



2-3-2020

ANTITRUST ENFORCEMENT IN LABOR MARKETS: THE DEPARTMENT OF JUSTICE'S EFFORTS

Murray, Michael

Follow this and additional works at: <https://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Murray, Michael, *ANTITRUST ENFORCEMENT IN LABOR MARKETS: THE DEPARTMENT OF JUSTICE'S EFFORTS*, 59 SANTA CLARA L. REV. 561 (2020).

Available at: <https://digitalcommons.law.scu.edu/lawreview/vol59/iss3/3>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com, pamjadi@scu.edu.

ANTITRUST ENFORCEMENT IN LABOR MARKETS: THE DEPARTMENT OF JUSTICE’S EFFORTS

Michael Murray*

Several recent filings in labor antitrust cases by the U.S. Department of Justice’s Antitrust Division as amicus curiae have prompted significant discussion in the bench, the bar, and the industry. The Division has expanded its amicus brief program, which has been in place since at least 1975, in order to further the proper administration of the antitrust laws. In the labor space, the Division filed several amicus briefs that detail some of its views on the application of antitrust laws to no-poach agreements, that is, agreements among companies about the hiring of each other’s employees. Specifically, the Division has set forth its framework for assessing whether such agreements are subject to the per se rule, the rule of reason, or so-called “quick look” analysis. Under the Department’s framework, the key questions are whether the entities in the no-poach agreement are capable of concerted action, whether those entities are competitors, whether the entities’ agreement is ancillary to a larger arrangement, and whether the agreement merits a “quick look.” This article, adapted from a speech in March 2019, describes the Division’s amicus program, provides a brief historical survey of the interaction of antitrust and labor law, including enforcement activities, and outlines the Division’s approach to no-poach agreements.

TABLE OF CONTENTS

I. Introduction	562
II. The Division’s Amicus Program	562
III. Recent Labor Amicus Filings	564
IV. History: Labor and Antitrust.....	566
V. The Department’s Framework for Analysis.....	569
A. Concerted Action	570
B. Standard of Law: Per Se Rule or Rule of Reason	572

* Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Remarks as prepared for delivery at Santa Clara University School of Law on March 1, 2019, with revisions as necessary to prepare for publication and to accommodate significant subsequent developments. I would like to thank the Santa Clara Law Review Volume 59 Editorial Board for their contributions.

1. Competitors	572
2. Ancillarity.....	575
3. “Quick Look”	576
VI. Conclusion.....	576

I. INTRODUCTION

I am here to talk about the Department of Justice’s antitrust initiatives in the labor space. The Department has been active in this area for many years, perhaps most prominently several years ago with a series of settlements concerning no-poach agreements and technology companies.¹ I would like to discuss the Department’s current activities, including several recent amicus filings that have prompted discussion in the bench, the bar, and the industry. My goal is to set these filings in both historical and legal context, to provide a better understanding of the Department’s views in this important area of antitrust practice.

II. THE DIVISION’S AMICUS PROGRAM

Before turning to that task, I would like to briefly discuss the related initiative that gave rise to those filings. There have been quite a few stories in the press recently about the Department’s renewed focus on its amicus program, which consists of the Department’s discretionary filings in private antitrust cases.² Commentators are saying that the Antitrust Division (“the Division”) is “get[ting] off the sidelines”³ and “seeking to make its voice heard.”⁴ The reaction to our filings has ranged from encouragement to hostility—encouragement from those we are supporting and hostility from those we are not supporting.⁵ It turns out

1. See, e.g., *United States v. eBay, Inc.*, No. 12-cv-5869, Final Judgment, Doc. 66 (N.D. Cal. Sept. 2, 2014); *United States v. Adobe Sys., Inc.*, No. 1:10-cv-1629, Final Judgment, Doc. 17 (D.D.C. Mar. 18, 2011); see *United States v. Lucasfilm Ltd.*, No. 1:10-cv-2220, Final Judgment, Doc. 7 (D.D.C. June 3, 2011); Press Release, Dep’t of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

2. *The Antitrust Division’s Competition Advocacy*, U.S. DEP’T OF JUSTICE (Mar. 28, 2019), <https://www.justice.gov/atr/division-operations/division-update-spring-2019/antitrust-division-s-competition-advocacy>.

3. Bryan Koenig & Matthew Perlman, *DOJ Antitrust Division Gets Off the Sidelines*, LAW360 (Feb. 8, 2019), <https://www.law360.com/articles/1126818/doj-antitrust-division-gets-off-the-sidelines>.

4. Karen Hoffman Lent & Kenneth Schwartz, *Antitrust Division Increasingly Weighs In as Amicus Curiae*, 261 N.Y. L.J. 1 (Feb. 11, 2019).

5. See *infra* Part III.

the age-old adage of “where you stand depends on where you sit” is fully applicable to antitrust.⁶

This reaction to our amicus program is half accurate. It is true that we are making an active amicus program a priority. Specifically, as our Assistant Attorney General, Makan Delrahim, told Congress, we are trying to expand our amicus program in order to “more proactively and more effectively promote the use of antitrust and competition principles across the judiciary.”⁷ To that end, we filed significantly more briefs in 2018 than 2017 (nine versus one), and if the current rate holds we will double that again in 2019, to approximately twenty briefs.⁸

But it has been our legal obligation since at least 1975 to file amicus briefs as a way to enforce antitrust laws. In that year, Attorney General Levi codified a delegation of authority to the Assistant Attorney General of the Antitrust Division.⁹ The text of it, which still exists today, provides that several “functions are assigned to and shall be conducted, handled, or supervised by” the Assistant Attorney General of the Antitrust Division and that these functions consist of, among other things, “[g]eneral enforcement . . . of the Federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization, including . . . participation as *amicus curiae* in private antitrust litigation.”¹⁰ So although our focus is renewed, it is well-grounded. It should be no surprise that we are doing what we are tasked to do.

That the amicus program is discretionary, though, raises a significant question: how do we decide which cases to pursue? The answer is that we learn of significant antitrust cases in the same way that scholars do: we search for them in the reporters and the dockets, we read about them in the news, and parties and organizations bring them to our attention. It is increasingly common for parties and organizations to come to us with a pitch about a case that they believe raises significant issues.

6. This adage is now attributed to a government official from the Bureau of Budget in 1949. See Rufus Miles, *The Origin and Meaning of Miles' Law*, 5 PUB. ADMIN. REV. 399 (1978).

7. Press Release, Dep't of Justice, Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2018), <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-senate-subcommittee-antitrust-competition>.

8. Antitrust Division, *Appellate Briefs*, U.S. DEP'T OF JUSTICE (Feb. 28, 2019), <https://www.justice.gov/atr/appellate-briefs>. This count does not include Supreme Court filings, which are the primary responsibility of the Office of the Solicitor General. See 28 C.F.R. § 0.20(a). There were three Supreme Court amicus cases involving the Division in 2018 and one in 2017.

9. Revising Delegations of Authority to the Antitrust Division, 40 Fed. Reg. 36118 (Aug. 19, 1975).

10. 28 C.F.R. § 0.40(a).

That makes a lot of sense, because it is likely that we are already reviewing the case, and parties reasonably believe that it is useful for them to try to persuade us of their view of the case. In this way, our amicus program is becoming somewhat similar to the amicus program of the Solicitor General, in which parties routinely advocate in person and in writing that the Solicitor General file an amicus brief on their side in the Supreme Court.¹¹ This is now a routine part of our practice.

We sort through these cases in the same way that we sort through which affirmative cases to bring in our criminal and civil programs: we exercise prosecutorial discretion. We are guided by the oath that we take as federal employees to “support and defend the Constitution” and “faithfully discharge the duties of [our] office.”¹² And we balance resource and policy constraints with the interest of the United States in a proper administration of the law.¹³ Indeed, the very fact that we are more active on the amicus front appears to redound to the benefit of the interest of the United States: by discouraging private parties from making the more extreme versions of their arguments, due to the possibility of a contrary United States amicus brief that could undermine their credibility.

A review of our filings indicates that we are willing to file on a wide variety of topics, from immunities and exemptions to the topic of these remarks, labor, to which I will now turn.¹⁴

III. RECENT LABOR AMICUS FILINGS

We have recently offered several filings to courts considering the proper standard for assessing market allocations in a labor market.

The reactions to our position have been swift and fierce. The first filing, in the Western District of Pennsylvania, took the position that no-poach agreements among competitors are per se unlawful unless they are ancillary to a separate legitimate transaction or collaboration.¹⁵ This

11. Robert L. Stern & Eugene Gressman, SUPREME COURT PRACTICE § 6.41 (9th ed. 2007).

12. See 5 U.S.C. § 3331.

13. For example, subsequent to filing a Statement of Interest in one no-poach case, the Division intervened in the case for the purpose of entering into the settlement with the defendant. See Statement of Interest of the United States of America, *Seaman v. Duke Univ. et al.*, No. 1:15-cv-462, Dkt. No. 325 (M.D.N.C. Mar. 7, 2019); Order, *Seaman v. Duke Univ. et al.*, No. 1:15-cv-462, Dkt. No. 362 (M.D.N.C. May 22, 2019).

14. See generally Antitrust Division, *Appellate Briefs*, U.S. DEP'T OF JUSTICE (Feb. 28, 2019), <https://www.justice.gov/atr/appellate-briefs>.

15. Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-798, Doc. 158, at *4 (W.D. Pa. Feb. 8, 2019). Subsequent to the date of this speech, the court accepted this argument in *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-798, 2019 WL 2542241, at *1 (W.D. Pa. June 20, 2019) (accepting Division's argument on per se rule). The Division also filed a similar statement in a different case,

position has been characterized by certain defense-friendly lawyers as an unsupported assertion based on lawless guidance that creates a “trap,”¹⁶ but hailed by plaintiff-friendly attorneys as pro-worker plaintiff.¹⁷ The second filing, in Washington State, explained that no-poach agreements in the franchise context are likely subject to the rule of reason.¹⁸ This position has been called a “welcome clarification” by defense-friendly lawyers¹⁹ but has been criticized by plaintiff-friendly lawyers as pro-business defendant.²⁰ We have not been able to please all of the people all of the time.

But of course, that is fine with us, because we are not in the business of satisfying a particular constituency. Our Assistant Attorney General has promised that “[w]e will be the officious inter-meddlers in random cases,” that “[w]e’re not going to take anybody’s side, but the side of what we believe . . . the law . . . should be”²¹ I am reminded of the

see Statement of Interest of the United States of America, *Seaman v. Duke Univ. et al.*, No. 1:15-cv-462, Dkt. No. 325, at **19-29 (Mar. 7, 2019), and subsequently intervened in that case for the purpose of entering into the settlement with the defendant. See Order Granting the United States of America’s Unopposed Motion to Intervene, *Seaman v. Duke Univ. et al.*, No. 1:15-cv-462, Dkt. No. 362 (May 22, 2019).

16. James Tierney & Alex Okuliar, *DOJ and FTC Set Possible Criminal Liability Trap for HR Professionals*, ORRICK ANTITRUST WATCH (Oct. 24, 2016), <https://blogs.orrick.com/antitrust/2016/10/24/doj-and-ftc-set-possible-criminal-liability-trap-for-hr-professionals/>; Reply Brief for Defendants, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-798, Doc. 163 (W.D. Pa. Feb. 12, 2019). See also Boris Bershetyn et al., *Expert Analysis: DOJ Is Trying to Rein in Franchise No-Poach Suits*, LAW360 (Feb. 19, 2019), <https://www.law360.com/foodbeverage/articles/1130056/doj-is-trying-to-rein-in-franchise-no-poach-suits>.

17. See Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. 18 (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf; see also Boris Bershetyn et al., *Expert Analysis: DOJ Is Trying to Rein in Franchise No-Poach Suits*, LAW360 (Feb. 19, 2019), <https://www.law360.com/foodbeverage/articles/1130056/doj-is-trying-to-rein-in-franchise-no-poach-suits> (suggesting that the Department’s position in recent cases is a “welcome clarification” of the law that developed after the 2016 guidance).

18. Notice of Intent to File Statement of Interest, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244, Doc. 24 (Jan. 25, 2019). Subsequent to the date of this speech, the parties settled these cases. Two courts subsequently considered the issues raised in the Statement. In one court, a respected district court judge, who took over for a retired district court judge that authored a decision cited in the Statement and this speech, declined to reconsider the retired judge’s ruling. See *Conrad v. Jimmy John’s Franchise, LLC*, No. 318-CV-00133, 2019 WL 2754864, at *1-2 (S.D. Ill. May 21, 2019). In the second court, the district court judge generally accepted the arguments in the Statement, concluding that rule of reason analysis should be applied to the no-poach allegations in that case. See *Ogden v. Little Caesar Enterprises, Inc. et al.*, No. 18-12792 (E.D. Mich. July 29, 2019).

19. See, e.g., Boris Bershetyn et al., *Expert Analysis: DOJ Is Trying to Rein in Franchise No-Poach Suits*, LAW360 (Feb. 19, 2019), <https://www.law360.com/foodbeverage/articles/1130056/doj-is-trying-to-rein-in-franchise-no-poach-suits>.

20. See Stutz, *supra* note 17; see also Bershetyn et al., *supra* note 19.

21. Makan Delrahim, Assistant Att’y Gen., What’s ahead at the Justice Department?, First Annual Conference at the Antitrust Research Foundation at George Mason University: What’s ahead in antitrust? (Jan. 19, 2018).

famous line from T.S. Eliot's *Murder in the Cathedral*. Archbishop Thomas Becket is foreseeing his eventual murder for standing on principle against the king. He then is confronted by four tempters who propose pathways forward. The first three advise him to do the wrong thing to avoid death, but the last urges him to do the right thing, to accept death, but not because it is right to stand on principle but rather because it would make him famous. Becket responds that "The last temptation is the greatest treason: To do the right deed for the wrong reason."²² In our amicus program, as our Assistant Attorney General said, we try to take the right position for the right reason, not because of the likely reaction. In this way, the amicus program parallels the mission of the university. The good faculty member writes articles to advance the truth, for the motivation of advancing the truth, and not to be popular, or to get tenure, or to be liked by students, or to get on television.

What all this means is that the best way to understand our position in the labor antitrust space is not through a simplistic pro-labor or pro-business paradigm. Rather, our position is best understood through the lens of the rule of law and as informed by history and doctrine.

IV. HISTORY: LABOR AND ANTITRUST

I will first briefly discuss the historical relationship between antitrust law and labor markets. I do this for two reasons: first, it is critical to understanding the Department's position; second, I am not aware of any authority—law review, trade publication, or treatise—that provides a detailed survey tailored for this purpose.

The historical relationship between antitrust law and labor markets is long and complicated. It dates at least to the 1890s. In discussing what became the Sherman Act on the floor of the Senate, Senator Sherman himself pointed to the power of monopoly to "command[] the price of labor."²³ Indeed, Senator Sherman's Act does not distinguish between labor and product markets.²⁴ Subsequently, employers used antitrust law to fight labor unionization before the passage of the Clayton Act.²⁵ Then, a complex body of statutory and nonstatutory exemptions arose to address the intersection of antitrust law and labor markets.²⁶ Over time,

22. T.S. ELIOT, *MURDER IN THE CATHEDRAL* 22-44 (1935).

23. Cong. Rec. 2455, 2457 (1890) (statement of Sen. Sherman).

24. See generally 15 U.S.C. §§ 1-7.

25. See, e.g., *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 F. 994, 996 (C.C.E.D. La. 1893).

26. See, e.g., 15 U.S.C. § 17 (statutory exemption); Clayton Act, 29 U.S.C. § 52 (statutory exemption); Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (statutory exemption); see also *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235-37 (1996) (nonstatutory exemption).

antitrust litigation in labor markets has become “rare,”²⁷ at least relative to other antitrust litigation. But that is not because the laws do not apply.²⁸

Quite the contrary: federal antitrust enforcers long have been active in this space, and in particularly relevant ways for at least the past twenty-five years.²⁹ In the early 1990s, the FTC challenged nursing homes’ practice of boycotting registries for temporary nursing services and the Council of Fashion Designers’ attempt to reduce the fees and other terms of compensation for models.³⁰ The United States, for its part, sued a Utah society for human resources professionals for sharing wage information that caused the matching of wages.³¹ In 2007, the Department also sued an Arizona Hospital Association for setting a uniform rate for per diem nurses.³²

And, of course, in this decade, the Department pursued civil enforcement actions against several major technology companies that entered into stand-alone (or, in industry parlance, “naked”) no-poach agreements regarding their competitors’ employees.³³ At that time, significantly, the Department alleged that the behavior constituted a per se violation.³⁴

This enforcement focus on the labor markets has become even more acute in the past few years. In October 2016, the Division and the FTC issued their Antitrust Guidance for Human Resources Professionals.³⁵ As the Principal Deputy Assistant Attorney General recently summarized, “[t]he Guidelines cautioned that naked agreements among employers not to recruit certain employees, or not to compete on employee

27. Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 570 (2018).

28. See *Brown v. Pro Football*, 50 F.3d 1041, 1054 (D.C. Cir. 1995); but see *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4, 9-10 (1st Cir. 1975).

29. Some private cases also have been litigated; they often involved ancillary restraints. See, e.g., *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001); *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981); *Nichols v. Spencer Int’l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967); *Union Circulation Co. v. Fed. Trade Comm’n*, 241 F.2d 652 (2d Cir. 1957).

30. See *In re Debes Corp.*, (F.T.C. 1991); see also *In re Council of Fashion Designers of Am., et al.*, 120 F.T.C. 817 (1995).

31. See generally *United States v. Utah Soc’y for Healthcare Human Res. Admin., et al.*, No. 94-C-282G, 1994 WL 729931 (D. Utah Sept. 12, 1994).

32. See generally *United States et al. v. Ariz. Hosp. and Healthcare Ass’n and AZHHA Serv. Corp.*, No. CV07-1030, Doc. 17 (D. Ariz. Sept. 12, 2007).

33. See, e.g., *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1033-34 (N.D. Cal. 2013); *Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044, 1053-55 (N.D. Cal. 2016); see also *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1172-73 (N.D. Cal. 2013); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1181-84 (N.D. Cal. 2015).

34. See *eBay, Inc.*, 968 F. Supp. 2d at 1038.

35. See U.S. Dep’t of Justice, Antitrust Div. & Fed. Trade Comm’n, *Antitrust Guidance for HR Professionals* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

compensation, are per se illegal and may thereafter be prosecuted criminally.”³⁶

These Guidelines are notable in many ways. They are directed to HR professionals, which is not our usual target audience for policy pronouncements. Perhaps as a result, the Guidelines do not really argue for their viewpoint: they do not contain case citations or in-depth analysis of the law, but rather a few references to previous enforcement actions and several broad pronouncements in lay English. Perhaps unsurprisingly in light of the audience and the message, critics have viewed those pronouncements as ambiguous in important respects. For example, critics claim that the Guidelines are unclear as to whether settlements among companies litigating trade secrets cases are running afoul of the antitrust laws.³⁷

For these reasons and others, the Guidelines remind me of a famous *Seinfeld* episode. Jerry arrives at a car rental agency to rent a car, having previously reserved a mid-size. The clerk tells him that they’re out of mid-sizes. Jerry responds: “But the reservation keeps the car here. That’s why you have the reservation.” The clerk says: “I know why we have reservations.” Jerry replies: “I don’t think you do. If you did, I’d have a car. See, you know how to take the reservation, you just don’t know how to *hold* the reservation and that’s really the most important part of the reservation, the holding. Anybody can just take them.”³⁸ In my view, the Guidelines are like the reservation: anyone can put out Guidelines. The key is making them workable, explaining them, and justifying them, so that they can actually guide people.

The Division’s current leadership has endeavored to do just that. About a year ago, Principal Deputy Andrew Finch announced that for unlawful per se “agreements that began *after* the date of th[e] announcement [of the Guidelines], or that began before *but continued after* that announcement, the Division expects to pursue criminal

36. Acting As’t Att’y Gen. Andrew C. Finch, Antitrust Division, *Remarks at Global Antitrust Enforcement Symposium*, U.S. DEP’T OF JUSTICE 10 (Sept. 12, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust>.

37. See Karin Johnson & Kevin Cloutier, *New Guidance for HR Professionals Regarding Wage Fixing and No Poaching Agreements*, SHEPPARD MULLIN LAB. & EMP. L. BLOG (Dec. 2, 2016), <https://www.laboremploymentlawblog.com/2016/12/articles/antitrust/new-guidance-for-hr-professionals-regarding-wage-fixing-and-no-poaching-agreements-highlights-new-focus-on-criminal-prosecutions-and-raises-new-concerns-for-employer/>.

38. See *Seinfeld: The Alternate Side* (NBC television broadcast Dec. 4, 1991).

charges.”³⁹ Around the same time, our Assistant Attorney General explained that there are pending criminal investigations on this topic.⁴⁰

The Department’s first enforcement action, in the case known as *Wabtec*, followed shortly thereafter.⁴¹ There, the Department successfully sued two of the largest railway producers in the country for agreeing not to poach each other’s employees, in the process alleging that the defendants’ actions constituted a per se violation of the antitrust laws.⁴² The Department did not pursue criminal charges in that case because the agreement did not continue past the date of the announcement of the Guidelines.

Where does that leave us? I think the following summary is fair: the Division has a longstanding enforcement interest in the labor space, including the no-poach space, and has taken the position, consistent with case law, that naked no poach agreements are per se violations of the antitrust laws.

V. THE DEPARTMENT’S FRAMEWORK FOR ANALYSIS

That brings me to our recent filings. This is really a story of, as the Deputy Attorney General recently remarked, quoting the Book of Ecclesiastes, “there is nothing new under the sun.”⁴³ For in light of this history, it is no surprise that our recent filings have taken the position that naked no poach agreements among competitors are per se violations while no poach agreements that are not naked or not among competitors are subject to the rule of reason.

But I will spell out the proper thinking about these cases. I do so because the Guidelines lack this detail. The corresponding caveat is that the Division is not so presumptuous to believe that it has all of the

39. Principal Deputy As’t Att’y Gen. Andrew C. Finch, Antitrust Division, *Remarks at the Heritage Foundation*, U.S. DEP’T OF JUSTICE 5 (Jan. 23, 2018), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-c-finch-delivers-remarks-heritage>.

40. Matthew Perlman, *Delrahim Says Criminal No Poach Cases are in the Works*, LAW360 (Jan. 19, 2018), <https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works>.

41. Complaint, *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747-CKK, Doc. 1, at *2-3 (D.D.C. Apr. 3, 2018).

42. See generally Final Judgment, *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747, Doc. 19 (D.D.C. July 11, 2018); see also Complaint, *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747-CKK, Doc. 1, at *3 (D.D.C. Apr. 3, 2018) (“Defendants’ no-poach agreements are per se unlawful restraints of trade.”).

43. *Ecclesiastes* 1:9 (“The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun.”); see Dep. Att’y Gen. Rod Rosenstein, *U.S. Remarks at Wharton School’s Legal Studies and Business Ethics Lecture Series*, U.S. DEP’T OF JUSTICE (Feb. 21, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-wharton-school-s-legal-studies>.

answers in this space, but I do believe that these are the right questions to ask in a systematic way:⁴⁴ whether the entities in the no-poach agreement are capable of concerted action, whether those entities are competitors, whether the entities' agreement is ancillary to a larger arrangement, and whether the agreement merits a "quick look."⁴⁵

A. Concerted Action

The first relevant question is whether the entities that allegedly entered into a no-poach agreement are capable of the "concerted action" required by Section 1.⁴⁶ *Copperweld* and *American Needle* provide the test to be applied to this question: "The relevant inquiry . . . is whether there is a contract, combination . . . , or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision making."⁴⁷

In the typical case, applying these precedents is not a difficult inquiry. Separate, unrelated corporations competing in the market for widgets are clearly "independent centers of decision-making."⁴⁸ But, in other cases, the inquiry can be more complicated because at its core it is fact-specific, based on what the Court called "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."⁴⁹

For example, in the franchise context, at least one circuit court—the Ninth Circuit—has held that franchisors and franchisees are a single entity exempt from Section 1.⁵⁰ In that case, the franchisor of Jack-in-the-Box restaurants required its franchisees to consent to a "no-switching" agreement, by which franchisees agree not to hire the manager of another franchisee's Jack-in-the-Box within six months of that manager's termination from the other franchisee's Jack-in-the-Box without the consent of the other Jack-in-the-Box franchisee.⁵¹ A manager sued

44. I do not endeavor to address how these questions should be assessed under *Twombly* and *Iqbal* at the pleading stage.

45. For a similar discussion about the proper questions, see generally expert analysis by Herbert Hovenkamp, *Competition issues in labour markets*, OECD (June 5, 2019), <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>; see *infra* Section V.B.3.

46. 15 U.S.C. § 1 (applying only to "contract, combination . . . , or conspiracy"); see 12 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1402A at 148 (3d ed. 2012) ("The Sherman Act § 1 reaches 'concerted action' . . .").

47. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) (internal citations and quotation marks omitted)).

48. *Am. Needle*, 560 U.S. at 195 (quoting *Copperweld*, 560 U.S. at 186).

49. *Id.* at 191.

50. See *Williams v. I.B. Fischer Nev.*, 999 F.2d 445, 447-48 (9th Cir. 1993).

51. *Id.* at 447.

his franchisee and the franchisor under the Sherman Act.⁵² The district court held, among other things, that the franchisee and franchisor were a “common enterprise incapable of conspiring” under the Sherman Act.⁵³ The court of appeals affirmed, relying on the district court’s extensive factual analysis about the degree of control by the franchisor over the business of the franchisee—what the district court called the franchisor’s exercise of “plenary control” over the franchisee.⁵⁴

But that decision—which, importantly, pre-dates *American Needle*⁵⁵—“require[d]” and turned on “an examination of the particular facts of [the] case.”⁵⁶ Indeed, a district court in the same circuit after *American Needle* reached the opposite conclusion, based on the allegations and facts in its case.⁵⁷ In that case, an employee of the franchisor Cinnabon sued Cinnabon and its franchisee for including a no-poach clause in the franchise agreement.⁵⁸ The district court recited the *American Needle* test and then held that the employee sufficiently alleged that the franchisor and franchisee were independent centers of decision making in light of the facts.⁵⁹ The court distinguished the Ninth Circuit case *Williams v. I.B. Fischer Nevada* as turning on its particular facts.⁶⁰

In sum, whether separate companies—be they companies in a franchisor/franchisee relationship or another arrangement—are capable of concerted action is a complicated question of fact.⁶¹

52. *Id.*

53. *Id.*

54. *Id.* (citing *Williams v. Nev.*, 794 F. Supp. 1026, 1030-31 (D. Nev. 1992); *Williams*, 794 F. Supp. at 1032 (“This plenary control, in addition to [the franchisor]’s and [franchisee]’s common economic goals, make them a single enterprise, incapable of competing for purposes of Section 1 of the Sherman Act.”)).

55. Professor Hovenkamp persuasively argues that this “conclusion is incorrect in light of *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010).” Herbert Hovenkamp, *Competition issues in labour markets*, OECD (June 5, 2019), <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>.

56. *I.B. Fischer Nev.*, at 447.

57. See Order Denying Defendants’ Motion to Dismiss, *Yi v. SK Bakeries, LLC*, No. 18-5627, Doc. 33, at **5-7 (W.D. Wash. Nov. 13, 2018) (discussed *infra*). Other courts have not addressed the issue explicitly but have taken as a premise that the entities were separate centers of decision making. See also *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 789 (S.D. Ill. 2018) (proceeding to next step of analysis); *Deslandes v. McDonald’s USA, LLC*, No. 17-C-4857, 2018 WL 3105955, at **4-8 (N.D. Ill. June 25, 2018) (same, citing *Copperweld*); but see *Danforth & Assoc., Inc. v. Coldwell Banker Real Estate, LLC*, No. C10-1621, 2011 WL 338798, *2 (W.D. Wash. Feb. 3, 2011) (applying *Fischer* in one sentence of analysis without citing *American Needle*).

58. *Yi v. SK Bakeries, LLC*, No. 18-5627, Doc. 33, at *2 (W.D. Wash. Nov. 13, 2018).

59. *Id.* at 5-6.

60. *Id.* at 6-7.

61. That is not to say that this question cannot be addressed on the pleadings under *Twombly* and *Iqbal* in some cases.

B. Standard of Law: Per Se Rule or Rule of Reason

Assuming the relevant parties are capable of concerted action, the next item on the agenda is determining the proper standard of law—the per se rule or the rule of reason.

1. Competitors

The next question, consequently, is whether the entities that allegedly entered into a no-poach agreement are competitors in the labor market; that is, whether there is a horizontal relationship among them with respect to the alleged no-poach agreement. I emphasize here that companies can be competitors in the labor market but not competitors in product or service markets. Companies in different industries can compete in the same market for employees. But if they are not competitors in the labor market but instead are, for example, vertically related in their industry, then any agreement among them is subject to the rule of reason.⁶² That is black-letter law as a general matter—most recently reaffirmed in *Amex*—and longstanding law in the franchise context as well since at least *Continental TV, Inc. v. GTE Sylvania, Inc.*⁶³ Franchisors and franchisees, of course, are primarily in a vertical relationship in their industry and generally not competitors with respect to the labor market. Consequently, agreements among them likely are subject to the rule of reason. Indeed, this conclusion is not particularly controversial: the American Antitrust Institute recently proclaimed that no-poach agreements between a franchisor and franchisee are vertical restraints that are subject to the rule of reason.⁶⁴

62. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

63. 433 U.S. 36, 54, 59 (1977) (holding that geographical restrictions in franchise system are subject to the rule of reason); see *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

64. Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. 18 (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf (“However, unless the arrangement amounts to a hub-and-spoke conspiracy, an antitrust challenge likely would have to be won under the rule of reason, which is notoriously difficult for plaintiffs.”). Subsequent to the date of this speech, the American Antitrust Institute sent the Antitrust Division a letter purporting to “clarify” its position. See Notice of Supplemental Authority in Opposition to Defendants’ Motion to Dismiss the Complaint, *Butler v. Jimmy John’s Franchise, LLC*, No. 3:18-cv-00133, Dkt. No. 87-1 [hereinafter *Letter*] (S.D. Ill. May 8, 2019) (attaching Letter from Diana Moss, President, and Randy Stutz, Vice President of Legal Advocacy, American Antitrust Institute, to the Hon. Makan Delrahim, Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice, and Michael Murray, Dep. Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice (May 2, 2019)). The letter attempts to recast its prior statement as part of its legislative advocacy program and as a mere description of “fallacious defense arguments”. See *id.* at 1-2. But its prior statement simply declares that, with respect to “no-poaching commitments from franchisees . . . unless the arrangement amounts to a hub-and-spoke conspiracy, an antitrust challenge likely would have to be won under the rule of reason, which is notoriously difficult for plaintiffs.” See Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. 18

If, however, the entities are not vertically related but rather horizontally related as competitors in the labor market, then they have entered into a classic market allocation.⁶⁵ As *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* reaffirmed, agreements among competitors to divide markets are per se unlawful,⁶⁶ absent a significant caveat.⁶⁷ That per se rule extends to customer allocation schemes for new or existing customers, geographic divisions, and even seemingly small divisions of markets.⁶⁸

(July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf. Although it may be more expedient to reframe that declaration now that AAI is advocating before courts instead of state legislatures, its prior statement makes no mention of or even any allusion to this position being part of “fallacious defense arguments.” *Letter*, at 2. AAI next mischaracterizes the Antitrust Division’s Statement of Interest as arguing that courts should “apply the full-blown rule of reason to vertical no-poaching agreements based on the *possibility* that they could be ancillary to the broader franchise agreement” and consequently “ignor[ing] that a restraint could only be removed from the quick look category if a court were to ‘conclude’ that the restraint *is* ancillary,” see *Letter* at 2, 3, when in fact the Statement argued just that: “In the latter situation where a court concludes that the no-poach agreement is ancillary, then, by definition, quick look analysis is not appropriate.” Statement of Interest of the United States of America, *Butler v. Jimmy John’s Franchise, LLC*, No. 3:18-cv-00133, Dkt. No. 82-5 (“Statement of Interest”), at 17 (E.D. Wa. Mar. 7, 2019). Next, the letter criticizes the Statement for relying without citation on the proposition—undisputed in the case in which the Statement was filed—that quick-look analysis does not apply to vertical arrangements. *Letter*, at 6. But the Supreme Court in *American Express* just recently indicated that a “quick look” is inappropriate for vertical arrangements. *See Am. Express*, 138 S. Ct. at 2285 n.7. The letter finally turns to what seems to be its primary argument, that “the no-poaching agreements at issue have no known, cognizable efficiencies and make no economic sense on their fact.” *Letter*, at 8. Although AAI implies to the contrary, the Division’s Statement did not take a position on this factual issue. *See generally* Statement of Interest. Regardless, on this point, several economists responded to the Institute’s letter by arguing, in their own letter to the Antitrust Division, that there is “significant evidence that low-skilled laborers receive training from employers that can be valuable to the employee,” that “no-poaching clauses are consistent with such restrictions,” and that “there is no valid evidence that no-poaching clauses in franchise agreements have a significant impact of the level of competition for workers in labor markets.” *See* Letter from Daniel S. Levy, PhD, and Timothy J. Tardiff, PhD, Advanced Analytical Consulting Group, to the Hon. Makan Delrahim, Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice, and Michael Murray, Dep. Ass’t Att’y Gen., Antitrust Division, U.S. Dep’t of Justice 2 (June 11, 2019), <http://aacg.com/wp-content/uploads/AACG-Letter-to-DoJ-6-11-2019.pdf>.

65. *United States v. Topco Assoc.*, 405 U.S. 596, 608 (1972); *Continental TV*, 433 U.S. at n.28.

66. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *see also* *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per curiam) (explaining that “agreements between competitors to allocate territories to minimize competition are illegal”).

67. *See infra* Section V.B.2 (explaining under what circumstances a horizontal restraint is not subject to the per se rule).

68. *See, e.g., Palmer*, 498 U.S. at 46, 49-50 (affecting the allocation of customers); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1368, 1373 (6th Cir. 1988) (same); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1088 (5th Cir. 1978) (affecting the allocation of territories); *United States v. Kemp & Assocs.*, 907 F.3d 1264, 1277 (10th Cir. 2018) (explaining that it does not “matter that the alleged agreement would only affect a small number of potential customers”).

An agreement to allocate employees is no different than one to allocate customers: one eliminates competition for employees, another for customers.⁶⁹ As the *eBay* court puts it, no-poach agreements are “a ‘classic’ horizontal market division.”⁷⁰ The leading treatise on antitrust law—Herbert Hovenkamp’s *Antitrust Law*—takes the same position.⁷¹

Competitors, of course, must actually have entered into an agreement, as opposed to merely engaged in parallel conduct.⁷² Parallel conduct arises most often when “competitors adopt[] similar policies around the same time in response to similar market conditions.”⁷³ Although it “may constitute circumstantial evidence of anticompetitive behavior,” “mere parallel conduct is as consistent with agreement among competitors as it is with independent conduct in an interdependent market.”⁷⁴ Consequently, some courts “distinguish[] permissible parallel conduct from impermissible conspiracy by looking for certain ‘plus factors.’”⁷⁵

Gone also are the days when a hub-and-spoke-conspiracy could be established without a establishing a rim around the spokes.⁷⁶ Some advocates characterized older cases as allowing plaintiffs to establish a single conspiracy among competitors (the spokes) subject to the per se rule by showing that each competitor (each spoke) separately entered into an agreement with a common defendant (the hub).⁷⁷ Subsequent cases have

69. *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1038-39 (N.D. Cal. 2013) (explaining that “[a]ntitrust law does not treat employment markets differently from other markets” with respect to a classic horizontal market division).

70. *eBay*, 968 F. Supp. 2d at 1038-39; see also *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1115 n.9, 1122 (N.D. Cal. 2012); see *Weisfeld v. Sun Chem. Corp.*, 84 F. App’x 257, 260 n.2 (3d Cir. 2004) (unpublished per curiam) (suggesting that a conspiracy between competitors not to hire each other’s employees could be unlawful per se).

71. 12 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2013B at 148 (3d ed. 2012); see also Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 544 (2018) (“This type of horizontal agreement is a clear violation of the Sherman Act.”); see Rochella T. Davis, *Talent Can’t Be Allocated: A Labor Economics Justification for No-Poaching Agreement Criminality in Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 279, 284 (2018) (identifying “antipoaching agreements that are squarely per se violations”).

72. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193 (9th Cir. 2015).

73. *In re Musical Instruments*, 798 F.3d at 1193.

74. *Id.*

75. *Id.* at 1194.

76. See *id.* at 1192-93.

77. See, e.g., *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir. 2002) (rejecting position attributed by advocate to *Elder-Beerman Stores Corp. v. Federated Dep’t Stores, Inc.*, 459 F.2d 138, 146 (6th Cir.1972)); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 331-32 (3d Cir. 2010) (rejecting position attributed by advocate to *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and *Toys “R” Us, Inc. v. Fed. Trade Comm’n*, 221 F.3d 928 (7th Cir. 2000)); see generally *In re Musical Instruments*, 798 F.3d at 1193 n.3 (“We note, however, one key difference between a rimless hub-and-spoke conspiracy (*i.e.*, a collection of purely vertical agreements) and a rimmed hub-and-spoke conspiracy (*i.e.*, a collection of vertical agreements joined by horizontal agreements): courts analyze vertical agreements under

made clear, however, that such facts do not establish a conspiracy among the competitors subject to the per se rule but rather a series of conspiracies subject to the rule of reason, unless there are allegations of agreements among the competitors (the rim).⁷⁸ But, of course, if there is a rim, then there is little point in using the hub-and-spoke analogy: that is really just a horizontal agreement among competitors that also happens to include a non-competitor.⁷⁹

2. Ancillarity

The next question that must be asked concerns the ancillary restraints doctrine. Even a horizontal restraint is not subject to the per se rule if it is “subordinate and collateral to a separate, legitimate transaction,” and reasonably necessary to “make the main transaction more effective in accomplishing its purpose.”⁸⁰ Whether a particular restraint meets this standard depends on the facts of the case. In one leading case, for example, the D.C. Circuit closely analyzed the facts of the interstate moving van business to hold that a company’s policy to terminate certain moving agents with operations independent of the company was ancillary to a larger project of organizing an interstate networks of moving services.⁸¹ Similarly, in a franchise case, the ancillary restraints question turns on the relationship between the no-poach agreement and the franchise system, particularly its promotion of inter-brand competition.⁸² The answer may not be the same for every franchise system.⁸³ All told, then, there are two ways for a no-poach agreement to be subject to the rule of reason and not the per se rule: verticality and ancillarity.

the rule of reason, whereas horizontal agreements are violations per se. This distinction provides strong incentives for plaintiffs to plead a horizontal conspiracy (either alone or as part of a rimmed hub-and-spoke conspiracy). The prospect of establishing a violation per se is much more appealing to plaintiffs than the potential difficulty and costliness of proving a § 1 claim under the rule of reason.” (internal citations omitted)).

78. See, e.g., *In re Musical Instruments*, 798 F.3d at 1193; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 327 (3d Cir. 2010); *Dickson v. Microsoft Corp.*, 309 F.3d at 203-04 (4th Cir. 2002); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008); see generally 12 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1402c (3d ed. 2012) (collecting cases).

79. *In re Musical Instruments*, 798 F.3d at 1192 n.3 (“for what is a wheel without a rim?”).

80. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.); see also *Texaco v. Dagher*, 547 U.S. 1, 7-8 (2006) (stating the rule of reason applies to joint ventures); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.).

81. See *Rothery Storage & Van Co.*, 792 F.2d at 211, 224.

82. *Conrad*, 2019 WL 2754864, at *1-3; *Ogden v. Little Caesar Enterprises, Inc. et al.*, No. 18-12792, 630 (E.D. Mich. July 29, 2019).

83. See, e.g., *Conrad*, 2019 WL 2754864, at *2 (“[I]f the facts of this case show that the no-poach agreements are not ancillary restraints, then the DOJ’s theory may not apply.”).

3. “Quick Look”

But a final question still remains: Should such a restraint be analyzed under the full rule of reason or the quick look doctrine? The quick look doctrine is a rarely-applicable version of the rule of reason analysis that is appropriate only when “an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect.”⁸⁴ The doctrine recently has been criticized,⁸⁵ and its exact contours have been said to be “lack[ing] definition” by Professor Hovenkamp.⁸⁶ But one thing that is clear is that the quick look doctrine is not supposed to be an intermediate third category of analysis: it is not some kind of compromise between the per se rule and the rule of reason, or invoked whenever a court thinks, for example, that a particular restraint is too hard to classify.⁸⁷ To the extent that recent court decisions embody that reasoning, they deserve further scrutiny.⁸⁸

The foregoing questions are those that should be asked when considering no-poach agreements. I have not attempted to answer all these questions, even in hypotheticals, because the answers depend on the facts, and they vary. In addition, delving into the particular facts of every no-poach case is not in the interest of the United States. What is in our interest is that courts administer the antitrust laws properly with the rigor and nuance that the foregoing questions would entail.

VI. CONCLUSION

I have explained that the purpose of our amicus program is to promote the interest of the United States that courts properly apply the antitrust laws. So we watch cases, taking on the role of tireless advocate for the right answer, whether it benefits plaintiffs, defendants, workers,

84. *California Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770 (1999).

85. See Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 839 (2016) (“Support for the quick look reflects a fundamental misunderstanding of the cost of implementing this approach and the link between the standard for per se liability and quick look analysis.”); see also Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 67 (2017) (“The lower courts have been reluctant to embrace quick look analysis. Among plaintiffs, only the FTC has actively (and effectively) advocated for the concept of presumptive illegality.”).

86. See Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 126 (2018) (“Another problem with the so-called quick look is that it lacks definition.”).

87. Compare Meese, *supra* note 85, at 880 (advocating for principled basis for departing from rule of reason for quick look), with Robert Pitofsky, *Are Retailers Who Offer Discounts Really “Knaves”?: The Coming Challenge to the Dr. Miles Rule*, 21 ANTITRUST 61, 65 (2007) (advocating for quick look as a “compromise”).

88. See, e.g., *Butler*, 331 F. Supp. 3d at 797; *Deslandes*, 2018 WL 3105955 at *7-8; Order, *Yi*, No. 18-5627, at *9-10.

employers, or others. I also have explained a nuanced and complex framework for the no-poach space, based on the historical relationship between the antitrust laws and the labor markets. We do not have all of the answers, but we think these are the right questions: whether the agreeing entities can act concertedly, whether they are horizontal competitors, whether their agreement is ancillary to a larger arrangement, and whether they merit a quick look.

This discussion endeavors to both argue and demonstrate that we are motivated in both instances by our devotion to the rule of law. Our only job is to see that justice is done.