra* note 26, at 1420–21.
[210] *See* Marinescu & Posner, *supra* note 21, at 35.

of establishing labor market concentration, rather than assessing the entire labor market.[211] As discussed earlier, showing that "allegations of a large number of geographically-small relevant markets might cut against class certification."[212] Thus, their approach would allow antitrust law to better police collusion in the labor market.[213] Courts under this approach may still apply rule of reason, but plaintiffs would be more likely to succeed because their class certification will not be undermined and they can assert market concentration.[214]

CONCLUSION

No-poach agreements in franchise agreements pose a significant issue for workers. Economic evidence suggests that they suppress wages. Workers, turning to their antitrust remedies for recourse, as demonstrated by this Note, will run into enormous challenges—many of which hinge on formalist inquiries. This Note hopefully provides some guidance as to how to navigate around those formalist inquiries. Nonetheless, this Note also advocates for significant reconsideration of antitrust laws, so as to allow them to be used as a tool to prevent anticompetitive practices in all markets, including labor markets.

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[211] *Id.*
[212] *Id.* at 36.
[213] *See id.*
[214] *See id.*